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Vol. 5.

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CASTILLERO'S REGISTRY

AND

ACT OF POSSESSION

TO THE

Mine of New Almaden,

IN

1845.

O'Meara & Painter, print.

INV. 1898.

SEÑOR ALCALDE DE 1^A NOMINACION:

Andres Castillero, Capitan de Caballeria permanente, y residente hoy en este Departamento ante la notoria justificacion de Vd. hace presente, que habiendo descubierto una veta de plata con ley de oro, en terreno del rancho perteneciente al Sargento retirado de la compañia presidial de San Francisco, José Reyes Berreyesa, y queriendo trabajarla en compañia suplico á Vd., que arreglado, á la ordenanza de mineria, se sirva fijar rotulones en los parajes público de la jurisdiccion para que llegado el tiempo de la posesion jurídica, asegure mi derecho, segun las leyes de la mineria, á Vd. suplico provea de conformidad, en lo que recibiré merced y justicia: admitiendo este en papel comun por falta del sellado correspondiente. Mision de Santa Clara, Noviembre veinte y dos de mil ochocientos cuarenta y cinco.
ANDRES CASTILLERO.

SEÑOR ALCALDE DE 1^A NOMINACION DEL PUEBLO DE SAN JOSE GUADALUPE:

Andrés Castillero, Capitan permanente de Caballeria, ante la notoria justificacion de Vd. comparezco y digo: ensayando el mineral que con anterioridad denuncié á ese juzgado, he sacado, á mas de plata con ley de oro, Azogue líquido, en presencia de algunos concurentes que podré citar en caso oportuno. Y por convenir asi á mi derecho le he de merecer á Vd. que unido al escrito del denuncio, se archive esta presentacion, no llendo en papel del sello por no haberlo.

A Vd. suplico provea de conformidad; en lo que recibiré merced y justicia.

Santa Clara, Diciembre 3, de 1845.

Andres Castillero.

No encontrándose en el Departamento de California, Diputaciones de Mineria: y siendo esta la única vez desde la poblacion de Alta California, que se trabaja, con arreglo á las leyes, un mineral; y careciendo además de Juez de Letras el 2º distrito, Yo, el Alcalde de 1ª Nominacion, C. Antonio Maria Pico, he venido, acompañado de dos testigos, para actuar por receptoria á falta de escribano público que no lo hay, para dar posesion jurídica de la mina conocida con el nombre de Santa Clara, en esta jurisdiccion, situada en el rancho del Sargento, José Reyes Berreyesa; porque habiendo fenecido el tiempo que señala la ordenanza de minería para deducir su accion el C. D. Andres Castillero, y que otros pudieran alegar mejor derecho, desde el tiempo del denuncio á la fecha. Y encontrándose dicho mineral con abundancia de metales explotados, el pozo hecho con las reglas del arte, y produciendo la elaboracion de la mina, abundancia de Azogue liquido, segun las muestras que tiene el juzgado; y estando tan recomendado, por leyes vigentes, la proteccion de un artículo tan necesario para la amalgamacion de oro y plata en la República, he venido en concederle tres mil varas por todos rumbos, á reserva de lo que señale la Ordenanza General de minería, por ser trabajada en compañia, de lo que doy fé, firmando conmigo los testigos, quedando agregado este acto de posesion al cúmulo del expediente que queda depositado en el archivo de mi cargo no llendo puesto en papel del sello respectivo que no lo hay en los términos de la ley.

Juzgado de San José de Guadalupe y Diciembre de 1845.

Antonio Maria Pico.

De asa—Antonio Sunol. De asa—Jose Noriega.

[Indorsed.]

No. 366.—Andres Castillero. New Almaden. A. P. L. Exhibit to deposition of Antonio Suñol, March 19th, 1855. Filed in office March 19th, 1855. Geo. Fisher, Secretary. Recorded in Record of Evidence, Vol. 18, pp. 621, 622.

U. S. Surveyor General's Office,
San Francisco, Cal.

I, James W. Mandeville, U. S. Surveyor General for California, and, as such, having in my custody the papers of the late Board of Land Commissioners to ascertain and settle the private land claims in California, do hereby certify the foregoing to be a correct copy of a document on file, in case No. 366, on the docket of said Board, in which Andres Castillero is claimant of New Almaden.

Given under my hand and official seal, at the City of San Francisco, this fifteenth day of September, A. D. 1858.

J. W. Mandeville,
U. S. Surveyor General for California.

TRANSLATIONS.

SENOR ALCALDE OF 1ST NOMINATION:

Andres Castillero, Captain of permanent cavalry, and at present resident in this Department, before your notorious justification, makes representation: that having discovered a vein of silver, with a ley of gold, on the land of the rancho pertaining to José Reyes Berreyesa, retired sergeant of the presidial company of San Francisco, and wishing to work it in company, I request that, in conformity with the ordinance on mining, you will be pleased to fix up notices, in the public places of the jurisdiction, in order to make sure of my right when the time of the juridical possession may arrive, according to the laws on mining. I pray you to provide in conformity, in which I will receive favor and justice; admitting this on common paper, there being none of the corresponding stamp.

Mission of Santa Clara, November twenty-second, eighteen hundred and forty-five.

ANDRES CASTILLERO.

SENOR ALCALDE OF 1ST NOMINATION OF THE PUEBLO OF SAN JOSE GUADALUPE:

I, Andres Castillero, permanent captain of cavalry, before your well known justification, appear and say: that on opening the mine which I previously denounced in this Court, I have taken out, besides silver with a ley of gold, liquid quicksilver, in the presence of several bystanders, whom I may summon on the proper occasion. And, considering it necessary for the security of my right, so to do, I have to request of you that, uniting this representation to the denouncement, it may be placed on file, it not going on stamped paper because there is none. I pray you to take measures to this effect, in which I will receive favor and grace.

Santa Clara, December 3d, 1845.

ANDRES CASTILLERO.

There being no deputation on mining in the Department of California, and this being the only time since the settlement of Upper California, that a mine has been worked in conformity with the laws, and there being no "Juez de Letras," (professional Judge,) in the second district, I, the Alcalde of First Nomination, citizen Antonio Maria Pico, accompanied by two assisting witnesses, have resolved to act in virtue of my office, for want of a Notary Public, there being none, for the purpose of giving juridical possession of the mine known by the name of Santa Clara, in this jurisdiction, situated on the rancho of the retired sergeant, José Reyes Berreyesa, the time having expired which is designated in the ordinance of mining, for citizen Don Andres Castillero to show his right, and also for others to allege a better right, between the time of denouncement and this date, and the mine being found with abundance of metals discovered, the shaft made according to the rules of art, and the working of the mine producing a large quantity of liquid quicksilver, as shown by the specimens which this Court has; and as the laws now in force so strongly recommend the protection of an article so necessary for the amalgamation of gold and silver in the Republic, I have granted three thousand varas, in all directions, subject to what the General Ordinance of Mines may direct, it being worked in company, to which I certify, the witnesses signing with me; this act of possession being attached to the rest of the expediente, deposited in the archives under my charge; this not going on stamped paper, because there is none, as prescribed by law.

Juzgado of San José Guadalupe, December , 1845.

ANTONIO MARIA PICO.

Assisting witnesses:
ANTONIO SUNOL,
JOSE NORIEGA.

[INDORSED.]

No. 366.—Andres Castillero. New Almaden—A. P. L. Exhibit to deposition of Antonio Suñol, March 19th, 1855. Filed in office March 19th, 1855. Geo. Fisher, Secretary. Recorded in Record of Evidence, Vol. 18, pp. 621 and 622.

U. S. SURVEYOR GENERAL'S OFFICE,
San Francisco, Cal.

I, James W. Mandeville, U. S. Surveyor General for California, and, as such, having in my custody the papers of the late Board of Land Commissioners, to ascertain and settle the private land claims in California, do hereby certify the foregoing to be a correct copy of a document on file, in case No. 366, on the docket of said Board, in which Andres Castillero is claimant of New Almaden.

Given under my hand and official seal, at the city of San Francisco, this fifteenth day of September, 1858.

J. W. MANDEVILLE,
U. S. Surveyor General for California.

2

THE

New Almaden Mines

A LETTER

FROM THE

SAN FRANCISCO DAILY HERALD,

AS PUBLISHED ON THE

Mornings of December 31, 1858, and January 1, 1859.

SAN FRANCISCO:
PRINTED AT THE SAN FRANCISCO HERALD OFFICE.
....
1859.

THE NEW ALMADEN MINES.

"All persons holding titles to real estate, or in quiet possession of lands under color of right, shall have those titles guaranteed to them"—*Proclamation of Com. Sloat, Commander-in-Chief U. S. Naval Force on raising the American Flag, July* 7, 1846.

CHRONOLOGICAL DATA.

The following chronological data, in connection with this subject, may be interesting:

(1845–6.)

In November and December, 1845, Castillero petitions and Pico (Alcalde) grants a mining possession—*See Expediente on file in Records of Santa Clara county.*

Wm. G Chard, merchant of Tehama, testifies that he was foreman of the mine under Castellero, Padre Real, and James Alexander Forbes, from November, 1845, to August or September, 1846. Was present when the Alcalde came with a number of witnesses, and gave Castellero possession.—*Evidence on file in United States District Court.*

(JUNE, 1846)

Lieutenant Revere visits "the famous quicksilver mine near Santa Clara." Relates the process by which the ore was reduced, etc —*Lieut J. Warren Revere, U. S. A., (Militarg Commandant, Sonoma,)* JUNE, 1846. "Tour of Duty, p. 54-5."

"The Commander in-chief * * * gives his inviolable pledge to all persons in California * * that they shall not be disturbed in their property, their persons, or their social relations."—*Wm. B. Ide, Bear Flag Revolution, June* 18 1846.

(JULY, 1846)

"I declare to the inhabitants of California that, although I come in arms with a powerful force, I do not come among them as an enemy to California; but, on the contrary, I come as their best friend. They will enjoy a permanent government, under which life and property * * * will be secured.

"ALL PERSONS HOLDING TITLES TO REAL ESTATE, OR IN QUIET POSSESSION OF LANDS UNDER COLOR OF RIGHT, SHALL HAVE THOSE TITLES GUARANTEED TO THEM"—*Com. Sloat, Commander in chief, U. S Naval force. Proclamation on raising the American Flag, July* 7, 1846.

(AUGUST, 1846.)

"The flag of the United States is now flying from every comanding position in the Territory. * * California now belongs to the United States. Until * * the various * * departments of the Government are arranged, military law will prevail, and the Commander-in-chief will be the governor and protector of the Territory."—*Proclamation of Com. Stockton, Commander-in-chief and Governor of Ter. California.*

(MARCH, 1847.)

The undersigned * * is instructed by the President of the United States * * to protect the persons and PROPERTY of the quiet and peaceable inhabitants of the country. * * Those who remain quiet and peaceable will be respected in their RIGHTS and protected in them —*Proclamation of S. W. Kearny, Brigadier Gen. U. S. A., and Governor of California, March* 1, 1847.

[MEXICO, DECEMBER, 1846.]

* * * * "That in Upper California, in the Presidio of Santa Rosa, there has been discovered by Senor Don Andres Castillero a great mine, the *leys* of which are truly surprising, since the result of the assays made in the College of Mining gives, as the common fruits, over thirty-five and a half per cent., while that of the best mine which is known, that of Almaden, (in Spain,) does not exceed thirteen per cent.; and finally, that, from all the data collected, it may be hoped, resting on a good foundation, that our mines of quicksilver are more than sufficient to supply all that is required for the reduction of our silver."

* * * "The Junta, on the 21st of April last (1846), sent to the professional Board (*Junta Facultatica*) of the College some specimens of cinnabar which Don Tomas Ramon del Moral presented, in the name of Don Andres Castillero, a resident of Upper California, with a representation in which he asked for assistance to work a mine which he had discovered in the Mission of Santa Clara, known by the old Indians, who got out of it vermilion to paint their bodies. The assay, made by the Professor of Chemistry, of the ores in common, produced the extraordinary *ley* of thirty-five and a-half per cent., which was communicated to the Government on the 5th of May, representing that Senor Castillero had been asked what assistance he required of the Junta.

"That Senor presented his petition in due form, and it was very attentively examined by the Junta, etc. * * * —*Report of the First Secretary of State of Mexico to the Mexican Congress, in December*, 1846. *Printed in Mexico*, 1847; *pp.* 136, 146.*

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* "*Memoria de la Primero Secretario de Estado de los Estados-Unidos Mexicanos, al soberano Congreso Constituyente, en Deciembre*, 1846 *Imprenta en Mexico*, 1847" This is a portly volume of between 300 and 400 pages, of a precisely similar nature to the reports of our own Secretaries of State to Congress. The edition was printed in 1847, and then distributed, and may be found in all public and important private Libraries in the Republic of Mexico.

[1848.]

Treaty of Guadaloupe Hidalgo, February, 1848—*Proclaimed July 4th,* 1848.

[WASHINGTON, 1849–50.]

Benton's Speech on California Land Claims—Cong. Globe, vol. 21, *pp.* 2,045–2,047. *Debates in Congress on California Mines—Congressional Globe, 31st Congress.*

(MARCH, 1851.)

"And be it further enacted, that the commissioners herein provided for, and the District and the Supreme Court, in deciding the validity of any claim brought before them under this law, shall be governed by the Treaty of Guadaloupe Hidalgo, THE LAW OF NATIONS, the laws, usages and customs of the government from which the claim is derived; *by the principles of equity,* and the decisions of the Supreme Court of the United States so far as are practicable."

* * * * * *

"For all claims finally confirmed by the said commissioners or by the said District or Supreme Court, *a patent shall issue to the claimant.*"—*California Land Commission Act, U. S. Stat. vol.* 9, *p.* 633.

[JANUARY, 1856.]

"In this case, on hearing the proofs and allegations, it is adjudged by the commission that the claim of said petitioner to the mine known as New Almaden, together with the rights of enjoying the privileges as mine owner under the Mexican law, within the space of 3,000 varas in all directions from the mouth of said mine, as originally opened by Castillero, *is valid, and it is therefore decreed that the same be confirmed to him.*" (Claim for two leagues of land rejected.)

ALPHEUS FELCH,
R. AUG. THOMPSON,
S. B. FARWELL.

—*Decree of Commissioners appointed by the United States to ascertain and settle Land Claims in California.*

(AUGUST, 1858.)

James Eldridge to John A. Collier.—"Whereas said Eldridge * * is justly indebted to the said party of the second part in the sum of one million of dollars * * (secured to be paid by his certain bond * * in the penal sum of two millions of dollars) * * with interest * * at the rate of ten per cent. per annum * * said interest and principal * * to be paid * * in New York to said Collier or the Assignee * * and holders of said bond and this mortgage. For the better securing (of which) the said James Eldridge * * does grant, bargain and sell * * the one undivided half * * of the tract of land * * known as Los Capitancillos, in the county of Santa Clara * * *the said premises including the New Almaden mines and minerals,*" etc., *etc.*—*Mortgage: James Eldridge to John A. Collier, of Binghamton, N. Y. Done in Santa Clara, Aug.* 16, 1858. *Witnessed by H. Laurencel. Recorded, Aug.* 16, 1858.

In this month the United States files its bill in the United States Court, setting forth that the United States had owned the land and mine of New Almaden since July 7th, 1846, and also owned all the "workshops, warehouses, buildings, furnaces, forges, engines, dwelling houses, shops, sheds, and other buildings, which were of the value of $500,000;" and praying that John Parrott, and others, (the owners,) might be restrained from mining on the said land, or using the improvements.—*U. S versus Parrott and others. In Equity, complaint for U. S. P. Della Torre, District Attorney.*

EDMUND RANDOLPH,
EDWIN M. STANTON,
Counsel for United States.

Filed, August 30, 1858.

(MEM.—As explanatory of these two data, it may be remarked that James Eldridge, who mortgaged, and H. Laurencel, who witnesses, are the owners of a rival claim to Almaden mines, known as the Fossatt claim to the Capitancillos Ranch, and that Edmund Randolph is their counsel in California, and Edwin M. Stanton was their counsel before the Supreme Court in Washington, against the Government. If the suit commenced by the United States were *really* to recover Almaden for the Government, of course the counsel for Eldridge and Laurencel, who claim the mine against the Government, would not bring, or support, such a suit.)

[OCTOBER, 1858.]

"It is now hereby considered and ordered that an injunction issue in this case * * to restrain until the further order of this Court—the said owners of (Almaden) from mining and digging in and upon the said tract of land and the said mine * * and from extracting quicksilver from the one mine in and upon the said land and mine.—*Injunction, U. S. Circuit Court for California. Oct.* 29, 1858.

[DECEMBER, 1858.]

"The General Government has ever been a liberal parent to the territories, and a generous contributor to the useful enterprises of the early settlers."—*President's Message, Washington, Dec.* 1858.

Part First.

It will have been perceived, in the course of our discussion on this question, that we* are unversed in the intricacies and elaborations of law. Happily, however, the greater the principles involved in a case, the simpler become the truths by which they are to be illustrated and enforced. Less technical knowledge is required to elucidate constitutional, or international, equities than is needed to administer the affairs of a Township Court. It is easier to drink at the fountain, from whence flow those mighty truths, which, conveyed in a thousand channels of statute and practice, make the law, than it is to draw from its numerous streams and branches. In the consciences of men, and in their common sense, have been implanted by a Divine hand, those feelings of rectitude which the law does but enunciate, and apply, to the exigencies of daily existence. They will not be far wrong, who, in the multiform phases of their life, keep the light within them undimmed by prejudice or selfishness, and by it guide their course.

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* Some one in the *National* supposes the writer has "great influence with Mr. Peachy and Mr. Yale;" and requests him to urge them to do something he thinks desirable. He takes this opportunity to say that he has no influence whatever with them. He has not exchanged three words with either of them for three years, directly or indirectly, on this subject, or he thinks on any other, as it has happened. He is simply a private essayist, discussing a matter of public interest in his own way, without asking whether it aids or prejudices the judicial proceedings in the case.

In the consideration of this case, we are perplexed, at the very outset, to understand how the Court, sitting as an equity tribunal, obtains *jurisdiction* over it. As jurisdiction pertains rather to the practice, than to the principles, of law, we distrust our competency to discuss it; and we only give our views as the common sense reflections of a business man, for what they may be worth. Equity, if we comprehend it, may be defined, as a judicial interference to enforce the *intention* of parties, or a party, to a contract or understanding, where no remedy exists at common law, or by the provisions of an express statute. It is the unexpressed reason of the thing, apparent to the mind of a Court, upon looking at the circumstances, the collateral surroundings, and the history of the case; and at the events out of which the contract or understanding arose. The subject of this controversy, is the ownership of certain lands by the Government, in possession of the defendants.

These lands are recently acquired California property. They have been made by the owner, the subject of an express agreement or special statute. That statute, contemplates a controversy as to the ownership of portions of them, and directs a precise mode of procedure, to ascertain the facts. With regard to claimed portions, the owner places his rights in abeyance, during the investigation he has instituted; for the law directs that these lands shall only be deemed public lands—that is his own—after the claims of occupants shall have been *finally rejected* by his own Courts; or if after two years of opportunity, claimants do not present their claims. The subject of his ownership to these lands, is, therefore, not a matter to be determined by equity; but by a precise and positive statute, and in only *one* defined mode.

During the pendency of this inquiry, as directed by law; after these defendants had brought their claim before a Court organized under the statute; and after that Court had *confirmed* their mining possession; comes the plaintiff and asks for an injunction in equity, to restrain them from waste, or mining, during an appeal from the decision of his own Court. The equity relief is sought, and granted, on the ground that it was the *intention* of the Government, to prohibit mining during its inquiry into the title of claimants in possession. Equity could interfere on no other ground.

We think we have clearly stated the case. The prerogative of the Court we submit, was therefore to ascertain what were the *intentions* of the Government on this particular matter. This it has to infer from the surroundings of the case itself. Inferences drawn from ancient usage, or English practice do not apply. They are to be drawn strictly from the circle of events which surround this especial property; and from the wishes and purposes of its owner with regard to it. Here, the law maker was the owner of the land, subject to certain engagements which his predecessor (Mexico) had made. The law which he promulgated, after he had for three years owned the property, contains his wishes and instructions. Equity cannot interfere, with these recorded expressions of his will. It can only interfere at all, with regard to this property, if it be shown that circumstances have subsequently arisen, not contemplated at the time of that record, which substantially contravene its intentions. We suppose it is claimed that waste, or mining, is such a circumstance.

At the time of the enactment of the statute the defendants were, and had been for a long time previously, extracting minerals. The business of the entire country, and their business, had been, was, and was expected to be, the extraction of minerals. This was personally known to the entire California representation, who brought in the statute. It was fully known and discussed by both Houses of Congress. (See Debates on California Mines.) It had been made famous throughout the world, by three successive Presidential messages. The *waste* was seen, notorious and recognized. It was not deemed waste, but thrift. It was not an unforseen incident, but a thing known, existent, permitted, and encouraged. It was the very thing which made the entire property of the plaintiff in California valuable.

The statute which expresses the will and intention of the Government on this subject, *was made in full view of the fact* of such waste, or mining, and did not forbid it. An intention is as thoroughly proven by the absence of express provision, when the thing to be provided for is a current daily event, as by its presence. If Congress had desired to prevent mining on lands in California during the inquiry into titles; knowing that mining existed and would continue to exist; it would have enacted, that during such inquiry, persons should forbear to mine. It did not so enact, because it did not intend that mining should be restrained. The Court therefore might most truly have answered the application for an injunction in this case: "If we take jurisdiction in equity, of this matter, we interfere with another mode prescribed by a special statute, which embraces the whole subject of inquiry into the ownership of California lands, and their use during that inquiry. Were we to grant an injunction to restrain mining, we should do *that* which the law makers fully considered, and refused to do. Instead of carrying out the intention of the plaintiff in this suit, we should contravene that intention and do something, which he never intended to be done. Besides which, we should be opposing the policy and practice of our Government in collateral cases. There are special statutes analagous to this, directing the survey and sale of public lands in new territories, for the purpose of vesting them in private ownership. Pending that survey and preparation for sale, it has been the custom of our people to use such lands freely; graze them, farm them, cut down timber upon them, and extract coal, iron lead, and copper therefrom. The Government has never intefered with this practice. There is no record in any case in which the Govornment sought to restrain its settlers. No Federal Court has granted such an injunction. As the Chief Magistrate says in his annual message: "The Federal Government has ever been a liberal parent to the Territories,—and a generous contributor to the useful enterprizes of the early settlers." Besides which, it is a matter of grave doubt whether mining in California *be* waste; and whether the Government be not in fact *richer*, by having its metals extracted than it would be, if they were not touched. Were mining *waste*, the whole State would be by this time impoverished; instead of which it is the richest, for its population, in the Union."

We do not know what lawyers may say to such a view of the subject; but business men, who neither know, or care, about English Chancery precedents, will be very apt to coincide with us. Indeed, men who have been long in California, know of their own knowledge pretty nearly, what the intentions of Congress were. They all, more or less, participated in its action, and it is so recent that time has not obliterated the recollection. Moreover, they can never agree that, with the Government for plaintiff, in the most technical sense mining in California can be considered *waste*. Not to mine is laziness. To shut up a mine is waste—of time, of the comforts of the people, and of the very substance of the State; whose wealth is only realized when its minerals see daylight. What California would have been to-day had the Government always restrained such waste is exemplified by what she was, before mining commenced at all.

The application of all law, resolves itself into the enforcement of men's promises. The great fabric of civilized society, is but an aggregation of human units, bound together by the cement of mutual promises. Man with man promises to be peaceable, kindly and true; that each will respect the other's rights; that all will perform their mutual obligations, industriously subserve the common weal, and pay to each other the debts of love, honor, or work, whether expressed or implied, which their joint condition imposes upon them. The top-stone of the fabric, the Government, promises to protect its people; and with an impartial hand adminis ers the rules, which they have agreed upon and recognize. Nations promise responsive forbearance with, and inviolate regard for, the honor, welfare and possessions of each other. The world is ruled by, and depends for its peace and moral advancement upon the sanctity of promises, tacit or proclaimed.

It appears to us, that in the case of the Government prosecution against the owners of New Almaden, much profitless inquiry and angry discussion would have been saved, both in Court and out of it, if this grand elementary doctrine had been applied and the simple fact, of the case presented. The facts are historical and concise, the application palpable, and the result as demonstrable and inevitable, as a mathematical truism.

The whole lies in a nutshell. From November, 1845, to September, 1846, it is proven beyond controversy that these owners of Almaden, or their grantors, were in quiet possession of this mine, at least under a color of right—(to our mind the evidence discloses a perfect right, but as this is not necessary to our argumeut we do not urge it.)

In July, 1846, the only authorized agent of the American Government on the Pacific, the commander-in-chief of its forces, in that formal and solemn act by which he took possession of the country, PROMISED, "All persons holding title to real estate, or in quiet possession of lands under color of title, *shall have those titles guaranteed to them.*" This promise was the inducement held out to the people of California—to these owners amongst others—to yield their country to the United States. The almost immediate submission of the people showed, that they responded to the offer and accepted the promise. The United States therefore, is bound to guarantee to them, and to all others similarly situated, their titles; at the very least, such as they had, which was in this case, quiet possession—although it seems to us that the legitimate result of this promise even goes further, and engages to give them something more, as the reward of their non-resistance. An inducement is something more, than a man has; they had quiet possession; the something more could hardly be less than absolute title.

The spirit and the letter of this *promise*, after running through every American proclamation made in California, were confirmed at the treaty of Guadaloupe Hidalgo; and it takes thereby a constitutional force, superior to ordinary statute or common law.

It is not pretended that any subsequent abandonment of the mine released the United States; nor can it be for a moment supposed that any subsequent act of those owners, except their solemn consent, could vitiate the right, then and there vested in them, by the promise of the federal power.

To the end of time, therefore, so far as the Government is concerned, its PROMISE gives them quiet possession; the only thing left open being as to *how*, it should guarantee their title. That it was to be guaranteed, was a proclaimed pledge. The method chosen by the United States, was enacted into a law, by the act constituting the Land Commission. The law and principles by which that commission was to be guided, as stated in an extract at the foot of this article were, the *Treaty of Guadalaupe Hidalgo*, the *laws of Nations*, and the *principles of Equity*. The original promise runs like a thread of gold through all the government's acts.

The Law Commission is opened. America's own officers enquire in their own way into the rights of the owners of Almaden. They redeem the promise given when the American flag was first unfurled—that their title should be guaranteed, and they FINALLY CONFIRM IT. This was in 1856, ten years after the first promise. The thread of gold holds out yet.

Another promise of the United States in the Land commission act is, "that for all claims finally confirmed by the Commissioners, the patent of the United States shall issue."

In November 1858, *instead of the patent, the injunction of the United States issued. Instead of being confirmed in, they were turned out of, possession. Promises on promises were violated—the golden thread was broken.*

There are also promises implied, as well as expressed. The very existence of our State for instance, rests on the *implied* promise of the government to permit men to mine upon its public domain. This promise is implied, first, by the well known policy of the government to surrender its wild laws to the public, until they are reserved by statute; second, by the message of the President promulgating the discovery of mineral wealth in California, without announcing restrictive laws; third, by the action of the law makers in Congress, who after long debate, formally left the mines of California to the people without limiting statutes; and fourth, from the fact, that the government of the United States *knew* that its promise was implied by the people, from ther universal action in working the mines; and while it had the power, it neither interposed its proclamation nor its force to restrain them—thus consenting to their occupation, in the most palpable way.

Under this implied promise also, for eight or ten years, at least, the owners of the New Almaden have been mining extensively; developing their property, and adding largely to its present and prospective value. It is trifling to suppose, as we have said before, that the Government discriminated, between mining for gold and mining for quicksilver; or that it yielded to its people the minerals of the Sierra Nevada,—and reserved those of the Sierra Azul—all were equally included.

Two promises of the American Government—the one expressed in words, the other implied by acts—and both accepted; guarantee to the owners of Almaden the quiet possession of their mine. We submit that these positions are impregnable—clear, homely, brief and comprehensive—they embrace the law, the equity and the common sense of the issue; so plain, as that he who runs may read; so strong that legal quibble and circumlocution, will but break into thin spray against them.

How, then, can we regard the fact that now, Almaden is locked up by the Government from its owners by force—that they are turned out of their possession, and left melancholy sentinels on the hilltops of their property—but an example of American law violated, a Government promise broken, a national word of honor to conquered men desecrated?

And for whom? For men of a class, whom the American people hold both in fear and contempt; for a clique of speculative politicians and scheming counsel. It is such who would pluck the plumage of the national eagle—its honor—to feather their own paltry nests.

Part Second.

We may expect to be asked why, if the law and the equity of the case lay in such compact form, the United States Court spent weeks in the trial of the injunction suit, and why we have occupied so many columns in our argument heretofore.

We presume the Court was compelled to decide on the case as it was presented, and to listen to the lawyers, who were engaged in discussing the acts of these owners, SINCE the promise of the United States confirmed their "quiet possession under color of title." With all deference to the counsel engaged, we submit that no subsequent act of the owners, except a formal release, or a distinct abandonment of their mine to the United States, could possibly vest in that power the right to interfere with their quiet possession. By their possession, prior to the conquest, they would have been entitled, upon the commonest principles of national equity, as against the United States, to perpetual quietude. But that possession was guaranteed by a solemn and formal national promise, in 1846; reiterated in 1848, in a national treaty; and finally fulfilled, in 1856, by a national Board of Commissioners. It is not possible for a citizen to be more assured by his government of any property, or privilege, than these owners have been assured of quiet possession, by the confirmed promises of the United States. What have their actions SINCE that promise, to do with the rights acquired by it? "They sought title from Mexico since the conqest!" They did not; but suppose they did, does that release the American Government? Suppose they obtained a license from France, or a quit-claim from the Emperor of Japan, or did any other absurd act, to which their fears might prompt them; could any or all of these vitiate the promise of the United States? It is nonsense to suppose so.

We have been led away into long arguments on this subject, we confess; for we did not see,—so heavy was the mist in which it was enveloped,—the simple broad rock on which the case of the defendants rests. It requires, after all, only common sense to distinguish its imposing strength. Upon the national promise, guarded by the national power, and surrounded by the national honor, reposes their claim to quiet possession.

The reader must not lose sight, of the point at issue. It is not whether the owners of Almaden have, or have not, a perfect title—whether some one else may not have a better—or whether their two league Mexican grant be, or be not, valid; but it is, whether the United States, who came to the country and found them working their mine in 1846; who promised *then* to guarantee their title; who let them remain ten years in quiet possession, and then by their Land Commission actually *did* guarantee that title by confirming it—shall *now*, have the right to restrain them from working, and oust them from possession; upon an allegation that since 1846 they had sought and obtained a Mexican grant. This is the matter at issue fairly stated.

To our mind the affirmative seems in the last degree absurd. We own a Quartz Lead in Tuolumne county. We have possession of it, by the permission of the United States—our tenure is its implied promise. If we were, from a freak of fear or of fancy, to proceed to Mexico and get a Mexican grant for the land, does any sane person suppose that we should thereby lose our Quartz Lead. There are a hundred persons in San Francisco owning lots under city titles, who have procured the Limantour quit-claim, well knowing it was an arrant fraud. Does anybody pretend that the city has a right to resume those lots, because the owners were fools enough to buy a title from Limantour?

But, urges an opponent, "the promise of the Commander-in-Chief in 1846, is nothing in law; he was not invested with authority to bind his government; he was not the agent of the Federal power to grant previleges, or to promise titles. It is out of the scope of his duty."

Of all the arguments advanced on this subject, this is the most despicable. We confess we do not know whether in technical law the promise of an American Commander-in-Chief would be binding on his Government or not. Unfortunately, we have no authorities in our possession upon international law; but our sense of justice tells us that such promises *are* held by that code to be binding; and if they are, they then become by the Act of Congress, the law of America with regard to California titles; for the statute organizing the Land Commission enacts, that it shall be governed by the LAW OF NATIONS in adjudicating upon them. This would settle the question, even technically, and make the promise and proclamation of a high American officer, as valid before the courts, as they are sacred in the hearts of the people.

"Not authorized to bind his government"—"not an agent to make promises"—"out of the scope of his duty!" He *was* authorized to bind a new country to his government, he *was* the agent to make conquests—it *was* within his scope of duty to take California. "But in the means to be employed he was restricted"—to what? To gunpowder and round shot, to the rifle ball and the deadly bayonet, to slaughter and destruction? Are these the only modes of conquest? May he not use the language of conciliation, and reason; of equity, of hope to the people he comes to subdue? If he finds an enemy on the inheritance of his fathers, or surrounded by the products of his industry, must he send a bullet through his brain—of necessity; or may he say "We come as friends; the possessions of your industry shall be guaranteed to you?" And if he does, in mercy and human kindness so promise, and thus conquer; shall this, his nobler, act be accounted naught, while a butchery, would have been legal and approved?

Commodore Sloat, in the celebrated proclamation that went forth to California with the breeze which first unfurled the national banner, spoke as a wise, good and brave man would naturally speak. Conciliatory, as the tone of his proclamation is, it does not contain a single inequitable promise. Though kindly, it is sternly just. We venture to say, that it did more towards the peaceable conquest of California, than any other act of the war. But for it, doubtless many noble forms would have bit the dust, that now look on the fair light of day; by it, many a hearth, both of the invaders and the invaded, was saved from desolation and lament.

It is an axiom of common law and common sense, that a principal cannot at once repudiate the acts of his agent, and accept the beneficial result of those acts. If a man acquire lands, by a promise of his agent that he shall pay for them, he cannot keep the lands and deny the authority of the agent to bind him to that payment. If by the arms or the promises of its agents, the United States acquire California, the very fact of its retaining the country, acknowledges ALL the acts of her agents by which it was acquired.

Besides, there is something in a national proclamation from the battle field, which sets the soul of a people, quivering with susceptability. A proclamation issued as this was, at the first upraisal of the nation's flag, to a people who submitted and confessed themselves a conquered race, becomes the word of honor of a sensitive nation. Their impulsive chivalriy will unite with their sense of right at a welding heat, to forge a weapon for its defence, which those who would desecrate its pledges, had better not encounter.

The most cruel and faithless foe, that in modern times has braved a civilized people, is the Mohammedan Hindoo, Nana Sahib, whose nameless atrocities have curdled the blood of Christendom,—a shout would rise up from the white man's world at his capture and destruction. Suppose that he were penned up with his followers, in an Indian jungle, by the forces under Colin Campbell, Lord Clyde,—a scorching sun, and nightly malaria, are consuming the precious lives of the commander's soldiers, and he proclaims that if the murderer and his force, will lay down their arms, their lives shall be spared, and their property guaranteed to them. They lay down their arms. They are in the power of the men whose wives, sisters, and infants, they tortured to death. Those men gnash their teeth, while standing spell bound, and sick at heart with thirst for vengeance. The civilized world joins in their feelings. But let the murderer and his band go their way. A soldier's word shields their worthless lives. A nation's honor chains a nation's wrath—for it is better that the accursed should encumber the earth, than that the pledge of a great people should be violated.

This is the extremest case that can be imagined; and even in it, civilization would say that the commander's promise must be held sacred. Then how much more the fair, and not more than equitable promise of Commodore Sloat to the unoffending people of California! Could our voice reach the utmost boundaries of the Federal sway, and were the question put, "Shall the promise of an American commander-in-chief to a conquered people be held sacred?"—how great an AYE! would sweep up from the length and breadth of the land. "What, under all circumstances?" There might be a pause for reflection, but momentary however, and the affirmative answer would outcrowd the echoes of the first response.

We see before us the genius of American honor, standing in the proud gaze of its own millions, and commanding the respect of distant nations. Its head is amongst the stars, its dais is a wide continent. Its august shadow, falls as the earth revolves, on the frigid, and on the torrid zone;on the waters of the Pacific in the morning, and upon those of the Atlantic in the evening. Its voice intoned with the clear energy of truth, falls inquiringly upon our ear.

"Is an American proclamation to be debased, or an American Commanders pledge to a conquered people, to be violated? Shall the first unfolding of the national banner on the Pacific, inaugurate a lie? I, the honor of this great people, speaking by my gallant representative, was pledged amidst the exultations of conquest to this people, '*that all persons in quiet possession of lands, under color of right, should have those titles guaranteed to them.*' You acknowledge that the defendants, were, at the time this pledge was uttered, in quiet possession of a mine, and had a color of title thereto. They believing the American power would be as truthful as it was mighty amongst others submitted. Their possession, my pledge, and that submission, made a title which cannot be infringed by the national power to the end of time. "Quiet possession," as against us, vested in them, then and from thenceforth. The Act was written by the hand of the Conqueror and sealed with the glory of the conquest. How is it, that I find them to day ousted from that possession? Has the great government of America broken the national faith, that it might steal a mine? Who has done this wrong?"

"But," interposes the *National,* "since July, 1846, they have sought titles from Mexico to this mine, and have antedated them."

"I pity them," the great voice replies, "because they had not more faith in American honor, and so saved themselves the trouble. Their fears, however, do not absolve my pledge. I guaranteed them such a title as they had then, which was at least quiet possession, and it matters not to you or to me; if since that date they have made forty pilgrimages to Mexico, and have antedated documents sufficient to carpet the intervening continent: their right and my pledge remain unaffected. If they have committed any crime, punish them as your code directs—but do not break your word."

"But," replies the *National,* "*they* had not quiet possession; Don Jose Berreyesa, or the Fossatt claimants had." "Enough," says Honor, "if *they* were in possession I confirmed it to them, and why does the government claim it? If there is a strife as to who was in quiet possession, let Berryesa, Fossatt, and these defendants settle the fact before the proper tribunals; my pledge of quiet possession, inures to the benefit of whoever was there, under color of right—it was not the government of the United States at that time."

"Mighty honor!" says *National,* again; "these people are not of us; we are the victors, and to us belong the spoils; they have a splendid mine; it is nobly equipped, and they are aliens and foreigners. What a shame is it that they should have so much, while many devoted adherents of the Government are poor."

"And would you take their 'quiet possession,'" answers the Genius, "because they are foreigners? Remember, they were *not* foreigners when my pledge was given; and would not have been foreigners until this day, had we not come. They were here at work, when we came and proclaimed ourselves as 'their best friends.' We have, hitherto, done them no good, except to protect them from the exactions of Mexican officials, who rapaciously tithe the industry of their people. And shall we now, obliterate ten years of such friendship, by wresting the whole of their property at one grasp? Who counsels such infamy? Who would confiscate the industry of the alien that reposes in our honor; and violate their country's conquering pledge, for filthy lucre's sake?"

Some names are whispered. A shade passes over that grand face. He takes a volume of history from the Records of Time, inscribed "The Roll of Fame." He opens a page, in which are writ, in lustrous characters, the names of the Fathers of the Republic. The sky brightens —for the world grows lighter every time that page is opened. He reads some names there, and with a pained expression, adds—

"Greatness and lofty virtue, are not family heirlooms. The glorious Fathers of America must look for their sons—not by name—but wherever the noble in spirit, and the good of purpose, dwell —among the millions of the people."

"But," deprecates a pleading voice, "these were but counsel, or editorial friends—employed"

Honor closed the volume, as if to say, he would not discuss subtle distinctions.

"Go to, Sirs!" he adds; "were you to win these men's possessions by legal technicalities, in the name of the people, and did your proceedings show nothing but the pure effect of patriotism; the people would not receive, that which you won. They would ask who discovered and rescued this mine from the wilderness; who made those roads, excavated that mountain, built those costly works, erected that mining town, and started this new branch of commerce? Did the United States, or these dispossessed defendants? Would we be richer or better if, to-day, the metals they have dug from the bowels of the earth, still reposed within their primeval fastnesses? Do we, as a people, so lack buried wealth, that we grudge them the portion they have exhumed? Give them their possessions, and a title thereto. Let them sit under the vine, and the fig tree, they have cultured, and nursed, and eat of their fruits in peace. Charge them, if it be our due, with the value of the naked hills, at the time when they took possession; but let it not be said, that a proud and powerful people, meanly took a legal advantage to rob the stranger of his eneerprise and toil. Our honored Chief Magistrate this month has proclaimed, *The Federal Government has ever been a liberal parent to her Territories, and a generous contributor to the useful enterprises of the early settlers.* These men were early settlers; their enterprise was useful; our contribution shall be a fee to the land they have improved.

"And my people," says Honor, "would speak as becomes my name and their nobility."

Part Third.

We think we understand the American people sufficiently to tell the movers in this business that they will never get Nueva Almaden in the name of the Government. Let us see the aspects this case presents to the public mind.

To start with, no Government prosecution resulting in the confiscation of private property, has ever been popular with any modern people, even if undertaken with upright motives, and reluctantly from a painful sense of official duty. The only Government confiscation amongst the Anglo-Saxons, any where near our own times, which had a gleam of popularity, was the absorption of the Abbey properties in England, by that royal brute, Henry the VIII. Even this could not have happened had there been a free press to instruct the national intelligence. Over one hundred years ago the Derwentwater estates were confiscated by the Crown, for the treason of their owner; and to this day that act is regarded with feelings of sorrow and regret by the people. If this repugnance prevails generally, what will be the national sensation when the repulsive features of this attempt are scrutinized. It will arouse its resentment, as it provoked our own. Its *results* are to deprive early settlers of the fruits of their enterprise. This will be hateful. The *manner* in which the prosecution has been conducted by the counsel—without dignity, with acrimony and vituperative language, will be distasteful. The sole evidence on which the prosecution rests—the confidential correspondence of the defendants with their agent, the disclosure of which was in itself infamous—added to the fact that this evidence was purchased by adverse private claimants for the enormous sum of twenty thousand dollars—will be repugnant. The singular inequality of the procedure which singles out these defendants, and arrests *their* mining operations, on the pretence that they have not obtained a Government release of their mine, while a whole State full of miners are left undisturbed, will be resented. When, in addition to all these things, it is discovered that in order to disturb them, the proclaimed pledge of an American commander must be treated as the idle wind; we need hardly say, that the inherent dislike of the national mind to confiscatory processes, will be inflamed into indignation. The people will resent a Government prosecution, if meanness, malice, or private speculation, becloud its high purpose. *Oppress* a man, and were he full of errors, they will take him into the shelter of their strong sympathy. Rob a man of that which the national promise, given under the national flag, has guaranteed to to him, and the lightning will be scarcely less swift than their anger.

Counsel in a case at law, even of a private nature, fill a quasi-official capacity. Counsel for a Government are public officers in all that relates to the matter at issue. The acts of public officers and their private position in relation to those acts, have always been deemed appropriate matters for public discussion. We have sedulously avoided everything personal while giving our views on this matter; and we adhere to the same course now, in alluding to the position of the counsel for the Government. That position belongs to the publicities of the case. The idiosyncrasies of conspirators, belong to a conspiracy. The *actions* of actors in a drama explain its plot as well as their words. We have stated that this case is *not* a government prosecution, but a prostitute use of the government name and title, to further a private speculation. This has been denied. We can only inform ourselves by enquiring what may be the object of the men who represent the Government, and are supposed to have originated the prosecution. The counsel for the United States, upon whose shoulders the case for the plaintiff has rested; are, or at least have been until recently, the counsel for Messrs. Eldridge Laurencel and others, the owners of the Fossatt claim, which they say embraces "the mines and minerals of New Almaden." One of these gentlemen appears as counsel for those claimants in San Francisco, the other appeared for them before the Supreme Court in Washington. The Fossatt claim was decided by the Land Commission *not* to cover Almaden; by the District Court it was adjudged to embrace that mine, and by the Supreme Court that judgment was reversed and the claim remanded for further evidence on the subject of boundaries. We believe this to be a plain statement of the transaction, though perhaps not explained in legal phrase. As it stood, with the Government for umpire, it was a very pretty fight. The parties were well matched—wealth and obstinacy on one side; political influence, fine manouvering, genius, and the hope of a splendid prize, on the other. First one made a successful hit, and then the other; and it was quite doubtful who would finally remain master of the field and take the spoils. Suddenly Fossatt—that is, all of him that had as yet appeared, viz: his counsel—comes equipped in the Government regimentals, bearing the flag and credentials of the supreme power, and charges down upon Almaden in the *name of the United States*, outflanks its defenders, and ties them up. We admire the generalship of the counsel; but what was the Government about, to let them steal its colors to accomplish a ruse? The facts are: Fossatt claims Almaden, and Messrs. Randolph and Stanton are, or were the counsel of Fossatt. The United States claim Almaden, and actually shut it up; and Randolph and Stanton are the counsel of the United States. Publicly their position appears duplicate and self-entangled. Two rivals claim Almaden, and the same gentlemen urge *both* claims. Yesterday, they proved that Almaden did not, and could not, belong to the United States, but to Fossatt; and they get a judgment to *that* effect. To-day, they prove that Almaden beyond all controversy, *does* belong to the United States, and therefore cannot belong to Fossatt, and they get a judgment to *that* effect also. Who does the mine belong to gentlemen? You should know, for you have proved up *both sides of the question.*

Some weak minded person sugests, as a solution to the enigma, that these gentlemen *were*, the counsel for Fossatt against the United States; but now *are*, the counsel for the Uuited States, against all comers, including Fossatt. We reject the explanation, as rank blasphemy; it implies professional treachery to a client, which is the unpardonable sin of the legal fraternity. Of course, a counsel having been retained in a case, and having, in his official capacity, obtained full insight into it; is bound forever, from employing that knowledge *against* his client, albeit that client ceases to employ him. The rule is just and rigid—even in this State, so lax in its morals, as compared to Philadelphia. "Once counsel, always counsel, or out of the case;" every lawyer's errand boy knows the proverb.

Two rivals for the same mine—the Government and Fossattt—claim the counsel. They have said pleasant things for each; spoken brave words on both behalves. Which do they prefer in their hearts? They smile on both suitors, and, we doubt not, receive support from each; would, they had panes in their stomachs, as Charles Lamb's friend had, so that we might see thefr inward minds! Every truthful and faithful tendency of nature, leads us to infer, that their *first*, is their only love; the other is flirted with, merely for the benefit of the early choice. Fossatt is the happy man. He first procured their kindly regards, and no doubt *retains* them still.

Seriously, we regard the appearance of the counsel of Fossatt, on behalf of the Government, as conclusive proof that the suit is brought for the benefit of Fossatt. Were it brought really that the United States should obtain the mine, which would finally deprive Fossatt of it altogether; the counsel for Fossatt would not have originated and supported such a suit. The supposition, that they have left Fossatt and joined an antagonistic claimant, is so contrary to professional honor and etiquette, that it is not to be tolerated. Having once claimed the mine for Fossatt, they can never claim it, except for him ; therefore, the present suit is a movement in support of the same claim.

And now we ask the counsel, if it is becoming and proper, that they should make a catspaw of the Government, for the uses of their clients ? They can not say, their clients do not claim this mine ; for at the time the counsel must have been drawing the bill for an injunction, at the suit of the Government, these clients were drawing up a mortgage for one million of dollars, upon half of their claim, "including the mines and minerals of Almaden," and recording it at San Jose. As private citizens, of name and station, it appears to us, that they should not have so debased the great and equal name of the Government. As officers, clothed with the livery, and speaking in the name of the Government, honor, surely, forbade them to exercise their functions for any private advantage whatever.

We only discuss this unpleasant view of the subject to prove that the Government is not the real party in the suit against the possessors of Almaden. We have already shown that Congress never intended that mining should be restrained, during the inquiry into California land claims. Lest it might be urged in reply, that such an intention is displayed by the fact that Government institutes a suit to restrain such mining, we prove that the suit is *not* brought for the Government—the acts, and the honor, of the Government counsel are our witnesses.

Were we so disposed, the anomalous position of the counsel, would afford a fine opportunity to retort the personalities, they and their supporters have indulged in ; but such is not our object. We merely wish to show—*That the real party in interest was not a made party to the suit ; and that the nominal plaintiff did not want an injunction.*

The counsel, their clients, and their friends, probably anticipate that a continuance of the calumniating style they have hitherto adopted, will conceal the real demerits of their case, and palliate its audacity. Fraud, forgery, Mexican grants, ante-dating ! have been reiterated with such apparently virtuous vehemence, that they have taken the semblance of criminality. A little common sense, a few plain words, will dispel such absurd becloudings. What is the charge ? This—that the defendants, after the American flag was raised in California, went to Mexico, and got a Mexican grant of the wild land on which the mine was situated which they were working ; and that Alexander Forbes, one of the owners, writing from Monterey, in the spring of 1848, to his agent[*], admits that Castillero procured his grant after the occupation of the country by the Americans. Now, we are bold to say, that, admitting all this to be true, there is not one business man in this community who would regard such acts as moral delinquencies. The idea is too puerile to need discussion, but yet we give it a sentence or two. In 1845–46 the parties were working the mine, and had an Alcalde's grant, and formal possession. Their title required strengthening. In July, 1846, the American flag was hoisted, and the American proclamation *guaranteed them their title.* This was good, so far as the United States was concerned. But war raged in Mexico still. Mexico might recover California ; and *then* where would be the American guarantee—it would be of no value at all. The Government's own, and almost sole, witness in this suit—the gentleman who got $20,000 for the confidential correspondences of his principals and partners—says, speaking of January, 1848, "at that period it was the opinion of foreigners" (i. e. Americans, English, etc.) and Mexicans, that California would be restored to Mexico." The Government prosecution establishes the fact, that in those days it was anticipated that the United States would evacuate California. Instead of this, the United States *purchased* California, when peace was contemplated, for $15,000,000.

[*] The letter, in which this admission of Mr. Alexander Forbes appears, is a curiosity of legal evidence. From the published correspondence it claims to be one of a correspondence of four letters on the same subject, all written in the stilted, hurt, semi-dignified style of two persons who are politely quarrelling with each other. Mr. Alexander Forbes swears point blank he never wrote this one; and produces a blotter copy of what he did write. Mr. ——— says the one he produces is the simon-pure. Here the matter comes to a dead-lock; so—produce the letter ; let us see the paper, the ink, the appearance, above all let us scrutinize the *handwriting*—that mysterious tell-tale which one knows, as one knows a face, without being able to describe it. Hey Presto! the letter is lost. Stolen. Mr. ——— brought it to the city to give it to the District Attorney, and somebody broke open his room door at the Railroad House, broke open his carpet bag, took out the precious document, then put everything tidy, and left ; all while the gentleman was refreshing himself. But he had something better—*he had a copy*. Thinking it might be stolen he had had a careful copy made, and by a man who could swear it *was a copy*. How fortunate ! Suppose the gentleman had not wished to produce the original he could not have done better. We must needs examine the copy. Look at it inductively. It don't fit into the place Mr. ——— says it ought to go ; Mr. Forbes's, blotter copy does. It is not an answer to the letter which precedes it—the letter which follows does not answer it. The blotter copy answers and is answered. The whole correspondence is querulous and complaining—this is frank and hearty. Put the five letters without date or name before a stranger and he would arrange four in order—*pat*, and throw the stolen one out as not belonging to the correspondence. Place the stolen letter without a *date* before any person versed in the thoughts, feelings and expressions of people in California, from 1848 to 1858, and he would date it 1852, or after (its date purports to be 1848) Less ingenious counsel than those for the Government would find no trouble in proving from circumstantial *prima facie* and inductive evidence that it is not a genuine letter.

Had we, or you, reader, or even the virtuous and fulminant counsel, in 1846-7, owned this mine under incipient Mexican titles, and had also the guarantee of the American power; but expected that at the close of the war, Mexico would resume her sway—what should we have done? *We should have gone to Mexico, if we could, and have got her title also.* The most tender conscience would have seen nothing in the act but ordinary common sense, and not particularly shrewd caution. The idea of fraud and forgery would never—could never—once have occurred to us. Why should we *not* have got a title from Mexico, so as to protect our property, in the event of her sway returning? We should have been stupid dunces if we had not done so. What trash—and worse than trash—what hypocrisy is it, to talk of fraud and forgery! If Mexico had, in 1848, resumed her empire over California, what would have been the effect of such acts, and such grants? Would they have been forgeries and frauds, or honest titles? The latter indisputably. Who, then, is foolhardy enough to say that the purchase of California by the United States converted those straight-forward business proceedings, into immoralities and crimes? The very conception is preposterous. All the effect, that the ultimate cession of California had on any such grants, was to deprive them of their legal effect. The United States Land Commissioners, apparently assuming these defendants' Mexican grant to have been thus procured, or imperfect, *rejected it;* while they confirmed their Alcalde mining grant, and their possession. There were no tirades about frauds and forgeries.

We neither know nor care where Castellero procured his Mexicant grant for two leagues of land. The Government proves the fact, that it was prior to the ultimate cession of California to the United States, and the published reports of the Mexican Minister, made in 1846, show that in April of that year he had applied for a concession from his government, and that it was willing to assist him. Transcripts of the grant, as strongly authenticated by the Mexican Government, and by the American and English Ministers, as such documents can well be, have been filed by the defendants—but the counsel insists they are fabricated. When asked to appoint a Commissioner to go to Mexico, and examine for themselves, they decline! We can imagine nothing to be more unjust, than to persist in disparaging imputations made by themselves, and at the same time to refuse to join in the only steps which can prove the truth, or falsity, of their assertions.

We repeat from the consideration of this case, as developed in this article, that the attempt by interested parties to obtain the mine of Almaden, in the name of the Government, is futile. It may, and does injure the defendants—it may, and does injure California, and prostrates an important branch of its industry. It may, and does for the moment, slur the national honor; but it will not gain the mine. Until they can blot out the fact of the early possession of its owners from the pages of history, erase a national promise from the records of a nation's triumphs, or blind with chaff that keen popular vision which goes straight to the bulls-eye of truth—they cannot lord it over Almaden.

We have been accused of being discourteous to the Government, and disrespectful to the Court, in our discussion. If we have been, we have unwittingly betrayed feelings which are foreign to us. We have been compelled to use the name of the Government to designate the ostensible plaintiff—but we have carefully insisted that the Government had nothing to do with the matter beyond this—that the Attorney General had been deceived, by interested representations, into a permission to use the Federal title, and that upon further light he would withdraw that permission. Towards the Court we are strangely mistaken if we have been in the least wanting in the respect which it is our duty to manifest. Why should we? It is especially the alien's Court, and we happen at the moment to be a plaintiff suitor in it, for a large amount. If we differ in opinion with the Court on any subject, and occasions arise for us to express our opinions, we freely do so. Why not? Were we to differ in a matter of legal ethics with Lord Brougham, in a geological inference with Murchison, or with Professor Whewell upon a proposition in inductive science, and express our views—should we intend disrespect for those eminent men; or if they regarded us at all, would it be with unkindly feelings? Certainly not.

They and the Court live for the establishment of truth. By intelligent discussion, truth is evolved. As the fall of an apple suggested to Newton the discovery of the laws of gravitaion; so the ideas of the humblest may suggest imporant results. If we have exhibited any feeling toward the Court, it has been that of confidence in its superiority to all personal prejudice, and in its high rectitude; in that, while a suitor before it, we have not hesitated to express opinions at variance with its own.

We have endeavored to show, in this article, that the real party in interest in this issue has not been made a party to the suit; that an injunction to restrain defendants from mining, contravenes the intention of the law, and of the law makers, who had fully considered the subject; and that the United States is precluded by its own promises—one proclaimed, ratified, and confirmed; the other implied, and both accepted in good faith—from interfering with the quiet possession of the owners of Almaden.

YOUR FORMER CORRESPONDENT.

M. L. Association 3

THE

NEW ALMADEN MINE.

THE DISCUSSION REVIEWED.

SAN FRANCISCO:
PRESS OF THE DAILY NATIONAL OFFICE.
1859.

THE NEW ALMADEN MINE.

ERRATA.

Page 2. Thirteenth line from bottom, for *assurance* read *assurances.*

Page 3. Twelfth line from bottom, for *light* read *weight*, and for *Almaden Mine Company* read *Almaden Company.*

Page 5. Seventh line from top, for *searched* read *reached.*

Page 7. Ninth line from bottom, for *California* read *Californian.*

Page 10. Tenth line from bottom, read *of those* called gentiles, etc.

Page 13. Third paragraph, second line, read *and by the same surveyor marked off, and inclosed*, etc.

Page 15. Tenth line from top, for *seeks* read *seek.*

Page 18. Third paragraph, for *investure* read *investiture.*

Pages 19, 20 and 40. For *Weekes* read *Weeks.*

Page 23. Seventh line from bottom, for *Cartearas* read *Castearas.*

Page 24. Second paragraph, for *June* read *January.*

Page 27. Second paragraph, for *Treasurer* read *Recorder.*

Page 41. Sixteenth line from bottom, omit the *comma* after Monterey.

Page 48. Seventh line from bottom, for *not* read *nor.*

Page 50. Fifth line from top, for *Court* read *Government.*

haps of half a dozen columns each, besides the editorials of the inferior sheets of the city and of the country papers.

Will the public undertake the case, or decline the jurisdiction? If the former, the public, as a conscientious tribunal,

THE NEW ALMADEN MINE.

THE DISCUSSION REVIEWED.

I HOPE no one will expect graces of composition from me, although I essay to write upon the subject of the case of the New Almaden Mine, now on appeal to the public from the United States Courts.

And first, I ask, what does the public know about this case? Very little, I am afraid; not from lack, but excess, in the material thrust upon it for consideration and judgment. The printed matter in the case, now to be found in San Francisco, amounts to: Arguments of counsel before the Land Commission, seventy-two octavo pages, chiefly from the hands of the counsel for the Company; in the United States District Court, pleadings and depositions, about one thousand octavo pages; in the United States Circuit Court, say another hundred octavo pages; opinions of Judges McAllister and Hoffman in the injunction matter, with a little appendix of motions and orders, eighty-one octavo pages more; and in the shape of newspaper commentaries, the space of about twelve columns in the *S. F. Herald*, (counting in one article from the *Bulletin*,) by a writer in behalf of the Company, who usually signs himself "Citizen"; some five columns in the *National*, from an opponent of "Citizen," who delights to distinguish himself as "No Alien"; and editorials of the *Bulletin*, *National* and *Alta*, to the amount perhaps of half a dozen columns each, besides the editorials of the inferior sheets of the city and of the country papers.

Will the public undertake the case, or decline the jurisdiction? If the former, the public, as a conscientious tribunal, assumes the duty of mastering all the facts, and weighing well all the arguments offered on either side. This sounds formidable enough, but it is a consequence not to be avoided when the public hears a cause upon appeal.

Of the two branches of its duty, that of weighing well the arguments on either side will, I opine, be found the lightest, and I can but hope, entertaining if not useful, seeing that the chief advocates who have volunteered for plaintiff and defendant, have entered so ambitiously on their task. They both deserve a passing word.

"Citizen" is blessed or cursed with fluency and effects sensation. To use a metaphor—and it is not possible to speak of him without one—his thoughts are blown-glass bubbles, and when they strike upon the mirror in his brain, a mutual crash ensues, and the scattered fragments—of idea and intellect—give back dancing thousands of such irrelevant images that we seem to be looking through our spectacles into a kaleidoscope. Witness, notably, the passage in one of his communications touching on the old common-law mode of conveying lands, where we are first treated to an English landscape in the feudal times, with cavaliers, maidens and priests, ancestral swords, plumes, palfreys, Genoese silks, hoods and cowls in the foreground; and then, by a magical transition, are all at once transported into Palestine, to find ourselves surrounded by virgins, tapers, and other pageantry of an oriental marriage; all which, pleasing enough in its place, can hardly be called sane when applied to the elucidation of the doctrines of common assurance, which was his matter in hand. Nor can he speak of dissolving an injunction, without depicting the circumstances of a general thaw!

"No Alien," too, has his variety. He affects severity—but his philippics are only coarse invectives, savage but not pointed; whilst his wit, if not mere puerility, is, to say the least, too delicate and refined for my apprehension. He gives some signs of vigor when he endeavors to grapple with his antagonist in argument, but the unsubstantial texture of the propositions generally eludes the awkwardness of the grasp. He would have done better to have avoided the tantalizing pursuit of phantoms, (perhaps these gladiators would be flattered if I should call one the *Secutor* and the other the *Retiarius* of the ancient amphitheater) and adhering to facts, gone deliberately to work to develop his case. Within these limits he might still have had the advantage of "Citizen," for I see no reason why he might not at least be rational. The draught animal is useful, though he cannot perform like the Arabian courser.

Neither of the gentlemen, I trust, will take offense at these remarks. I suppose they wanted notice, or they would not have written in a manner so ostentatious of self, nor left the unwrought bulk of New Almaden to press so heavily as at this moment on the public mind.

Stripped of the nonsense of its expounders, it is obvious that the interest of this case arises from its bearings upon business. The public cares nothing for the New Almaden Company, but it does care for quicksilver. "Citizen," in his peculiar style, tells us that the county of Santa Clara "grumbles in discontented poverty," and that some hundreds of unoffending workmen have been thrown out of employment—that the hammer makes clamor no longer in deserted Almaden, nor do the mule-bells tinkle along its precipitous hights, etc.—and it is true; and a much more important consideration is that the price of quicksilver has doubled, which is doubling the amount of a large and constantly increasing item of the cost of the production of gold in California. This is a great fact, with consequences which extend beyond the range of a mere scribbler's vision and will deserve a conspicuous place in the annals of the country. It will deserve to be noted and recorded as a calamity; but were the calamity greater still, what light would that consideration have upon these questions which embrace the New Almaden case? viz:

Had the Judges the power under the law to enjoin the New Almaden Mine Company—or are they usurpers?

Were the officers of the government justified in asking for the injunction—or are they tyrants?

Ought the New Almaden Company to have been enjoined—or have they a good title to the mine?

I submit that neither the price of quicksilver, the discontent of counties, the suffering of unfortunate workmen and their families, nor the tinkling of mule-bells, can vary the answers to be rendered—that the answers must be the same when millions and multitudes are involved, as when only a pittance and the humblest individual; for when considerations of material interests affect the public judgment on issues like these, the people will already have suffered the corruption of bribery and consented to the sale of justice.

To seek, as "Citizen" has done in sundry of his fine passages, to maintain, on the admission that the title of the New Almaden Company is fraudulent, that they still have a right to the property, by reason of their labor and expenditures in constructing, on a before untenanted spot, improvements which he paints as elegant, solid and useful, is but to attempt to justify the crime of forgery. Eugene Aram, with even more eloquence, once sought by similar reasons to justify the crime of murder, but is yet considered to have been justly hanged. "Citizen" intimates that he is engaged in some species of traffic himself, but in the name of mercantile as well as every other species of honesty, I repel his suggestions—the product, it is to be hoped, rather of the levity of his fancy than an expression of his principles—and say to him that his Clerk may with his own arguments justify the forgery of his check, provided he looks well to the application of the proceeds.

First. Are the Judges of the U. S. Circuit Court usurpers? This is a main question, because it is simply by the words of their mouth that the labors of the New Almaden Company are suspended. It is they who have so ordered. Is the suspension tyranny? Then the judges are usurpers, for there are no laws of the United States which authorize judges to do anything which is tyrannical. But let the public be cautious. Usurpation by a judge is not to be lightly assumed. It ought to be almost self-apparent, and but little need to be shown by argument or enforced by declamation — as if, for instance, a court should assess taxes and proceed to collect them by execution—otherwise the public may be misled to condemn the judge before it has fathomed the merits of the cause.

The argument for the company evades an open announcement of this charge of usurpation, and pretends to put the court in the position of a monarch, whose ministers, not himself, are responsible for his acts. This is disingenuous, and but a simulated deference; a sophistry designed to cloak the malevolent purpose, not shield the judges; a wreath that conceals a dagger. They had the pleadings, the evidence, the arguments, the law, before them; they, only, had the power in their hands; and if there was not law to close the New Almaden Mine with an injunction, they and none other must bear the responsibility. If there was crime, no one can be searched until the judges are first condemned. Therefore—

Second. The law-representatives of the government stand justified of tyranny whilst the judges remain unconvicted of usurpation. They need no other defense than that after an unusually protracted argument, study, and long reflection, the judges concluded that their prayer ought to be granted. The judges said that the New Almaden Company ought not to be permitted to go on working the New Almaden Mine, because, so far as the case could then be investigated, the New Almaden Company did not own the mine, but were enjoying its enormous profits under a forged title. If the judges were correct, the agents of the government could not be wrong in asking for the prohibition now, just as on final judgment they would ask for an execution. In either case the right to sue is included in the sentence. If they had the right to make the demand, it is difficult to understand that they had the discretion to forbear. That would be a dangerous prerogative in any case; and there is surely nothing in the insignificance of the value of the New Almaden Mine, or in the venality of the offense of forgery, which could make it tyranny not to forbear to enforce the rights of the government in the present instance—no matter what may be the pecuniary loss to the public at large, nor whether the action of the government eventually resulted to the benefit of the national treasury, or of some honest owner for whom the United States assumed the place of trustee under the stipulations of that treaty by which they perfected in themselves "the paramount legal title" (as expressed by Judge McAllister) to the soil which they had conquered.

There was no guilt on the part of the agents of the government, unless there was a conspiracy, in which those that wear the ermine, not those who wear the gown, were the greater criminals. If there was neither usurpation, tyranny, nor conspiracy, the New Almaden Company would have no better right to force their sorrows on the public than any other suitor who had lost a cause.

To assail before a people those who administer their laws, in newspaper articles written at the instance of parties who have that moment issued from the precincts of justice under sentence of condemnation, is an enterprise too bold to be attempted openly. Hence we have not only the hypocritical fiction of the non-responsibility of our judges, but it is to be extended to the Attorney-General at Washington, who, also, it is artfully pretended in words, has been misled by advisers, and thus the assault is limited, apparently, to the local attorneys. But the artifice is too transparent; a charge which could not be avowed is again clearly insinuated, and we are desired to believe that Mr. Black, too, is one of the conspirators.

The people of California are not more incredulous than others. I am myself not incapable of believing judges and other officers of the law guilty of even as great crimes as these; but sensible men will wait for some better ground than the issuing of an injunction in a particular case by a court of equity which was made for the purpose of issuing injunctions; and honest and fair-minded men will at least require a respectable accuser and sufficient evidence before they yield their convictions.

Such an accuser is not, at this moment, the New Almaden Company. The provisional sentence of forgery stands unreversed against them—and the rhapsodical essays of "Citizen" are not that evidence. Putting away, then, the newspaper vanities of the writers who have figured on either side—lamenting, though to no purpose, yet sincerely, the loss of employment to laborers, and the rise in the price of quicksilver to the country—declining the leperous touch of a morality that would justify forgery, by the money laid out on the thing forged for—totally indifferent to mule-bells, and turning an adder's ear to charges or insinuations of usurpation, tyranny, conspiracy, or any other crimes, against the judges and the law officers of the government—I approach the mountain of the New Almaden controversy with the desire to offer an honest opinion, as in any other case, great or small, of the correctness of the judgment of the court, not on questions of the law of procedure—the when, and where, and wherefore, of granting injunctions—but on the facts, viewed in the untechnical light of a common understanding, which brings me to this question:

Third. Have the New Almaden Company a title to the New Almaden Mine?

If they have a title, it is either without papers or with papers. They allege that they have both, but I shall not go further when I find either.

Independently of papers, their title must be found in the events of the following history. From the first foundation of missions in California, now some dozen years less than a century, a cave had been known to exist in the hills constituting part of the mountain range which bounds the valley of San José on the side next the coast, and about fifteen miles to the southward from the Santa Clara Mission. From this cave the Indians obtained vermillion for painting their bodies, whilst they continued in the savage state, and for painting the Mission Church after they had been converted. The color of the earth, and the weight of the fragments of stone, which were easily broken off from the sides of the cave, soon—it is not known how soon—gave rise to the impression that it contained metal of some sort. The first known of any attempt to work it as a mine seems to have been in 1824, when Antonio Suñol, in partnership with one of the Chabollas, (from whom the range of hills in which the mine is situated received a Spanish name, which signifies in English "The Range of the Mine of Luis Chabolla,") worked it, or attempted to work it as a silver mine. They built a mill on a neighboring stream for grinding the ore, and singularly enough procured, it is said, a flask of quicksilver to facilitate their operations. Of course, this early California mining enterprise proved a failure. In 1834, '35 or '36, a Chabolla made another effort with no better success. The cave seems to have remained unmolested, but not forgotten, for about ten years longer, when Captain Andres Castillero, of the cavalry of the Mexican regular army, came to California on the business of the central government, as an agent, I have heard, to look after another agent who had preceded him to this coast on some special service of a political nature. A Californian, of the name of Robles, (nicknamed Chato—*flat-nosed*), carried the captain to the old cave, and he, being a man of some knowledge of mineralogy, soon discovered that the hitherto inscrutable substance was quicksilver. History finds its charm in the details of great events, and so it may not be amiss to relate that Castillero made his experiments at the Mission of Santa Clara, in the quarters of the priest, the Rev. Father Real, and that his process was by putting small pieces of ore into a gun barrel, and the touchhole stopped with clay, and the muzzle inserted in water, subjecting it to a strong heat. The condensation of the mercurial vapor in the water, made the first quicksilver produced in California. Andres Castillero knew the value of quicksilver—all Mexicans do. He formed a copartnership with Chato Robles and his brother, his friend, the priest of the Mission, and Gen. José Castro, then military commandant of this Department. Their agreement was to combine their efforts to procure a title, and money to work the mine, which was to remain provisionally under the charge of Father Real, in the absence of Castillero. They stipulated with one another, that of the products no more should be taken out than was necessary to enable them to complete their arrangements. Father Real furnished some Indians of the neophytes under his pastoral charge. Gen. Castro probably furnished a supply of gun-barrels, and the two Robles contributed a brother-in-law, an American, named Chard, who sometime in the fall or beginning of the winter of 1845 took charge of the operations of the company. He put the Indians to breaking off ore from the cave, and erected a sort of battery of gun-barrels over an impromptu furnace in the side of the hill, each gun-barrel charged, touchhole stopped, and muzzle in water, as before described. From each charge of a gun-barrel he obtained half an ounce of quicksilver, but a very few charges unfortunately consumed the gun-barrel, so the extraction went on slowly and at some expense. Whilst he was thus employed he was one day visited by the partners and some of their friends, in all perhaps a dozen or fourteen persons. What they did is in some respects variously related. The witnesses all agree, however, that the party was a merry one; they walked about the mouth of the cave, and lounged under the trees or sat upon stones, rode around a little way through the brushwood, and chatted and laughed; and the witnesses upon whom the New

Almaden Company chiefly rely, say that Antonio Ma. Pico, Alcalde, standing up, surveyed the scene, and declared to Andres Castillero that he granted him three thousand varas of land in all directions.

Castillero and partners, and Pico, and the witnesses, at that moment believed that the land belonged to a retired sergeant, whose name was José Reyes Berreyesa, as they have since declared.

Chard, the only American witness, (it is rather unusual to find one to a transaction of that date,) can not, however, remember that Castillero was present at all, and yet he was in charge of the place under Castillero's appointment and orders, of course knew him perfectly well, and must have been the host who received the party. He can not either distinctly remember any granting, giving, or taking possession, but thinks he heard something said about taking possession; in fact, if he was the only witness, it might all well pass for a pleasure excursion made up amongst the parties to the contract I have referred to, to see how their agent was coming on with the gun-barrels. All the witnesses say there was no surveyor and no instruments, no measurement, no marking of lines or fixing of corners, and but one saw any paper or writing materials, and the Alcalde's secretary was not that one.

Of how much land did these proceedings make Castillero the owner, whether it was public or private land? How much further did his and his partners' rights extend than the Indians had that day thrust the crowbar? Night left them as the morning found them, naked occupants. They say they had thirty-six millions of square varas.

After this, Chard descended the hill to the creek, a mile from the mine cave, but within the three thousand varas. Here he built a log cabin, dug a trench, at the bottom placed a trough filled with water, covered the trench with iron-bars in the fashion of a grating, heaped the ore upon the grating, inverted one of Father Real's iron pots (in which in the days of the hide trade the priests were wont to try out tallow at the Mission), over the heap, built a fire around and upon the pot, and sat himself down to wait until the fumes of mercury descending into the trench deposited quicksilver in the water in the trough.

The results were unsatisfactory, as the waste was great and the product small. He then built an adobe furnace; two chambers or ovens, one above the other; in the lower a fire which communicated through flues with the one above, which was charged with ore through a hole at the top, and that closed with an iron door made secure with cement. He charged it but once; the first time the fire was lighted it exploded, and he pulled down the adobes to gather what quicksilver might have insinuated itself into crevices. He fell back upon the try-pots, and continued to work at them until he had secured quicksilver enough to half fill or quarter fill, a pot of dimensions not given. He never weighed it, but another witness, who most probably did, says that it was about eighteen hundred pounds; the which remained in the aforesaid pot, deposited in a room of Chard's cabin on the creek.

On the fourth of April, 1846, Andres Castillero left California. For some time before he had taken up his quarters at Monterey, and Chard with his mine had, in accordance with the articles of partnership, passed under the charge of Father Real. In May, the disturbances of the war began with Fremont; on the seventh of July the flags were changed, and California became the soil of the United States. In September, Father Real, the priest, transferred the mine to the keeping of James Alex. Forbes, British Vice-Consul. In October, Chard abandoned the mine, and the try-pots at the creek salivated. Forbes continued to keep an Indian or two for a while about the mine, but carrying on no works, unless perhaps occasionally breaking out a little ore. He sometimes had as many as four Indians there, but most generally only one, who was a wild or unconverted Indian, called gentiles, to distinguish them from the neophytes. Finally, there was nobody there; the bears broke into the cabin and eat some prosivions that Chard had left, and the bands of Indians from the Tulare plains, who were in the habit of visiting the settlements to steal horses, selected the place at the creek as a camping ground. The story runs, that they were greatly perplexed at the quicksilver in the pot, and shouted over it in admiration when they found it would float a stone. In the spring of 1847, Isaac Branham, of Santa Clara County, then recently arrived in the country, was hunting in that region and came upon this cave. He says, in an affidavit in the injunction suit, that it was then a lonesome and solitary place; a crowbar lying in the cave, also some broken lumps of ore, and close by, a small shanty without an occupant.

If Branham had found a spot like this, in precisely the same condition and with a similar history, in the mountains among the gold mines, might he not have occupied it and kept it? Was there then any right of Andres Castillero, or Father Real, or any of their associates, which would have stood an obstacle in his way, to prevent him from taking and holding the now world-renowned New Almaden Mine? It would not have been necessary to drive away an Indian—not the British Vice-Consul's Gentile. He might have taken his turn at carrying ore down the precipitous paths, (where until of late mule-bells were jingling,) and at the try-pots by the creek, in the same manner and with the same right that Chard had done before him. Why not? One naked occupancy may follow another, as shadow flits after shadow, even across the slopes looked out upon from Almaden.

At this time, Andres Castillero was in Mexico, perhaps on the retreat from Buena Vista; chronology, at least, would not conflict with the supposition.

For aught that appears from the foregoing relation, (taken, I wish to be understood, from the depositions of Antonio Suñol, José Noriega, José Fernandez, Antonio Ma. Pico, James Alexander Forbes and William Chard—all of them but Forbes witnesses for the New Almaden Company—and from the book of Revere, quoted by "Citizen,") it would be as hard to find the connecting link, at that time, between Andres Castillero and the New Almaden Mine, as between that captain of the enemy's cavalry and the white house at Washington.

Not so, however, thought Castillero. He found time from his campaigns to sell a portion of his interest, and found a purchaser in Alexander Forbes, the British Consul, then established as a merchant at Tepic in Mexico, and consequently as much an enemy of the United States, by public law, as any Mexican. Forbes bought of him five twenty-fourths of the choicest spot of the soil of California, but on the prudent condition of paying for it when he got it. A Mexican notary's certificate, however, is now produced to show that this proviso was abandoned. Alexander Forbes enjoyed already the experience of more than three score and ten years; he was not only a sagacious man of business, but also something of a man of letters; he had published a passable book on California; and his proceedings showed that his energies remained unbroken. Belonging to an indestructible breed of Scotchmen, he is supposed to be still living in the city of London, something short of ninety. He sent up first as his agent, to make a reconnoisance, Mr. Robert Walkinshaw, another Scotchman domiciled in Mexico, the same lately deceased. Walkinshaw did not tarry long, and on his return made a report which induced Forbes to come up in person, to verify things with his own eyes. He reached Monterey on the last day of September, 1847, and undivested of his Mexican nationality, attaching from his domicil, coming from a Mexican port with Mexican goods and people on board, seems in conformity to the peculiar romantic notions with which it pleased people in command to conduct that war, to have been permitted to enter the country, and without serious molestation to proceed with his workmen and tools to the mine. He sought to know whether there was a quicksilver mine there or not; for his Mexican experience had taught him that there is not always a mine of value where a little cinnabar is found. He suffered much anxiety on this subject, and it was not until the 24th of November that he wrote to a friend, "We have at last discovered the vein;" and as late as January he was not afraid to write to Monterey that "there is no mine, nor does there appear to be any quantity of this kind of stuff"—so little was there yet known with certainty about this marvelous deposit of quicksilver. But there was a mine; and so soon as Alexander Forbes, who, at the age when other men are tottering around their hearths, was lodging during winter in a cabin in the wilderness diligently searching for it, had discovered it, he set to work to make sure of it. From the Alcalde of San José he obtained a grant of a tract of land two hundred varas broad and eight hundred varas long, which was surveyed and marked off upon the vein including the cave. He also procured a surveyor who had no more authority than himself, (there was not nor could be any surveyor authorized to survey the public lands, before the appointment of a Surveyor General by the Federal Government) to survey and mark the boundaries of two leagues of land including the small grant by the Alcalde, and the lines of which were after much debate settled in such manner as he supposed would meet least opposition from the rancheros around him, and with a total indifference to calls of any grant of his own—his plan being to fence others off rather than to fence himself in. These were his acts. Then he went away and has not come back since.

Did he by these surveys and delineations acquire any title to the rectangle of two hundred varas by eight hundred, or to the two square leagues of land?

Assuredly not. At least a loyal American citizen who at that time had settled upon the public lands, and by the same surveyor, marked off and inclosed one hundred and sixty acres, could not in that way have secured his homestead. Unless he afterwards complied with the laws passed by Congress, the Surveyor of the United States would in due time run his lines over him and obliterate him. Nor is such the possession taken and held by the miners for the gold, of which the United States have made largesse to the people who occupied these shores. State-builders and founders of empire—they yet acknowledge the title of the United States, and accept as their portion of the general bounty that which falls to them by the allotment of their neighbors.

I have now with the most scrupulous fidelity, stated all the material facts, as well as I could gather them from the immense record. They come down to a naked occupancy by Castillero, soon relinquished as was to have been expected, and two unlawful surveys, one within another, by Alexander Forbes. This is the title of the New Almaden Company without papers—their alleged equitable title resulting from their acts—and the public has no choice but to render a verdict against it.

Something has been said by "Citizen," rather exceeding in strangeness the usual extravagance of that fantastical writer, about a proclamation of Commodore Sloat. What I can make out from a half column in the *S. F. Herald*, in which we have of course, the waving of banners, roaring of artillery, and shouting of the troops and *foreigners*, down there at Monterey, on the 7th of July, 1846—which, by the way, I believe was rather a quiet day, certainly by no means so noisy as he represents—is, that the continued possession of this mine, as it was held in July, 1846, was one of the conditions of the submission of California, otherwise Father Real would never have surrendered; and Chard, forgetful that he was born an American, with his Indians would have piled the navy upon the army in the defiles round about New Almaden. He says it makes no difference what the Constitution of the United States may be, that proclamation was the first American law in California and hence above it; nor what laws may have been since passed by Congress, Father Real was not a party to that legislation. This is strong doctrine and looks like an inversion of the order of our laws—most people would have supposed that Commodore Sloat meant what the Constitution authorized him to promise, and that the guaranties he intended were such as Congress might by law define, and that the object of the present proceedings was to test the right of the New Almaden Company to the benefit of those guaranties as then promised and since defined,—but let him have the law his own way, and the proclamation merely assures Father Real that he shall be considered what we have found him, a naked occupant of the mine, with a right to no more than he was standing on, so long as he stood there, and at sufferance only. We will not differ about this proclamation.

But if the New Almaden Company really had a good title, instead of none nor shadow of one, different from and outside of their papers, I may remark that it would not affect the question of their right to complain of this injunction, because no such title is before the Court, but only their title by papers. They commenced their suit in 1852 before the Board of Land Commissioners, which could try no titles but written titles—grants on paper from the former Spanish or Mexican Governments—as I am advised. They there filed their papers and upon these prayed confirmation of the aforesaid "tract of two leagues of land"—and they have to this day prayed for nothing else, no mining rights, no naked or other occupancy rights. They brought their suit against the United States, and it is the only one in reality that has yet been brought involving the New Almaden title. That suit is on appeal in the U. S. District Court, and the injunction, though it comes from the U. S. Circuit Court, is not a new suit, but merely a proceeding in aid of the old suit on the paper title on the other side of the passage in the Court-House. The United States, required in the District Court to execute their bill of sale for all the quicksilver at New Almaden, deny their obligation; the Company, notwithstanding, and in the meantime, proceed to carry off $8,000,000 worth of quicksilver, and the United States seeks protection from the Circuit Court until the right can be determined. Both Judges sit in both Courts, and it is only because of the technical division of jurisdiction, it is said, that both Courts are called into action on one and the same matter. In our State Courts, if such a case was on trial, the same judge who tried the title would grant the injunction. There is no dispute as to this; the Government asked for the injunction on the ground that it was no new suit, but in aid of the old one; on that ground it was resisted, and that was a question decided. I might then, seeing that all these undocumented equities were not before the Court, have overlooked them altogether and contented myself with the remark that it was enough to try one case at a time; and a remonstrance against any attempt to forestall public sympathy by urging claims yet unsubjected to the test of a legal scrutiny. But the record furnished material to meet the case in the newspapers, as well as the case in the Courts, and I am persuaded that the public will prefer to hear, as far as possible, all the New Almaden story, and to give it the benefit in full latitude, of an untrameled sense of right and the most comprehensive liberality.

From the title without papers we pass to the title with papers. There are two series of these papers—one for California and one for the city of Mexico; the acting powers, respectively, being the Alcalde of the Pueblo of San José, and the Supreme Government of the Mexican Republic. Of the first, this is the essential one:

"There being no deputation on mining in the Department of California, and this being the only time since the settlement of Upper California that a mine has been worked in conformity with the laws, and there being no '*Juez de Letras*' (professional judge) in the second district, I, the Alcalde of first nomination, citizen Antonio Maria Pico, accompanied by two associating witnesses, have resolved to act in virtue of my office, for want of a Notary Public, there being none, for the purpose of granting juridical possession of the mine known by the name of Santa Clara, in this jurisdiction, situated on the rancho of the retired Sergeant, José Reyes Berreyesa, the time having expired which is designated in the ordinance of mining, for citizen Don Andres Castillero to show his right, and also for others to allege a better right, between the time of denouncement and this date, and the mine being found with *abundance of metals discovered, the shaft made according to the rules of art, and the working of the mine producing a large quantity of liquid quicksilver*, as shown by the specimens which the Court has; and as the laws now in force so strongly recommend the protection of an article so necessary for the amalgamation of gold and silver in the Republic, *I have granted three thousand varas of land in all directions* subject to what the general ordinance of mines may direct, it being worked in company, to which I certify, the witnesses signing with me; this act being attached to the rest of the expediente, deposited in the archives under my charge; this not going on stamped paper, because there is none, as prescribed by law.

Jusgado of San José Guadalupe, December 30th, 1845.

[Signed] ANTONIO MARIA PICO.

Assisting Witnesses:
ANTONIO SUÑOL,
JOSÉ NORIEGA."

This document, the New Almaden Company call their "juridical possession of said mine and land, to the extent of three thousand varas in all directions."

Admit that it is genuine, and it is utterly worthless. In their own papers the highest mining authority in Mexico is made to say that the possession was not in conformity with the mining ordinance; that is to say, contrary to law. The reason given, is that the quantity of land was too great, and it is a good one. Antonio Ma. Pico had as much power to grant thirty leagues in all directions, as three thousand varas; 36,000,000 of acres, as 36,000,000 square varas. But there is a better reason, still. The paper says the mine is on the land of José Reyes Berreyesa, and that the three thousand varas are of his property. No matter whether such was the fact or not, the paper says so, and so it must be for that instrument, which is therefore null on its face. In law, it may be said to read, that, whereas, the mine is on private land, I, Antonio Ma. Pico, have no power to dispose of it, and grant you not one inch. True, in the mining law of Mexico, authority is given to condemn a very small extent of private land for the benefit of a miner, *compensation being first made*, just as a man's land may be condemned for a public highway in California; but the utmost of that extent was four squares of two hundred varas, (called *pertenencias*,) the quantity that Alex. Forbes afterwards took in 1848, whilst the three thousand varas in all directions —or "to every wind," as expressed by one of the Company's witnesses in the Californian vernacular—taken according to the well-known custom of the country, in a square upon the double of the distance named, amounts to exactly nine hundred of those *pertenencias*. Such monstrous and arbitrary spoliation, was as much unknown to Mexican mining laws as it is now to our own laws. For an officer to go out upon any land and repeat the formula of this Act of Possession, would then as now have been a jest which acquired neither gravity nor consequence by being reduced to writing, on paper sealed or unsealed. It is the first time a Court ever witnessed the solemn mockery of the exhibition of a paper containing such recitals, as a title.

But it is not genuine. Pico, Suñol and Noriega, have sworn that it was executed on the day, at the place, and for the purpose expressed. They have not sworn truly. Three concurring false witnesses—this sounds strangely. But if there was nothing but the nature of the paper itself, it would be more difficult to believe in such a violation of common sense, than to disbelieve these witnesses. There is a great deal more, however, which I will introduce, first noticing some things which it is time that some one was not afraid to say before the public.

The testimony of the present generation of native Californians —I do not deny that there are exceptions—is irretrievably damaged. The Land Commission and the U. S. District Court have been the grave of their reputations. Look to the Limantour case, and tell off the number of those who have testified in support of that stupendous forgery—not obscure men, but those who from their youth were habituated to the honors of the soil on which they were born. I name the Limantour case as the most remarkable, in other respects than for false testimony, of those yet decided. In that particular it is equaled by a long list of inferior, but as well detected frauds. Who does not know that there are professional brokers in this kind of evidence, and that the men that they bring up from the magazines of this sort of merchandise—well known haunts in this city—are often of more respectable names than those subscribed to this Act of Possession? That there is even a division of professions among them—one set finding papers, another proving signatures, and a third re-collecting old improvements, etc.? Who has not heard that the outlay for witnesses—*always, of course, merely to pay their actual expenses, tavern bills and the like*—on the trial of an ejectment suit, depending on facts occurring before the American conquest, amounts commonly to thousands of dollars? Whoever is ignorant of these things, though fortunate as a man, has yet to learn a chapter in the history of California. In justice and charity I must say that native Californians are not alone to blame in this lamentable business, but are entitled to divide the shame with men of a different race—shrewder minds and stronger wills, who have abused their facile dispositions and reaped dishonest gains from their necessities. May a happier era soon dawn upon this land!

But to the Act of Possession. Pico dare not have made it. It was too grossly illegal—Castillero would not have taken it. It was too plainly useless.

The story told in the Act of Possession is not that told by the witnesses. The possession there purports to have been given to Andres Castillero. Not only does Chard not remember to have seen him there when he should have been so prominent receiving his investure, but says the possession he heard of was the possession of the Company, and as two of his brothers-in-law were members, he is confident he should have heard of the fact if the whole property had been put into the hands of any one man.

The Act of Possession says that the mine "was found with abundance of metals discovered, the shaft made according to the rules of art, and the working of the mine producing a large quantity of liquid quicksilver." When Revere visited the place in 1846 he found only a cavity in the mountain of about twenty cubic feet worked by two Indians. These are in his own words. Shafts and rules of art were things better understood after Walkinshaw and particularly Forbes had arrived in 1847—and instead of the working of the mine producing a large quantity of liquid quicksilver, Chard was experimenting painfully with his little battery of fast-consuming gun-barrels —each of which yielded for a charge of ore something less than half an ounce of quicksilver—and on a scale so small that he had not yet descended to the water which was indispensable to any considerable extraction of the metal.

On the 12th day of December, 1857, Antonio Suñol, the subscribing witness, was examined in open Court before Judge Hoffman. He was asked: "At the time of giving possession, how much quicksilver had you seen from that mine?" He answered: "I never saw but one small drop." The other subscribing witness, Noriega, said they had never seen any—that when at the cave they washed with a pan for gold.

If the paper had been made at its date there would have been no misstatement or even exaggeration of any fact, for there would have been no motive. The recitals would not have accorded with the more ambitious pretensions of a later day. The paper first appears in use in January, 1848. The British Vice-Consul then, at the request of the British Consul, made a copy of it, to wit: James Alex. Forbes for Alexander Forbes from papers handed him by the latter, which he returned to him again and never saw afterwards. This was done at the New Almaden Mine, at the time that the same Alexander Forbes was receiving from the Alcalde of that day, whose name was Weeks, another possession of four pertenencias above mentioned. When the copy of this and the accompanying papers, constituting, what they called an Expediente, we, a Record, was completed, the two Forbes procured of the Alcalde a certificate that the whole was a faithful copy, to the letter, of the original Expediente or Record in the archives under his care. The certificate was false. Of it, Judge Hoffman says: "The original from the archives of the Alcalde," he means not what was, but what the New Almaden Company allege to be, the original, as fully appears in his opinion, "has since been produced, and it shows that the copy certified by Weekes is neither 'faithful' nor 'to the letter.' It is evident that the copy certified to by Weekes could neither have been prepared from, or compared with, any original existing in the archives under his charge." At this moment the ancestor of New Almaden companies stood upon the ground with these two papers in his hands: Weekes' grant of four pertenencias; Weekes' false certificate copy of a former grant of nine hundred pertenencias, from Antonio Maria Pico, including the four; and in his pocket the original of that copy, declared in the certificate to be at that moment in the records of a public office; and a few days afterward he surveyed his two square leagues, including all within its ample verge.

Not only had Jas. A. Forbes when he made the copy—agent, manager and part owner as he was—never seen or heard of this Act of Possession from Antonio Ma. Pico, which now turned up in the keeping of Alex. Forbes, but there is the best reason to believe that Castillero, Father Real and the Robles, had not, as they had made no allusions to it in their numerous deeds transferring shares among one another. When they bought and sold, they had uniformly referred to the writing of partnership of Nov. 2d, 1845 for description of the property; and seemed to think that the quantity of land they were to have under it was *three pertenencias* not nine hundred. A copy from James Alex. Forbes' copy, including the false cerificate of Weekes, and a long tail of Mexican certificates, was filed by the company, with their petition and as their first exhibit.

The next time the Act of Possession appears, was two years later, the 21st of Jan. 1851. It was then in a record found by Capt. Halleck, Superintendent and General Director of the operations and engineering at the mine, and in other cases, the law partner of Messrs. Peachy & Billings, Attorneys for the New Almaden Company; who, with some inaccuracy, appear to have signed the pleadings in this case with the firm name of Halleck, Peachy & Billings. Mr. Halleck, in October, 1857, was called as a witness for the company. He testified that he found the document containing the Act of Possession in the office of Josiah Belden, Mayor of San José; and that it was taken by Mr. Belden in his presence, and transferred to the office of the County Recorder of Santa Clara County. He was looking for papers connected with the New Almaden Mine for the purpose of making translations. On his cross-examination, Mr. Halleck was asked by the counsel for the United States this question:

"QUES. 54.—In September, October, November and December of the year 1850, where were the papers of denouncement and juridical possession of the mine of New Almaden?

ANS. 54.—I do not know.

Q. 55.—Were they not, to the best of your knowledge and belief, in Mexico?

A. 55.—I have no knowledge of their being in Mexico. My belief is that they were in San José.

Q. 56.—Have you a good memory?

A. 56.—I have a good memory of occurrences and of persons, but not a very good memory for names or dates.

Q. 57.—During the time of which I have inquired, did you not verily believe that they were in Mexico?

A. 57.—I did not. I had no reason to believe that they were in Mexico, and my reasons for believing that they were in San José are that I found them there in 1851, as I have stated."

Yet Mr. Halleck is in error. He did believe at the time referred to, that they were in Mexico. We have his own word for it. On the 23d day of Dec. 1850 he made this affidavit:

"STATE OF CALIFORNIA,
County of Santa Clara.

JAMES A. FORBES, ROBERT WALKINSHAW,
v.
MARIA BERNAL DE BERREYESA, ET ALS.

The defendants in this cause, in answer to the order of Court, made on the 13th day of Sept. 1850, requiring defendants to produce in Court certain papers upon which they intend to rely as a defense in this cause, answer and say:

That they have exercised all due diligence to procure and produce said papers in Court, by writing immediately on the receipt of the above mentioned order to the parties in Mexico *who hold them*; but to this date the defendants have not received them; this delay having been caused, as defendants verily believe, by the failure of the mail steamers running from Panama to San Francisco to touch at the port of San Blas in Mexico, from which place the defendants *have expected and still expect* to receive said papers. The defendants therefore ask of your Honorable Court such further time as may be necessary to procure said papers, and comply with the said order of Court.

And the defendants further aver, that the said papers and other documents which they *have sent for in Mexico*, and which they are daily expecting to receive, are absolutely necessary to them in the above entitled cause, (it was ejectment against the company,) and that they cannot proceed with the trial of this cause without said papers and documents.

And the defendants specify, among others, the following papers and documents as absolutely necessary to them before they can proceed with the trial of this cause, viz: 1. THE ORIGINAL DENOUNCEMENT OF THE MINE OF NEW ALMADEN, AND THE JURIDICAL POSSESSION GIVEN OF THE SAME IN 1845. 2. Etc., etc. 3. Etc., etc. 4. Etc., etc.

State of California, }
County of Santa Clara. }

Henry W. Halleck, one of the attorneys (this must be taken, of course, with the explanation above given,) in the above entitled suit states, on oath, that he believes the facts mentioned in the foregoing answer and petition are true, that all due diligence has been exercised to produce in Court the aforementioned papers, that further time is necessary to defendants in order to enable them to produce said papers, and that defendants can not go to trial in this cause till said papers are procured. H. W. HALLECK.

Sworn and subscribed to, before me,

John H. Watson, Judge.

Filed Dec. 23d, 1850. H. C. Melone, Clerk."

So Mr. Halleck had forgotten. He did believe in Dec. 1850, that this Act of Possession, which as the No. 1 of his affidavit he describes with the greatest precision, was in Mexico. His affidavit will not permit us to indulge any other supposition, and what he then believed must have been the fact, for he was in a position to know. He had been six months in charge of the mine, and more than eight months acquainted with the reputed character of its title, by information from one of the partners in the company who had come to California as the agent for the rest, and from whose hands Mr. Halleck seems to have received his appointment as Superintendent, etc. His affidavit is recalled to his memory in the following manner:

"Ques. 58.—It is now seven years since the period of which I have questioned you. The human memory is treacherous. I therefore desire you to reflect well upon the answer you have just given. Do you answer in the same manner?

Ans. 58.—I have no change to make in my answer, except to say, as I have before said, that I cannot say positively that the paper produced by Mr. Houghton (from the Recorder's Office of Santa Clara County), is the same I found in Mr. Belden's office. I believe it to be the same, as I have before stated.

Q. 59.—You regard the paper which you found in the office of Belden, as the original denouncement and juridical possession of New Almaden, do you not?

A. 59.—I do.

Q. 60.—In reference to that paper, you then repeat the answer you have given above, do you?

A. 60.—I do.

Q. 61.—Did you not in Dec. 1850, declare on oath in a Court of Justice, that the original denouncement and juridical possession of the mine was at that time in Mexico?

A. 61.—I may have done so. I had copies or a copy of that original denouncement and possession, and may have supposed then that the original, which is usually delivered to the parties, was in Mexico," etc.

Here are two more mistakes. He could not have had any copy of the paper at that time, and could not have supposed that the duplicate usually given to the parties was the paper called for, because the order of the Court was that "the said papers or *copies* thereof" should be produced, and this order would have been satisfied by any copy which Mr. Halleck had at that time, or by the original itself from the old Alcalde's record, or any copy from his copies or that original made on the moment; and Mr. Halleck consequently could not have sworn as he did that he had used all due diligence to produce what the Court had called for, and that the papers the Court wanted were then held by parties in Mexico, that he had written for them and expected to receive them from San Blas.

It follows from the affidavit and the deposition of Mr. Halleck that the Act of Possession which he found in the office of Mr. Belden, Mayor of San José, on the 21st of January, 1851, had been lodged there since 23d of December, 1850, and it is only to be wondered that he had not been convinced of that fact himself, or perhaps how the impressions of that remarkable occasion have since so entirely passed from his mind.

There is also some minor evidence to corroborate the testimony of Mr. Halleck, that the document had not been accumulating dust and cobwebs in the repository where he found it. J. M. Jones, (late Judge U. S. District Court, S. D.,) the attorney who now called for it, had the year before defended the Company in two suits brought by, or at the instance of, Walkinshaw for the possession and property of the mine and conducted with the bitterness to be expected from a former agent and now dissatisfied partner. Jones had evidently never seen the document, for he speaks of it as a "pretended denouncement made in 1845 or thereabouts, upon the land in the plaintiff's complaint herein mentioned, pretended to be made by one Cartearas, a military officer," showing that he had not been yet apprised that the denouncement was made in December, 1845, nor that *Castillero* was the name, and *captain of permanent cavalry*, the rank of the fortunate man to whom at that time Antonio Maria Pico had given three thousand varas in all directions of the land of José Reyes Berreyesa, all of which would have appeared if this Act of Possession, found by Mr.

Halleck, had ever fallen under his eyes. Again, Melone, the first American who held the office of Clerk of a Court at San José—first of the Alcalde, then of the Judge of First Instance, and finally County Clerk—and who officiated in person in the suits of Walkinshaw, never saw the document, nor heard it spoken of, neither during that feud, nor after it was composed, when he caused all the papers in his charge to be carefully examined one by one, and a separation to be made between such as should go to the County Recorder's office and those which he should keep as County Clerk under the Constitution and laws of the State of California, then just organized. But José Fernandez who was connected with the Alcalde's office during a part of this time, says he saw it tumbling about among the other papers.

When Mr. Halleck and Belden carried the document to the Recorder's office, John T. Richardson, the Recorder, wrote on it in pencil, "Filed June 21st, 1851." It was fortunate that he did so, for it would appear to have immediately returned to Mexico, or at least to have escaped from the Recorder's Office, and was not seen there for two years when it was found again. Mr. S. O. Houghton, Deputy Recorder, and a witness for the New Almaden Company, shall relate in what manner:

CROSS-EXAMINATION.

"QUES. 5.—Can you or can you not say whether that paper was in that office in the year 1852, to the best of your recollection, knowledge and belief, founded upon your custody of the office and knowledge of its contents, as you have stated?

ANS. 5.—I can not state positively either way. It may have been there and it may not. The first recollection I have of the document is a few days before the date of this filing on the back of it, which is, 'Filed Feb. 25th, A. D. 1853, at 12 o'clock, A. M. J. M. Murphy, Recorder, by S. O. Houghton, Deputy.' I think it was sometime in the month of February. I think so from the time this filing is dated. Mr. James A. Forbes came to the office and desired to see the record of this paper, describing the paper to me. I examined the record, and told him it was not recorded there. He then looked for it himself, and insisted that it was recorded there. He did not find it. He was looking for the record of the paper, not for the paper itself. Some days after that, I found the paper in the office. There was a safe in the office, in the top of which were some papers, and there was also a desk, with pigeon-holes containing papers. I found it in one or the other of them; I do not recollect which.

Q. 6.—When you found the paper, how did you recognize it?

A. 6.—By the description given by Mr. Forbes.

Q. 7.—If you had ever seen such a paper before in the office, would you not have remembered it?

A. 7.—I think that I should.

Q. 8.—Were you not surprised when you saw the paper?

A. 8.—I was surprised that such a paper should be there without its being known.

Q. 9.—Did Mr. James A. Forbes appear to be making a thorough search; and about how long was he searching for the record of that paper of which you have spoken?

A. 9.—I think he and I searched more than one day. He represented the paper to me to be of great importance, and I made a very thorough search for the record of it. * * * * * * * * * * *

Q. 11.—After you found the paper, what did you do with it?

A. 11.—I kept it there until Mr. Forbes came, and filed it at his request."

Under these circumstances, we may venture to say that this Act of Possession which Mr. Houghton, to his very natural astonishment, discovered one day lying under his hand, was in reality found the second time by Mr. Jas. Alex. Forbes, then the most active partner of the New Almaden Company in California.

After the finding of the document by Mr. Halleck, which he regards as the record of Castillero's grant from the Alcalde in December, 1845, of the mine of New Almaden and circumjacent tract of three thousand varas in all directions, the New Almaden Company filed their petition before the Land Commission, and with it as their first exhibit not a copy of that record in the archives, but as we have seen, a copy of James Alex. Forbes' copy from the original in the pocket of Alexander Forbes. These papers I will distinguish for clearness, the one as the Halleck document, the other as the Forbes document. Both contain the Act of Possession prefaced by two short petitions from Castillero. In other respects they are entirely different, though both purport to be the record of the original mining title. There are other differences, but principally each contains an important writing which the other does not: the Forbes document, the writing of partnership immediately following the Act of Possession; the Halleck document, a petition of Gen. José Castro, preceding the Act of Possession which in the latter is dated December, 1845, and in the former December 30th, 1845. A record can not vary from itself; made up of writings which record events as they happen it must always be and remain one substance inscribed with the same words in the same order. It cannot have a double being, but is always a unit and identical, just as a man can be born but once, live one life and die one death.

When they file the Forbes document with their petition in the Land Commission, the New Almaden Company in effect say: Here is our Act of Possession in this little volume, consisting of these sheets containing these writings, made up in the Alcalde's office as the record of our original mining title. When they produce the Halleck document they say: Here is our Act of Possession in this other little volume, consisting of other sheets and containing other writings, made up in the Alcalde's office as the record of our original mining title. It is positively certain that both of these records produced by the same person cannot be true, and it is morally certain, consequently, in accordance with a well established rule of our daily judgments, that both of them are false. Indeed, the New Almaden Company have themselves declared them so by making use of first one and then the other.

The question may be asked, why holding both they did not suppress one? I cannot say what were the motives of other men, but I can discover good reasons for accepting and equally good reasons for rejecting both the documents. The Forbes document contained the writing of partnership which is the only evidence as to who were associated with Castillero, and of their rights. Therefore keep it—we claim under these men. But it contradicts flatly Castillero's petitions on no less a point than his knowledge of the existence of quicksilver in the mine. Thus: the writing of partnership, dated Nov. 2d, is "of a mine of silver, gold and *quicksilver*," but in his first petition to the Alcalde, dated Nov. 22d, twenty days later, Castillero says he has "discovered a vein of *silver with a ley of gold*," and not until the 3d day of December, in his second and supplementary petition, put in for this purpose alone, does he say, "that on opening the mine which I previously denounced in court, I have taken out, besides silver with a ley of gold, *liquid quicksilver in the presence of several bystanders*." Therefore, let the Forbes document be allowed to sleep on the files; it is incredible that a man should make his arrangements on the 2d of November to dig quicksilver which he had not discovered till a month afterward. Then the Halleck document has also its good points. The petition signed with so respectable a name as Gen. Castro's, relates that possession was given to Castillero on the 30th of December; we want that date, we will keep that document. But it also says, that the possession was only for one *pertenencia* and prays for three more; that flies in the teeth of our Act of Possession which calls for no less than nine hundred. It will not do, then, to rest upon the Halleck document—put it aside.

The New Almaden Company might have argued in that way or they might not. But there was only one way to avoid their dilemma and that they took, namely, to reject the end of the Forbes document and the beginning of the Halleck document, and put in evidence only the middle that was common to both, the two petitions of Castillero and the action thereon in the shape of this Act of Possession. On the 19th day of March, 1855, Frank Lewis, then a Deputy Treasurer of Santa Clara County, was examined in the Land Commission:

> "QUES. 5.—Examine now the paper marked "A" (P. L.), purporting to be a copy of the petitions and action thereon in the document of which you have been testifying, (the Halleck document which he had brought with him,) and state whether it is a true and exact copy of said original papers, and how you know it?
>
> ANS. 5.—It is a true and exact copy. I know it from having carefully compared it at the present time. I have the original and copy both now before me."

I have examined the printed copy of the Transcript, as it came from the Land Commission to the U. S. District Court, and find the two petitions of Castillero and the Act of Possession, annexed as an exhibit to the depositions of Lewis, Suñol and Noriega, and no more of the Halleck document. Of the Forbes document I find no trace at all, but an English translation following the above exhibit. The deficiencies in both documents were cured in the District Court, and they both appear now, set out in full upon the record—and the dilemma is restored.

The petition of Gen. José Castro, which stands first in the Halleck document, is a forgery. Benito Diaz, a native Californian witness, whose credit was much assailed, however, by the counsel for the company, swears that he wrote it at the request of Father Real, after its date and after the American conquest. The witness, in the present instance, had in his favor the fact that the New Almaden Company had proved by their witnesses that the petition was in his handwriting, and thus imposed the necessity upon the Government of calling him, as a failure to do so might well have been argued as an admission of the genuineness of the paper. For the effect upon the Act of Possession, it seems to me, that the Government might well have made the admission. But the proof of the forgery was not left to rest upon his testimony. It is shown by public documents, including many of his own letters, that Gen. Castro, at the date of this petition, was on the march against Fremont; and that for weeks and even months before, had been too much engrossed with the political troubles fast brewing around him, to give a thought to the question whether the New Almaden Mine consisted of one or three pertenencias, or to have any leisure to bestow on the study of the mining ordinances, as I am informed was suggested by the counsel for the company in argument. Genuine or forged, the petition was made by some of the parties claiming an interest in the mine, and is contained in one of the records brought to light by the New Almaden Company. It shows that on the 26th day of June, 1846, or later, its makers looked to a source of title which was not the Act of Possession signed by Antonio Ma. Pico, witnessed by Antonio Suñol and José Noriega.

Against all these things, weigh the bald assertion of Pico, Suñol and Noriega. The man who will then believe that this Act of Possession was made at the time and for the purpose in it expressed, is capable of believing in Mormon miracles.

II. Castillero left California in the Kanaka barque Don Quixote, Capt. John Paty, on the 4th day of April, 1846, reached Acapulco on the 21st of the same month, and on the 24th set out for the city of Mexico. He carried with him, Capt. Paty says, about a common bucket full of ore, of which he thinks some was of silver. During the present year, the New Almaden Company sent one John P. Brodie to Mexico on urgent business which will require notice hereafter; it took him about thirteen days to go from Acapulco to Mexico and ten to return, which he tells us may be taken as the average of the time required for the trip. We will assume, therefore, that Castillero was ten days on his journey, and that he reached the city of Mexico on the 4th day of May, 1846. On the very next day—the 5th of May, 1846—begins the second series of the New Almaden Company's papers—what they call their title from the Supreme Government of the Mexican Republic.

The dispatch of the government equaled its promptitude—the eagerness of all its branches exceeded both. On the 23d day of May the job was finished, and Castillero held under the authority of Paredes, then in the exercise of unlimited powers:

1. A ratification of the possession of three thousand varas in all directions, as granted by the Alcalde.
2. A grant of two square leagues of land, as a colonist, on the surface of his mining possession.

Such is the story of the petition filed in the Land Commission. The ratification is not in any paper delivered to Castillero, but is gathered from a correspondence between an establishment at the city of Mexico, known as the "Board for the Encouragement and Direction of Mining," and the Minister of Justice; the originals of which correspondence are said to exist to this day, on the letter-books and files of those offices respectively.

May 5th, 1846. Vicente Segura, President of the Board, writes to Becerra, Minister of Justice, and informs him that a certain professor, named Don Tomas Ramon del Moral, had presented to the board some specimens of cinnabar and two letters which had been received from Don Andres Castillero, in California, "with the object of inciting the Supreme Government, that it may be pleased to aid so important an enterprise;" that the board had immediately sent them to be assayed at the College of Mining; that the Director of the College reported the percentage of metal to be thirty-five and a half per cent., and therefore thought "Señor Castillero has, by such an important discovery, made himself deserving of the efficacious protection of the Supreme Government and of the Junta (Board), for the Encouragement of Mining, and is persuaded that your Excellency will interpose all your influence to the end that this individual may receive a proof that the Supreme Government knows how to distinguish and reward those citizens who contribute to the prosperity of the country;" and the President, then resuming, says in behalf of his board, that "it has already asked Señor Castillero what kind of aid or protection he needs for the encouragement of his brilliant enterprise, congratulating the Supreme Government on a discovery which, if it meets from the beginning with the protection it deserves, may completely change the aspect of our mining, freeing it from the necessity in which it has been until now, of foreign quicksilver," etc.

One of the letters referred to, though written by Castillero at the Mission of Santa Clara, describes the mine as five leagues to the west, when it is not to the westward at all, but five leagues to the south and perhaps somewhat to the east. It also informs us that coal "is very abundant, and is found on the bay of San Francisco, so that *the Steamers*, sending out their small boats, may load all that they require." At this day, coal is abundant on the bay of San Francisco only in the coal-yards, and at that day, "*the Steamers*" were not in existence, nor for two years after was their presence in the bay of San Francisco dreamed of. In 1849, however, "the steamers" were upon this coast, and, for want of wharves, were in the habit of taking in coal with small boats, at San Francisco and at the little Mexican towns, (they stopped regularly at San Blas,) just as Castillero with miraculous detail had prophesied three years before—before the Mexican war—before the conquest—before that great change which brought white men, civilization and steam, to these remote and unfrequented shores.

May 9th, 1846. Becerra, Minister of Justice, acknowledges the receipt of the foregoing, and says that his Excellency, the President *ad interim* of the Republic, learns with satisfaction that Castillero "has discovered a deposit of quicksilver of excellent quality, according to the assays made in that College, and that said Señor Castillero has been asked by the Junta, (Board,) what kind of assistance he needs to encourage his brilliant enterprise."

It is certain that this reception of Andres Castillero, returning from his domestic mission with a bucket full of ore, preceded though he had been by "some specimens of cinnabar," sent to his friend Moral, exceeded in warmth anything recorded in the annals of diplomacy. Alighting from his mule, after his wearisome journey from Acapulco, on the 4th, he next morning finds himself the man of first consequence in all the Capital. There was at that moment gathered on the horizon a cloud black with the fate of Mexico. Blood had already been shed upon the frontier by the orders of Parades. He had heard that his army had crossed the Rio Grande; that a blow had been struck and American troops captured or slain; the blow would be immediately returned, and soon he was to hear that on that very day—the 9th of May, 1848—his army had been annihilated at the *Resaca de la Palma.* He had not a dollar, an hour, or a thought to spare from the fearful contest he had provoked; and yet, entirely unconscious of his situation, he concurs in the ecstacies of the Mining Board, thinks of freeing his country, not from foreign troops, but foreign *quicksilver*, and awaits only the pleasure of Castillero to know how and in what sums he shall expend the resources of the nation on a vein of metal situated in the most distant and exposed part of the national territories.

May 14th, 1846. The President of the Board of Mining again writes to the Minister of Justice. He now incloses Castillero's petition to the Board for its aid, dated the 12th of May, 1846. He says the Board "has no hesitation in recommending said petition to your Excellency for being persuaded of the great importance of the enterprise, it considers it entitled to all the protection of the Supreme Government, *and also the particular circumstances of the Department, and the just desire which his Excellency, the President, has shown to preserve the integrity of the national Territory, render it worthy of the greatest consideration.*" The Board is, consequently, of opinion that Castillero should have what he wants on his own terms. In his petition, Castillero recites the discovery, the percentage of metal in the ore, "richer," he says, "certainly than were ever seen before, not only in the Republic but perhaps in all the world,"—which may be true—his denouncement and the possession of three thousand varas, the formation of a company, and "the fact that repeated and advantageous offers" had been made to him by "*several foreign houses in California,*" of all the means he needed, but which offers he had rejected because the business would then "result in advantage to foreigners, when it may be entirely national," and his patriotism had prompted him rather to apply to "your Excellency and your Honors," to wit: the President and Board of Mining, "to obtain the small and only resources" which he required.

"These," he says, "are reduced to a small advance of five thousand dollars in money in consideration of the excessive scarcity of coin in that department, and the quick remittance to it of retorts, cylinders, and the small distilling apparatus, as also iron flasks for bottling up the quicksilver. I would have proposed a contract of partnership to the Junta, an '*avio*' or some other agreement, *if there had been time* to be able to furnish the proofs and the detail which would be required for said contracts, but being compromised by the Supreme Government to *leave this Capital within a few days*, I find it necessary to restrict myself to that which appears to present no difficulty, and which may open the way *to our future agreements.* I am well persuaded that the Junta will *accede* to my request, so far as may be *within its powers*, and it will *send up* to the Supreme Government with a recommendation *that which may require the decision of the latter.* My *propositions*, then, are the following:

'1. The Junta, in the *act of approving* the agreement, will give me a draft for five thousand dollars on some mercantile house in Mazatlan.

2. On my part I bind myself to place in said port, within six months after leaving it, fifty quintals of quicksilver, at the rate of one hundred dollars each, which I will send from the first taken out, with absolute preference over every other engagement.

3. The Junta will order that there be placed at my disposal, before leaving the Capital, the eight retorts which it has in its office, and all the quicksilver flasks which can be found in the *negotiation of Tasco* which are fit for use, and lastly, it will deliver to Señor Don Tomas Ramon del Moral, my attorney, the sums to pay for the retorts, cylinders and other kinds of small apparatus, which may be ordered to be made for the negotiation, to the amount of one thousand dollars.

4. I will receive the retorts of the Junta at cost price, and the flasks which I may select at two dollars a piece, agreeably with their valuation.

5. The ascertained value of said retorts and flasks, and that of sums which may be delivered to Señor Moral, I will repay in the term of one year from this agreement, and also the premium on the draft on Mazatlan, in quicksilver placed in said port at the price of one hundred dollars per quintal; but if the Junta should wish to take one or more *acciones* in the mine, it shall be left as a part payment of the sum corresponding to one or more "barras."

6. While the company is being formed, during the period of one year counted from the date on which *this agreement shall be approved and the five thousand dollars spoken of in the first proposition being paid*, I will give the preference to the Junta

in the sale of the *quicksilver placed in Mazatlan*, at the rate of one hundred dollars the quintal.

7. The Junta (Board), shall represent to the Supreme Government, the necessity of approving the possession which has been given me of the mine by the local authorities of Californias, in the same terms which I now hold it.

8. It shall also represent the advantage of there being granted to me, as a colonist, two square leagues upon the land of my mining possession, with the object of being able to use the wood for my burnings.

9. For the compliance of this contract, I pledge the mine itself and all its appurtenances.

The subscriber submits this request to the deliberation of the Junta, (Board), which, if accepted, may be made into a formal contract, and made legal in the most proper manner. GOD AND LIBERTY.

Mexico, May 12th, 1846. ANDRES CASTILLERO.' "

May 20th, 1846. Paredes, through his Minister of Justice, acknowledges the receipt of the foregoing letter of the 14th, inclosing Castillero's petition. " His Excellency has been pleased " (reads this note), to approve in all its parts the agreement made (*convenio celebrado*), with that individual, in order to commence the extraction of said mineral, and on this day the corresponding communication has been made to the Minister of Exterior Relations and Government, to issue the proper orders respecting that which is contained in the eighth proposition for the grant of land in that department."

Paredes had now heard of the loss, eleven days before, of that army which he had boasted was to conquer Texas to the Rio Grande. It existed no longer. His soldiers were killed, captured or dispersed; his artillery, munitions, camp equipage and the standards of his regiments were in the hands of the enemy. Taylor had passed the Rio Grande, yet bearing on its swollen current to the sea the corpses of the defenders of the integrity of the soil of Mexico, drowned in their hurried flight from the field of their disaster—the flag of the invader floated over Matamoras. But Paredes is no wise embarrassed, nevertheless, and bent upon commencing the extraction of quicksilver in California, he dashes off his consent to an appropriation of five thousand dollars of the public money to Captain Castillero and his mine in the Mission of Santa Clara.

The ratification is now complete.

The Board of Land Commissioners say it is no ratification at all, but a distinct original grant of the mine and its *nine hun-*

dred pertenencias, and on that footing confirmed it. Judge Felch, in delivering the opinion of the majority of that Board, said: "The Junta (the Mexican Board for the Encouragement of Mining), was not an appellant tribunal. It had no authority to review the proceedings of any local officer, and to affirm or disaffirm his decision." In other words, could not ratify a mining possession. The mining title then rests upon the contract made, the *convenio celebrado* approved by Paredes. These are formal words, meaning a contract executed in due form of law. There is no such contract anywhere yet disclosed. We have Castillero's nine "propositions," as he very properly calls them; but propositions are not a contract. These terms might be modified or finally declined. A paper is wanting—a *convenio celebrado*—in which the terms should be reduced to covenants, and the parties bound by their signatures. Castillero and the Mining Board both tell us that there was not time to make one. Nor is there any informal or implied contract. After receiving the propositions, and expressing a favorable opinion of them to the President, the Mining Board no where appear in these papers to have had one word to say to Castillero. No implications can be raised in his favor from what the board thought proper to say to third persons. Paredes himself does not make any contract, because none was asked from him, and he speaks of it as a thing already done before the affair reaches his hands.

That Paredes was mistaken in speaking of a formal instrument, *convenio celebrado*, we know from both parties, and if he had read their communications during the six days he had them under consideration, he could not have fallen into that error. That he was not warranted in inferring an agreement of an informal nature, any one can see from the papers themselves, the matter not having progressed further between the parties than a proposition. And that there never was at any time afterward an agreement of either class, has been put in evidence by the New Almaden Company.

By Castillero's first proposition, the token of the consummation of the agreement was to be the delivery of the draft for $5,000 on Mazatlan. He never got it. The Company inform us that: "On account of the declaration of war made by the

United States of the North, when he was going to receive the draft on Mazatlan, the Ministry issued the order of Sept. 19th, of this year (1846) directing the suspension of all payments of the branch of quicksilver, except the support of the College and the expenses of the office." And in another place, that the Mining Board was reduced to the "lamentable extremity" of having no money at all, "by the order of the 10th May, last, which directed the suspension of all the payments which were made by the public treasury. The sad results of such determinations, the Junta (Board) will not stop to detail."

Either of these orders would appear to have been sufficient to have prevented Castillero from receiving his draft, and defeated the contract conditioned thereon. If he was stopped by the order of the 10th of May, he must have been as much surprised as we are, at the unreflecting eagerness of Paredes in this matter of quicksilver mines, which would induce him to draw on a fund which he had suppressed ten days before. If by the order of the 19th of September, the wonder is that he should have applied for the draft, long after it was known in Mexico that California, whither he proposed through blockading fleets to transport this money, was in the hands of the Americans—an event then some two months and a half old.

If there was no contract, there was no mining title made at Mexico. Whether there was or was not a contract, is a question which, with the facts before it, the public can adjudge as well as the Board of Land Commissioners, and hence without arrogance may assume to decide whether, on their own showing, this branch of the title of the New Almaden Company has any foundation in law. The Courts are the proper tribunal to determine whether, if the contract is proven to have been made, Judge Felch is right in saying that it amounted to a grant.

Vicente Segura, President of the Mining Board, in this letter of the 14th of May, estimates the extent of the concession by the Alcalde to Castillero, as only fifteen pertenencias. From the nature of his office, being chief of the "highest mining tribunal in the Republic of Mexico," as described by the New Almaden Company in the petition presented to the Board of Land Commissioners, in the name of Andres Castillero, we must presume that no one was more skillful than he in all the calculations belonging to his department. Yet he does not know how many pertenencias are contained within the space of three thousand varas in all directions from the mine. The shape of the tract which he speaks of, would be something like a plank, the width being two hundred varas, the length three thousand varas, making fifteen pertenencias. Estimated according to the custom of the country, it would be a square on the double of the three thousand varas—something more than nine square miles, making nine hundred pertenencias. As it would be commonly understood from the words, it would be a circle with a radius of three thousand varas, making seven hundred and six and eighty-six one hundredths pertenencias.

We have no explanation how this astounding blunder came to be committed by this high officer, nor how it escaped the observation of the Minister of Justice and the President of Mexico, who had the means of making the calculation under their eyes. Nor is Segura alone in this confusion of ideas on the subject of the territorial extent of the mining rights of this company. They have put in the case the certificate of the functionary next below Segura in the mining establishment, one Gondra, the Secretary. He certifies that the grant to Castillero was of *one pertenencia*, of three thousand varas. *Pertenencias* of the larger class are always squares, and if this one is to be understood as such, it would give a square of three thousand varas, or two hundred and twenty-five pertenencias of the ordinances; and he further says that their grant of two square leagues was contiguous to, not covering this vast *pertenencia*, as represented by everybody else. And so in California. The parties, those upon the spot, are all this time in Egyptian darkness on the subject of a three thousand vara grant, however calculated, from their neighbor and associate Antonio Ma. Pico, the Alcalde. On the 27th day of June, 1846, they date the petition of Gen. Castro, in which he is represented as declaring that the grant, at first, was for *one pertenencia*, and as praying for an addition of three more. And for several years, in a series of deeds and other documents, they persist in alleging that they have but three. Until finally, on the 27th of Nov. 1852, Yecker, Torre & Co. sell out all their interest in the concern, by an act before a Notary, without allusion to any estimate of *pertenencias*, or to a grant of two square leagues of land, unless it is to be found in this singular stipulation, that they are to be "*without responsibility for the past* and in future."

But it is not only in the mathematical line that the President of the Mining Board utterly surprises us. He recommends the ratification of the Alcalde's grant as a measure of defense—the particular circumstances of the department of California and "the just desire which his Excellency, the President, has shown to preserve the integrity of the national territory," render Castillero's plans and requests, "worthy of the greatest consideration."

And again: "But that which is most worthy of consideration, is that Californias being a frontier department, and *frequently threatened* by the emigrants from the United States of America, and by the new colonists of Oregon, it *seems proper to grant* the first mine in a department so extensive, a greater number of *pertenencias*."

But why? Human wit cannot discover how nine hundred, a greater or a less number of *pertenencias* granted to Castillero, could conduce to "preserve the integrity of the national territory," or restrain the "emigrants from the United States of America," or the "colonists of Oregon," to say nothing of the land and naval forces of the United States, with whom Mexico was at open war—nor of what avail would be the five thousand dollars, nor the retorts which were not mortars, nor the flasks, even if, as one of the counsel for the United States is reported to have said in argument, they were charged with the fulminate of mercury, instead of quicksilver. It is impossible to believe that high functionaries made such papers. It is taxing public credulity too heavily, to put forth such absurdities, under such signatures. The grant of two square leagues of land is only a branch from the same stem. In the same note of May 20th, 1846, in which Becerra communicates to Segura the President's approval of the contract—as yet undiscoverable—he informs him that orders had been issued to the Minister of Relations to expedite the proper orders in respect of the "eighth proposition for the grant of lands." Upon the receipt whereof the Minister of Relations makes the following:

"MINISTRY OF EXTERIOR RELATIONS,
GOVERNMENT AND POLICE.

Most Excellent Sir:—

His Excellency, the illustrious Minister of Justice, in an official communication of the 20th inst., says to me that which I copy:—

'Most Excellent Sir:—

I to-day say to his Excellency, Don Vicente Segura, President of the Junta, for the encouragement of mining that which follows:—

Most Excellent Sir:—

Having reported to his Excellency, the President *ad interim*, the note of your Excellency, of the 14th inst., with which you were pleased to transmit, with a recommendation, the petition of Señor Don Andres Castillero, for the encouragement of the quicksilver mine which he has discovered in the Mission of Santa Clara, in Upper California, his Excellency has been pleased to approve in all its parts, the agreement made with that person to commence the exploration of that mine, and on this date the corresponding communication is made to the Minister of Exterior Relations and Government, that it may issue the proper orders relative to what is contained in the 8th proposition with respect to the granting of lands in that department.'

And I have the honor to inclose it to your Excellency, to the end that with respect to the petition of Señor Castillero, to which his Excellency, the President *ad interim*, has thought proper to accede, that as a colonist, there be granted to him two square leagues upon the land of his mining possession, your Excellency will be pleased to issue the orders corresponding. I repeat to your Excellency, etc.

Wherefore, I transcribe to your Excellency, in order that, in conformity with what is prescribed by the laws and dispositions upon colonization, you may put Señor Castillero in possession of the two square leagues which are mentioned.

GOD AND LIBERTY.

Mexico, May 23d, 1846. CASTILLO LANZAS.

To his Excellency, the Governor of the Department of Californias."

Of this document, the point is in the conclusion. The significant words are those in italics. It is merely a letter written by Castillo Lanzas to Pio Pico, which was never delivered, as the New Almaden Company admit; and for aught that appears never left the possession of Castillo Lanzas, until it was to be forwarded to California to be filed as an exhibit to the petition before the U. S. Board of Land Commissioners. Whether such a paper is a title to those two square leagues of land, which, by referring to the Pico Act of Possession it describes as being the private property of José Reyes Berreyesa, it would be a waste of time to argue. I shall refer only to what Judge Felch, in whose eyes even it could find no favor, said when he rejected it:

"The petitioner (the New Almaden Company, under the name of Andres Castillero), claims that these documents establish a grant made by the President of the Republic to him.

The decree of the President is not, in my opinion, a grant nor was it intended to be such. The colonization law of 1824 and the regulations of 1828, made under it, had committed the granting of the national land to the Governors of the department, subject to the approval of the local assemblies, and, in certain cases, the Supreme Executive of the Republic.

The Minister of Foreign Relations and Government was the proper organ of the Executive to communicate with the Governors of the departments, and hence the decree not that the grant be made, but, that the Minister communicate the application to the officers having charge of the subject of grants where the land was situated, with an expression of the favorable disposition of the Executive thereto. The Minister of Relations so understood the decree, and acted in accordance, by his communication to the Governor on the subject.

If a grant had been intended by the President, a document of title would have been issued and delivered to the party, instead of directing a simple communication to the Governor of California. The inference from the whole proceeding is irresistible that the President did not assume to make a grant, but that he referred the matter, with an expression of his favorable appreciation of the object of Castillero, to the Governor to proceed according to the colonization laws on the subject. The land asked for was, in part at least, according to Castillero's representation, granted in colonization to Berreyesa. It could not, therefore, be granted to Castillero, unless by denouncement, which could be decreed with propriety only by the local authorities."

Coming from an approved friend, this is plain and conclusive enough on the New Almaden Company's title to two square leagues of land. For the public and myself, a more edifying subject of contemplation is found in this certificate, which was filed with and yet remains attached to that title.

"STAMP FOURTH, {Stamps for the years 1850 and 1851.} ONE REAL.

Jesus Vejar, Notary Public.

I certify and assure that the preceding authentic instrument, signed by his Excellency, the Minister of Exterior Relations, Government and Police, Castillo Lanzas, has been respected under that signature, and obeyed by the Mexican authorities who governed in Upper California, in the year one thousand eight hundred and forty-six, according to insertions which the same authorities made of that instrument in acts which they authenticated upon the matter treated of, and which I certify I have seen; and for this reason the signature to the said instrument ought to be considered as genuine, and as the hand-writing and letter of his Excellency, the Minister, and also because Señor Don Andres Castillero recognized it as such in acts which have passed before me. And, at the request of Messrs. Barron, Forbes & Co., I affix my notarial mark and signature to this present, in Tepic, on the fifteenth of March, one thousand eight hundred and fifty.

JESUS VEJAR."

Loreto Corona and Eusebio Fernandez, respectively Constitutional First Alcalde and a Notary Public, attest the official signature of Vejar, and are in turn attested by E. L. Barre, Acting Consul of the United States.

Upon this document, Judge Hoffman, in his opinion, remarks:

"Almost every statement contained in this certificate, *is admitted to be false.* It is not pretended by the defendants, that the dispatch of Lanzas was ever delivered to the Governor, nor that it was ever presented to, much less, respected and obeyed by the Mexican authorities of California, in the year 1846. The insertions of said instrument, made by those authorities, in acts which they passed upon the subject and which the Notary certifies to have seen, are purely imaginary. When a certificate of this character is *procured from a Mexican Notary and by them filed as an exhibit*, the Court is surely justified in regarding with *suspicion*, not only all documents which are authenticated in a similar manner, but also those the genuineness of which is assailed by other proofs."

When the learned Judge used so mild a term as *suspicion*, the most cautious will observe that he set an example of extreme moderation.

Here is another false certificate, already noticed, that of Weekes to the Forbes' copy of the Pico Act of Possession, of which the same Judge said it *was admitted to be untrue;* neither "faithful," nor "to the letter," as it pretends.

"COURT OF THE JUSTICE OF THE PEACE,
San José, Guadalupe, Upper California.

I certify, in due form, that the foregoing is a faithful copy, to the letter, from its original, the expediente of the mine of Santa Clara or New Almaden, which exists in the archives under my charge, to which I refer.

And in testimony whereof, I have signed it this twentieth day of January, one thousand eight hundred and forty-eight.

JAMES W. WEEKES."

And here is the third false certificate, the most remarkable of all:

"[SEAL.] Carlos Horn, First Lieutenant of the National Navy and Captain of this Port—

I certify that according to the documents existing in the Archives of the office of the Captain of the Port, the Hawaiian Bark Don Quixote, Captain John Paty, anchored in the roadstead of San Blas the *thirteenth day of April*, eighteen hundred and forty-six, *coming from the Port of Monterey*, in the Alta California.

CARLOS HORN."

Being shown to Captain John Paty on his examination, he was asked if it contained the truth, he replied:

"ANS. 23.—It does not. I went direct from Monterey to Acapulco. I stopped there on my way up to Monterey, about the middle of June. I was also there with the Don Quixote in April, 1845. I do not recollect being there with the Don Quixote at any other times.

QUES. 24.—How long did you remain at Acapulco in 1846, before you left for Upper California?

A. 24.—I remained there from the 21st of April to the 18th of May."

The manner in which this certificate was procured requires a word of explanation. In the summer or autumn of 1857 it was ascertained that Castillero left Monterey on the 4th of April, 1846, in the Don Quixote, and inquiries were at once instituted, and the probabilities much and openly discussed, whether he had reached the city of Mexico by the 5th of May, the day on which the preliminaries of his title begin. One Domingo Danglada, who appears to be the same person who had been called by the company as a witness before the Land Commission, and who had lived in Mexico twenty-two years before 1849, was employed in behalf of the Government to ascertain whether the Don Quixote had put in at San Blas, and, if so, on what day. He wrote, he says, to some elderly retired gentlemen of wealth and high respectability at Tepic, and in due time received the above certificate of Carlos Horn; the substance of which is that the Don Quixote after a remarkably good run down the coast, in nine days from Monterey, cast her anchor in the port of San Blas, and, therefore, that Castillero had ample time to reach the winning post of this race. Captain Paty upset this theory which had issued so mysteriously from the head-quarters of the New Almaden league, but the Government thought it proper, nevertheless, to prove the whole transaction by Danglada, and filed the certificate.

Vejar's certificates appear almost everywhere throughout the company's papers. He may be regarded as a piece of the office furniture of the house of Barron, Forbes & Co.

Taken together, from the 5th to the 23d of May, the second series of New Almaden papers are thus, it will be seen, a clumsy patch upon recent history—a tale repugnant to itself—rejected of common sense—that scouts at probabilities, and defies belief. There is no object in disputing their sufficiency under the law, they are so plainly fictitious; nor their genuineness, they are so obviously worthless as a title.

However, proof was offered in their support. On the 30th day of January, 1855, there appeared before Peter Lott, Commissioner, a witness who had recently arrived from New Orleans by the way of Nicaragna. He was a lawyer by profession, had held the office of Minister of Interior and Exterior Relations of Mexico, in the latter part of 1846; from 1848 to 1852 was Senator of the Republic of Mexico; and had several times been a Deputy in the Mexican Congress—he has within the last year been embassador to Spain—and he gave his name as José Maria Lafragua. I am informed that the representatives of the Government have not been able to learn that the arrival of this distinguished personage was noticed in the customary manner by the newspapers; that with the excusable vanity which exists among other nations, and is not supposed to be wanting to Mexicans, he made himself known to the Governor, or other dignitaries, or the distinguished citizens of the State of California, or evinced any curiosity to learn the actual condition or future promise of American institutions on the Pacific, or that he was seen outside of the precincts of the Land Commission and the counting-room of Bolton & Barron, in this city—agents and partners of the New Almaden Company. He gave his testimony, and disappeared as noiselessly as he came.

If what I now write should reach the eyes of any member of the Cabinet at Washington, I beg to be permitted to say to him that he can do no better service to the cause of justice than to remove the doubt which rests upon us here, whether this man was or was not the Lafragua he represented himself to be. Let our Government put the question directly to Lafragua himself and let us have his answer. It is time to know whether the highest Mexican officials will, in the service of private individuals, make long voyages in this obscure manner, will condescend to enter our courts, as it were, by stealth, will there venture to contradict cotemporaneous history, and commit themselves, in support of monstrous frauds, to perjuries which their intelligence would teach them that no art could conceal, all of which did the Lafragua who came before the

Board of Land Commissioners. Shown a copy of the correspondence between Segura and Becerra, he swore that he had compared it with the originals in Mexico; that it was correct; that he knew the signatures to the originals and they were genuine; that he made the comparison in November, 1854, and he then found something which had been overlooked up to that time, but was now regarded as very important, viz: these words, written on the margin of Andres Castillero's petition of May 12th, and signed with the rubric of the Minister of Justice: "May 20th, 1846. Granted in the terms which are proposed, and with respect to the land, let the corresponding order issue to the Minister of Relations for the proper measure of his office, with the understanding that the Supreme Government accedes to the petition"; that at the end of 1846 he saw the petition of Castillero and marginal note, in the office of the Minister of Relations, over which he then presided, and to which the mining business had been removed since May of that year; that he knew the signature of Castillo Lanzas and found it genuine on the dispatch to the Governor of California.

The papers which he saw in November, 1854, he knew to be the same he had seen in 1846, because at that time he was obliged to examine all the acts of Paredes, for the purpose of laying them before the Mexican Congress. By the same rule, Mr. Cass should have such a knowledge of every paper filed in the office of the Secretary of State during the administration of Mr. Marcy, that he could swear to its identity with a certainty that would exclude the possibility of an imposition. Lafragua here makes oath to that which is not proved by the chiefs of office but the subordinates, the actual custodians of the paper as a material thing, not those who review the acts of Government. Nothing could be more preposterous.

He said that after making this examination in 1846, he made his report in which he referred to Castillero and his quicksilver mine. He produced a fragment of that report with the places marked which related to this subject. His words are: "This document is taken out of a large bound volume, which embraced my whole report as Minister of Relations, upon all subjects pertaining to my office with accompanying documents. I took this portion for convenience, because it embraces everything which my report contained relating to said Almaden Mine, or Castillero's connection therewith. *The book I speak of is a ponderous volume.*" Too ponderous to be brought into Court, or perhaps he means from Mexico. He is right at any rate, that it is too ponderous to be filed in evidence, as the representatives of the Government admitted, when at last by accident they saw the whole book, of which there was but one copy in San Francisco, however common they may be in Mexican libraries. It is a "portly volume of between three hundred or four hundred pages," not of a "precisely similar nature to the reports of our own Secretaries of State to Congress;" but, on the contrary, stuffed full of an incomprehensible medley upon every subject, except the great interests of Mexico at that day. The report itself is reasonably short, but all the rest between the lids might as well be old newspapers, from which indeed it would seem to be made up. The rubbish is dignified with the name of "accompanying documents." The cost of making up such a volume would be the printer's bill. The actual history of the making up of this volume as given in a note at the end, is this: In November, I think, 1846, Lafragua made his report and Congress ordered it to be printed; there was no money until May, when the work was begun; it was not finished when the Americans took the city of Mexico in September; the Government fled, but took the precaution, though their flight was hurried and in the night, to carry this inestimable document along with them—copy, proofs, materials and all—to Queretaro, where it was completed and issued with the same title page which had been designed for it in Mexico—at the office, to wit, of certain printers, on a certain street of that city—so that but for the explanations of the note, the job might be supposed to have been executed under the supervision of Gen. Scott. What was all this trouble for? When the printing was resumed at Queretaro, Paredes, who was the subject of the history, was down; Salas, for whom Lafragua wrote the history, was down; Santa Anna, the successor of Salas, was conquered; and the men of an opposing party, who had collected at Queretaro, hardly aspired to the name of a government at all. If there was money for this printing in May, where were the means obtained after September? or if a dollar could possibly be had then, would it possibly be expended in carrying through a business so stale and useless? If the report itself was worth the trouble and expense, what occasion was there for printing the accompanying mass constituting more than three-fourths of the portly volume, and relating to mines, to the price of quicksilver, to administrative details of a country utterly broken down and in the hands of a foreign enemy? Why, finally, should this report have been printed and none other? The only reason that can be imagined must be found in the extracts which the testifying Lafragua thought proper to cut out from his ponderous tome, and bring into the Land Commission. These two extracts are all which comes from the report itself:

PAGE 65.—"In the State of San Luis Potosi the metals reduced and quicksilver extracted are in proportion; and in Upper California, a mine (criadero), has been discovered whose *ley* surpasses that of the best mine known, that of Almaden, which does not produce more than thirteen per cent., while *ours*, by the assays made in the College of Mining of this Capital, exceeds thirty-five and a half per cent."

This might all very well be, and no harm done. I have to note, however, that *criadero* does not mean a mine, but simply a vein; and that if Lafragua really wrote in this way about a mine or vein in Upper California, in November, 1846, calling it "ours," and congratulating himself on the richness of its yield, when it *had been four months in the hands of the American army and navy*, without the slightest evidence of any intention on their part to give it up voluntarily, but, on the contrary, an avowed fixed purpose to retain it, he manifested a courage and a hopeful patriotism which exceeded that of the Romans, who bought and sold the land on which Hannibal was encamped at the same prices as if there had not been a Carthagenian in Italy, as much as his case was more desperate than theirs.

PAGE 66.—"I recommend the *Sovereign Congress* to direct its attention to this subject, making the production of *our* quicksilver a truly national enterprise, the importance of which cannot be overrated, *either by creating a fund, or dictating other suitable measures.*"

But that Congress was not then sovereign over that mine, and if it would ever again have the privilege of saying "our quicksilver," when speaking of the vein in Upper California, Mr. Lafragua should have advised them to direct their attention to sending an army to recover it, instead of creating a fund and dictating other such measures, which were in no wise suitable to that end.

The supposition of a Minister at that day and under such circumstances, holding such official language to a grave deliberative body, and of that body taking all this trouble to print and perpetuate it, so exceeds the bounds of the most extravagant burlesque, that one is tempted to pause and inquire if it is really true that the American flag was hoisted at Monterey on the 7th of July, 1846, or if the same Minister proposed a tariff for that port and for San Francisco; we know that even later, some of their officials actually did make grants of land in California, so much were they confused in their latitude and chronology. It is evident that all Mexico was possessed still with the idea that had gotten the better of Paredes, Becerra and Segura, in the spring—that peace or war, Castillero, with funds, retorts and flasks, was the thing for California; and that whoever was master there, the quicksilver would still be Mexican. The New Almaden Company, alone, could have enabled us to solve this mystery.

In these posthumous recommendations for California, Judge Felch found nothing so extraordinary. The New Almaden Company appeal to them, as a triumphant vindication of the genuineness of the second branch of their title. Other people will wonder where such ignorance was bred, how it came to be allied with so much audacity, and how that apathy was engendered which suffered such a blundering crime to pass undetected. It may be that the rest of Lafragua's report is genuine, the quicksilver extracts can not be, and they are a millstone about the neck of the witness who appeared under the name of Lafragua.

The other passages cited in the Lafragua fragment are taken from the Appendix of Miscellanies. They are also two in number and have been already mentioned as fixing the date of the stoppage of payments from the treasury, which prevented Castillero securing his draft on Mazatlan, in one, as the 10th of May, 1846, and in the other, as the 19th of September, of that year. In the latter, referring to Castillero's projects, Vicente

Segura (for it is on no less authority that we have all these details), says: "This grand national enterprise, the Junta, (Mining Board) has not been able fully to carry out because it has been deprived of one of its funds of one per cent. on the circulation of money," etc. Otherwise, the New Almaden Mine would have been in operation on the account of the Mexican Government, in 1846. Fremont, Sloat, Stockton and Kearney, notwithstanding—the same story over again.

But the ponderous book contains still other matters of interest not cut out with the Lafragua fragment. The distinguished witness declared, on his examination, that, "In consequence of the revolution, Paredes became clothed with absolute power, embracing the Legislative as well as the Executive, and all other functions of the Government." Nobody was better qualified to speak about this fact, except Paredes himself. Among the materials from the great book, gathered up perhaps in haste, there was included, possibly by accident, the plan of San Luis Potosi of the 14th of December, 1845, with the amendments made to it at the city of Mexico, January 2d, 1846. In this charter of his revolution Paredes declares that he had no powers but those of the laws in force, and pledged himself never to exceed them unless it became necessary in repelling the Americans. The validity of these grants, for so they would have them considered, of the mine by force of the contract, and the two square leagues of land by the dispatch of Castillo Lanzas, was supposed to depend upon making good this unlimited despotism in the person of Paredes. Paredes denies the usurpation and flatly gives the lie to the traveling Minister of Relations.

For more than two years Lafragua had been the pillar on which the case rested, and his book the corner-stone. Recently, the foundations of the edifice have been inspected, and a prop thought necessary. John P. Brodie, in July last, made his trip to Mexico before spoken of. He carried with him a neatly executed traced copy of all these documents testified to by Lafragua, and sundry other documents which had not been brought to light in Lafragua's day. He compared his copies with most painstaking accuracy, and found them to agree with their originals in the archives at Mexico, even to the very blots and stains upon the paper, as he relates in his deposition taken since his return. Where were those traced copies made? Wherever that was, of course there were their originals. Brodie does not know; he did not make them. They were put into his hands by William E. Barron, who, as long ago disclosed by his affidavit, is the managing agent for the New Almaden Company, of which he is also a partner in the prosecution of this claim. At the same time he received another package—smaller, he is careful to tell us, than that containing the traced copies, (but that might well be, for with these appears to have been inclosed a stout notarial document on common paper, which would greatly increase the bulk of that package,) which, upon his reaching Acapulco, he forwarded by express to the elder Eustace Barron, at the city of Mexico, who, since the superannuation of Alex. Forbes some six or seven years ago, has been the head of the New Almaden league. If the package which went by express contained the originals, they were on the spot when Brodie arrived to make the comparison. This, of course, is but a guess; but Wm. E. Barron had just arrived from Mexico when he sent back Brodie with the copies. If they had been traced in Mexico, he should have brought up with him the man who traced them. He would have had no difficulty in this. People are easily brought from Mexico; Brodie brought up two with him—one an attorney of Eustace Barron, the other no less a personage than the Secretary of the present "highest mining tribunal in the Republic of Mexico," successor of that with which Castillero dealt in 1846. This Secretary, however, who has been all his life a Clerk in the department, and has the custody, as he swears, of a part of the originals, did not make the traced copies, had never seen or heard of such a thing in Mexico; and, with these in his hands, persisted in saying that they were pressed copies. And Brodie declared, that in the thirty years he lived in Mexico he never saw a traced copy, not until he came to California. Traced copies, so completely unknown in Mexico, are made every day with the utmost nicety in the Surveyor-General's office at San Francisco. And unless Wm. E. Barron, after having his traced copies made in Mexico, was so indifferent to expenditure that he came away with the papers, and left the witnesses to prove them behind, and so had immediately to dispatch Brodie back upon his route. And unless the art of tracing had been lost as soon as these, the first and only Mexican copies, were achieved, and therefore no new traced copies could be made, and the trouble saved of returning those improvidently brought to California, one would suppose that the originals of Mr. Wm. E. Barron's traced copies were once many thousands of miles nearer to us than they are represented to be at present.

The Secretary of the Mining Tribunal, who accompanied Brodie when he came back—Manuel Couto by name, and nephew, he says, of Bernardo Couto, one of the signers of the Treaty of Guadalupe Hidalgo—says that he has had his portion of the originals always in his custody very safely at Mexico. He swears, also, to the office and the signatures of Segura, Becerra, Lanzas and the rest. Cross-examined, it appears, that these facts exhaust his whole knowledge. He is not helped to the recollection of these things by suggestions from surrounding facts, but he remembers everything by the aid of the great central light, of the transaction with Castillero. Thus he knows that Becerra was Minister of Justice, and Castillo Lanzas, Minister of Relations at this time, because he sees their names on Castillero's title papers, but he remembers not another Minister of Justice or Relations for years before or since. He has absolutely no knowledge of revolutions, and the storms of state have broken over his head like the storms of nature over a man asleep in a cavern.

Add now some scores of Mexican certificates, many of them from Vejar and his colleagues, in the Notarial Office, and a few from consuls and foreign ministers—including Mr. Forsyth, the American Minister, and who was present and sat by the side of the Mexican attorney of Eustace Barron when the traced copies were compared at Mexico, as Brodie says—certifying to the person and office of some of the Mexican certifiers, and we have the evidence with which the New Almaden Company sustain the second series of their title papers.

On the other side, we have the papers themselves, testifying on their face, conclusively, to the forgery of the alleged title, as we have seen; all the evidence that has been arrayed against the Act of Possession, which becomes a part of the second series also, as it is the thing to be ratified, is incorporated with the Castillo Lanzas dispatch, and the circumstances which have been noted, show it to have been fabricated, not only after its date, but after the 23d of May, 1846; the impossibility of believing that any court would execute its patent for more than nine square miles, under the name of a mining right, or for two square leagues, for the purposes of colonization, averring in its very grant that it was already the private property of a citizen; and, finally, we have the well-considered declaration of Mexico made to the United States on the most solemn occasion known among nations.

The President of the United States instructed Mr. Trist, the celebrated embassador, when he should agree upon the terms of peace with Mexico, to insert a provision to the effect that grants of land in California made after the 13th of May, 1846, on which day Congress recognized the existence of a war by act of Mexico, should not be valid. The Mexican Commissioners who met Mr. Trist objected to the form of this stipulation, on the ground that it would give them the appearance of consenting to the confiscation of Mexican property, and induced Mr. Trist to waive it, by assuring him that as a matter of fact, no such grant had been made. They said they would insert a declaration in the treaty to this effect, and thus Mr. Trist's object would be as fully secured, in a manner less offensive to their feelings. Mr. Trist, before he gave his consent to the change, desired them to look again and be certain of what they stated. They returned and reported that there was not a shadow of doubt, that no grant of land in California had been made after the 13th day of May, 1846. The Xth Article of the original draft of the treaty was then inserted: it guaranteed Mexican grants of land in California, qualified with this declaration. When the treaty came before the Senate of the United States, they struck out the whole of the Xth Article, both the guarantee and its qualification. Mr. Benton, in one of his subsequent speeches, says that the Senate did this because they were afraid that the guarantee would cover some inequitable claims of an earlier date than the 13th of May, 1846, and had in mind particularly the immense grant to the Irish Catholic priest, Eugene Macnamara, of whom I shall presently speak, some of the incipient steps in which were taken in the summer of 1845. With the Xth Article stricken out the treaty came back to Mexico for ratification. Mr. Clifford, now Associate Justice of the Supreme Court of the United States, and Mr. Sevier of Arkansas, were the Commissioners on the part of the United States, and Luis de la Rosa, Minister of Relations, represented the Mexican Republic. The place was the city of Queretaro, and the time the 26th of May, 1848, when and where we are told that the Report of Lafragua, setting out the whole affair with Castillero, had now been printed, by the order, and at the expense of the Commissioners who negotiated with Mr. Trist, and the Minister of Relations who was about to ratify with Messrs. Clifford and Sevier. The Mexican Government feared that it would be charged with failure to secure the protection of the property of the ceded Mexicans, and before ratifying the treaty without the Article, exacted a protocol explanatory of the intention of the omission, which was signed by both parties and contained these words, which I take as translated from the Spanish:

> "These concessions, notwithstanding the suppression of the Article of the Treaty, shall preserve the value which they may have in law; and the grantees may avail themselves of their lawful titles before the American tribunals.
>
> *According to the law of the United States, those are lawful titles to property of every kind, moveable or immovable, existing in the ceded territories, which may have been lawful titles under the Mexican law up to the 13th of May*, 1846."

This is the most exalted evidence. If it is not so declared in the law, let the lawyers re-write their books and assign it the first chapter. In this declaration of a State stipulating for peace and a continued existence, is included with the voice of millions, that of Andres Castillero and all his associates, and all who now claim under them the mine and two square leagues of New Almaden.

Against this evidence to offer the oaths of spectral ministers of State, document finders, and collators of traced copies, is but to affront the courts and the public, with a mocking insult.

Not the fact, but the manner of the forgery, is in truth the inquiry.

We have seen the first time the three thousand vara Act of Possession, which is the basis of the whole, appeared in use, was when James Alexander Forbes made his copy, from an original handed him for the purpose by Alexander Forbes, which he had never seen before and never saw again after he handed it back, on or about the 21st of January, 1848. For practical purposes we may assume that we have here the forgers and the date of the forging of that document.

Before that time, in the spring of 1847, to-wit, Robert Walkinshaw had brought with him a copy of one version of the Castillo Lanzas document, consequently it was made before he came to California. That version is not the same which now appears on file—for Walkinshaw laid it before James Alex. Forbes to whom he was the bearer of a letter of Alex. Forbes, yet at Tepic, and whose advice he was instructed to take; he, after seeing it, wrote the letter dated May 5th, 1847, which has been put in evidence by the New Almaden Company. It is as follows:

"(Private.)

SANTA CLARA, 5th May, 1847.

MY DEAR SIR:

It is with much pleasure that I acknowledge the receipt of your letters by Mr. Walkinshaw, and another of the 27th of January.

I have much satisfaction to inform you that Mr. Walkinshaw has taken quiet possession of the Quicksilver Mine, by virtue of your agreement with Mr. Macnamara; and has made the necessary assays and observations for his entire satisfaction, which will be welcome intelligence to you.

I have done everything I could do for the advancement of your views in this undertaking; and have communicated to Mr. Walkinshaw all the information relative to the necessary measures that must be taken in order to preclude the possibility of an intrusion by the Americans, or any other persons who may find a pretext for litigation; and I now lay before you my views, that you may see the necessity of immediate action.

It is of the most vital importance to obtain from the Supreme Government of Mexico, a positive, formal and unconditional grant of the two sitios of land conceded to D. Andres Castillero, according to the decree appended to the contract, and also an unqualified ratification of the judicial possession which was given of the mine by the local authority of this jurisdiction, including, if possible, the three thousand varas of land given in that possession as a gratification to the discoverers. The documents should be made out in the name of D. Andres Castillero and Socios. I think that it will not be difficult to obtain these documents, on making known to the Supreme Government that this Departmental Government is completely 'acefalo'; in consequence of which, the possession of the two sitios ordered to be given by the dispatch of Señor Castillo Lanzas, has not been obtained, nor cannot be obtained, nor even mentioned without imminent risk of opposition on the part of the American Government in this Department. It is indispensable that the title and ratification of possession should be of the date of the decree of Señor Lanzas.

It is of great importance also to the future security of all titles to land in California, that Her Majesty's Minister at Mexico be advised of the expediency of using his influence with the Government, in case of a cession of California to the United States, (which God forbid,) that there be inserted in the treaty of cession a distinct and special clause, that all titles of land that may have been granted by the Departmental Government to British subjects, even if they be not according to all the prescribed forms of colonization law, be held inviolable and valid.

There is a sufficient quantity of land in the vicinity of the mines to supply the grant of the two sitios, without encroaching upon the land of Berreyesa, whose title Castillero tells you is but for one sitio. This is true in respect to his first title, which was given by D. Manuel Jimeno, as *Gobernador interino*, during the administration of Alvarado. But Berreyesa afterward made a representation to Micheltoreno, and obtained the other sitio; he, however, did not receive judicial possession of the land.

With respect to the ratification of the contract between yourself and Mr. Macnamara, for the habilitation of the mine, as promised by Don Andres Castillero, I, as attorney or procurator of the two Robles, send that document, in which I ratify (in their name) the contract, and make allusion to the privileges conceded by the Mexican Government to the owners of Quicksilver Mines; for, in lieu of these privileges, it was expressly stipulated by D. Andres Castillero and his Socios, that they should all participate in the two sitios of land to be asked of the Departmental Government.

This will also be advantageous to you, independent of its justice.

I have made arrangements with Mr. Walkinshaw for the extraction of the ores that I have taken out of the mine, for our mutual account, in the manner that is expressed in a contract made between us, which will, of course, be manifested to you.

I have only to add that you shall surely rely on me, as you have been so pleased to honor me with the title of a friend, which I shall be proud to prove to you. I shall stand between all difficulties that may occur on the part of these new and arbitrary Governors of California, or any other person. Trusting to hear of your speedy measures in relation to the title, etc.

I am, my dear sir,
Your most obedient servant,
(Signed.) JAMES ALEX. FORBES.

ALEX. FORBES, Esq."

Mr. Forbes, as requested, here gives his views of the "necessary measures that must be taken in order to preclude the possibility of an intrusion of *the Americans*, or any other persons" upon the quiet possession which Mr. Walkinshaw had taken of the quicksilver mine under the agreement with Mr. Macnamara. He finds that the Castillo Lanzas document which Walkinshaw had brought, will not answer, for two reasons, one that they dare not even mention it, much less take possession of the land, and the other that it does not contain the ratification of the mining possession given by the local authorities. The Castillo Lanzas document in the exhibits, does contain this ratification, and Forbes, with the paper before him, could not have avoided seeing it.

The ratification which Jas. Alex. Forbes desired, was "of the judicial possession which was given of the mine by the local authority of this jurisdiction *including*, *if possible*, the three thousand varas of land given in that concession as a *gratification* to the discoverer."

This contemplates two things to be ratified, one of which did not necessarily include the other, which might be ratified one without the other, and which he discriminates as the *judicial possession of the mine*, and as *a gratification to the discoverer*. The thing produced as ratified is one and indivisible; a single subject matter, not two, which might be ratified separately, not susceptible of description by terms, which discriminate parts—that must be accorded or refused as a whole. In the Act of Possession, which a year later, Jas. Alex. Forbes copied for Alex. Forbes, the outline of these ideas is preserved, but their distinctions are confounded, and the *mining possession*, and the *gratification*, are blended in a single phrase: "I have granted three thousand varas of land in all directions." The nicer lines traced in the meditations of the younger Forbes, seem to have been lost under the fusing heat of the action of the elder Forbes, and the elements of the future title were taken to Mexico in a common mass. We have returned to us, therefore, a Castillo Lanzas document, which is not the one that Walkinshaw brought up with him, because it contains a ratification and an Act of Possession which is not the one that Jas. Alex. Forbes analyzed, because it can not be resolved into parts.

But it is necessary to go back to Father Macnamara. The business which occupied him at the city of Mexico in the summer of 1845, detained him until the spring of 1846. It was a vast speculation; a project to colonize California with Irish Catholics, with the double purpose of protecting the territory from the rapacious Yankees and the Catholic church from what he describes as "Methodist wolves," in his communications with the Government. He obtained favorable letters from the

Central Government to the Government of California; passed through Tepic; received on the 15th of April a letter from Alex. Forbes to James Alex. Forbes, of which the "object was," in the words of Mr. Alex. Forbes, "to request of you (Mr. James Alex. Forbes), to procure as correct information as you could respecting the quicksilver *mine or mines* lately *said* to be discovered in California, one of which you mention as being worked by Mr. Castillero;" sailed from Mazatlan, after the 11th of May, in the British ship-of-war Juno; arrived at Monterey some time in June, but was disappointed in meeting Mr. James Alex. Forbes, who felt it his duty at that time, as British Vice-Consul, to be present in the lower part of the State advising with the Governor and other influential Californians, how they should make the approaching crisis redound most to the advantage of Great Britain and least to that of the United States. He followed down the coast in the Juno, and found Mr. Forbes at Santa Barbara. There Mr. Forbes drafted for him the petition upon which shortly afterward Pio Pico granted him the whole valley of the San Joaquin. At Santa Barbara they separated; Macnamara, with his petition, going to Los Angeles, and Forbes sailing on the Juno for San Francisco. Whilst Forbes was at sea, Commodore Sloat planted the American flag at Monterey, and Father Macnamara coming up by land soon afterward met Gen. José Castro on his retreat to the south. About the middle of July Forbes reached San Francisco, and on the road thence to Santa Clara was met by a courier from Admiral Seymour of the Collingwood summoning him to Monterey. The Collingwood had watched the movements of the Savannah and endeavored to get first to Monterey, but when Seymour arrived, Sloat was already in possession. If the Collingwood had been the winner of the race, the last ten years of history might have been differently written for us now upon the Pacific.

At Monterey, Forbes again met Macnamara, and for the first time saw this power of attorney:

"POWER OF ATTORNEY.

In the port of Monterey, the twelfth day of the month of June, one thousand eight hundred and forty-six, I, José Castro, in presence of the witnesses hereinafter named, in exercise of the powers which my partners have granted to me, for the purpose of executing any contract which might offer in regard to the three pertenencias, which by just title and as discoverers we possess in the mine of quicksilver situated in the district of Santa Clara; and being favored by the Mining Ordinances and the respective laws, and more especially by the supreme law of seventh October, one thousand eight hundred and twenty-three, in the procuring of the great advancement and profit in the working of this class of mines, and the mine which we now possess being first, sole, and most important for its richness which has been discovered in Mexican territory; considering that the Government cannot extend to us the assistance to which we are entitled on account of the mine being at such immense distance, and beyond sea; and there existing no hopes that this country of itself can forward this important branch, for want of disposable funds; and likewise, because of there being no professed mineralogist to be found here, nor laborers for the continuous working, which are required for the advancement of this branch of industry unknown in this department,—have agreed, and do agree to confer special, full and sufficient power, as much as may be necessary in law, and convey most authority, and be binding, to the Presbyter Don Eugenio Macnamara, that, representing my person and my copartners, he may contract with an English company, with exclusion of any other nation, to undertake the working of the three pertenencias of said mine for the term of nine years, with the purpose of procuring the supplies, (avios,) defraying the necessary expenses, and maintaining the mine in good working order, in conformity with the Mining Ordinances; one-half of the products of the three pertenencias of the mine to be for the owners, and the other half for the English company; and in the case that he may not be able to make such arrangement, he may offer two-thirds to the English company, and the owners shall receive the other one-third, in the understanding that the portion falling to the owners shall be free of all expenses; and should he not be able to effect any contract even on these terms, he may make other stipulations, with the concurrence of Don Andres Castillero, so as to expedite the effecting of a contract; and after the expiration of the said term of nine years, the contract will be extended for seven years more, on the same terms as the first may have been formed; after all which time the negotiation shall be at the absolute disposal of the owners of the mine, as likewise all the materials, buildings and other appurtenances, such as machinery, and other utensils appertaining to said working; and the English company shall not be entitled to claim any other expenses which they may have incurred for their own proper use and benefit. And to the security and validity of whatever may be executed in virtue of this power, I bind myself in full form of law to its fulfillment; and to this effect I subject myself to the judges who may have cognizance of the case.

In testimony whereof, I sign this with the four witnesses, who are—Don David Spence, Don Juan Malarin, Don Manuel Diaz, and Don Antonio Maria Osio—the day and year above written.

JOSE CASTRO,
DAVID SPENCE,
MANUEL DIAZ,
JUAN MALARIN,
ANTONIO MARIA OSIO."

This instrument is dated on the 12th of June, when José Castro was in the neighborhood of Santa Clara most probably, and absorbed in his preparations for the contest with Fremont, who had returned from the mountains of Oregon to northern California, and was there mustering his hardy band of veteran frontiersmen under the bear flag; and when Macnamara had not yet seen Forbes, from whom he was to obtain his information about the quicksilver mine. It was undoubtedly made after Castro had left this region of the country, and when Forbes and Macnamara met again at Monterey. Their first meeting had been devoted to the most important business, the grant of the San Joaquin Valley; their second was given to the Quicksilver Mine of Santa Clara, as it was then called, now New Almaden. It is not at all unreasonable to suppose that it was made on board of the Collingwood, where, unquestionably, the Vice-Consul and the semi-diplomatic priest were frequent and distinguished guests.

This power of attorney, it will be seen, at this early day ignores, like so many other papers in this case, the presence or the danger of the coming of the Americans, and upon the supposition that California is always to remain a part of Mexico, Gen. Castro goes on to authorize "the Presbyter, Don Eugenio Macnamara, that, representing my person and my copartners, he may contract with an English company, with exclusion of any other nation, to undertake the working of the *three pertenencias of said mine* for the term of nine years," etc.

With this instrument in his possession, on or about the 22d of July, 1846, Macnamara sailed on the Collingwood for the Sandwich Islands. There he wrote to Mr. James Alex. Forbes this letter:

"HONOLULU, September 27, 1846.

DEAR MR. FORBES: I take advantage of the first favorable opportunity that presents itself, to send you a few hurried lines, in accordance with a former promise. Here I am, still, very much annoyed, as you may easily conceive, at being detained in this half savage place, having nothing to do, and my anxiety to reach Mexico amounting almost to madness. I am daily, nay hourly, expecting the arrival of the Palinurus, transport ship, which is to carry me to San Blas. The only English man-of-war here at present is the Juno, with our friend, Capt. Blake. The Grampus, a fifty-gun frigate, reached this shortly after our arrival, but was sent off almost immediately to Tahiti. The Collingwood left for the same destination on the 3d inst.; the Spy, brigantine, has gone more recently, also for Tahiti; the Cormorant steamer, the Fisguard, the Modesta, and two surveying vessels under the command of Capt. Kellett, are in the Columbia River. The

American Ship Columbus is here, lately from Japan; she was destined to co-operate with the squadron on the coast of California, but, now that the storm is blown over, she goes to Valparaiso.

The only news of any importance by the last mail, is an account of the settlement of the Oregon question. The treaty fixes the boundary by the line of 49 deg. 20 min., with the free navigation of the Columbia to British vessels, until the expiration of the H.'s B. Company's charter. By this you will perceive that England gives up all the good harbors of the north-west coast and gets nothing in return. Thus has the country been again sacrificed by assinine stupidity of old Aberdeen. Every Englishman with whom I have spoken on the subject, seems utterly disgusted at the whole proceeding, and none more so than the officers of H. M. Navy, who looked forward with pleasure to a brush with the Yankees, but who now must hide their diminished heads, while Jonathan may well boast, if not of his bravery, at least of his superior sagacity.

I fully expect to leave this before a week, and soon to enjoy a long palaver with our mutual friend, Mr. Forbes. I am most anxious to set about forming a company to work the mines of Santa Clara. In the event of my succeeding, (of which I have very little doubt), would you consent to take charge of the whole concern? Pray let me know in your next letter. I am also very desirous of doing something about that grant of land. I will give the Yankees as much annoyance as I possibly can in the matter. May I beg of you to write to me by the very first opportunity to Mexico. Send your letter to me under cover, directed to Mr. Bankhead. I inclose a letter, which I got for you at Los Angeles, but which I forgot to deliver when last we met. I shall write to you again when I reach the city of Mexico. I forgot to mention, that by the last accounts the Americans were rapidly advancing into the very center of Mexico, and it was even feared that they would overrun the country, if England or France did not interpose. The "ilustre sangre Mejicano" seemed to be below zero.

I remain, my dear Mr. Forbes,
Your very sincere friend,
EUGENE MACNAMARA."

In the expression, "I am very desirous of doing something about that grant of land," he certainly refers to the grant of the San Joaquin Valley. In this, "I will give the Yankees as much annoyance as I possibly can in the matter," he expressed his disposition and that of his friend, the Vice-Consul, toward the American people in the matter of the quicksilver mine, as well as in every other regard whatsoever. To the same era, with the power of attorney from José Castro, belong evidently his petition to the Alcalde for *three more pertenencias* in addition to the first one, and the precaution of putting the mine under British protection. These acts are all in the same sense and to a common purpose, and were done while Father Real yet had a controlling influence. On the twenty-eighth day of November, 1846, at the city of Tepic, Macnamara contracts with Alexander Forbes for the working of the *three pertenencias* for sixteen years instead of nine. This contract has yet four years to run. On the seventeenth of December, Andres Castillero ratified this contract for the working of the *three pertenencias*, at the city of Mexico. Having done this, he cedes for the sixteen years something, which with the three pertenencias, he represents as the whole of his property at that time in and about the mine, viz: two square leagues of land of which the Supreme Government had made him a concession, as shown by the official document which he presents to be copied. After the signature and attestation of this writing, comes a copy of the present version of the Castillo Lanzas document, which a Mexican Notary assures us with the solemnity of a certificate was the paper offered by Andres Castillero. We have seen that it was not, and how it was the very different sort of a Castillo Lanzas document which Walkinshaw shortly afterward brought up to California and submitted to James Alex. Forbes for his opinion. We may fairly assume, then, the seventeenth day of December, 1846, as the date of the forging of the first false title paper in the case—this Walkinshaw version of Castillo Lanzas' dispatch to the Governor of California. On the same day, we have the sale by Castillero to Alex. Forbes of five of his twelve *barras* or shares in his mine, under the writing of partnership of November 2d, 1845, in which sale occurs the cautious proviso, that it should not be a bargain unless Forbes should succeed in getting possession; which another notarial certificate informs us, was nevertheless immediately waived, and the money, four thousand dollars, paid down. In this sale Alex. Forbes is represented by his friend, Don Francisco Martinez Negrete, in whose house it was that the Notary afterward saw the money paid.

Whereupon Alex. Forbes writes to James Alex. Forbes, this letter:

"TEPIC, January 7th, 1847.

JAMES A. FORBES, Esq., California.

My Dear Sir:—I had the pleasure to receive your very obliging letter of the 29th of October last, which chiefly relates to the mine of quicksilver about which I wrote you at so much length by Mr. Macnamara. I had previous to the receipt of your letter been in treaty with D. Andres Castillero, respecting this mine, and on the arrival of Mr. Macnamara with the powers from the other proprietors, the treaty was much facilitated, and I am now happy to inform you that I have contracted for the "habilitation" of the mine, and have also purchased a part of Mr. Castillero's 'barras,' all of which will be made known to you by Mr. Walkinshaw, who goes to California as my attorney and agent for the examination and working of the mines. Mr. Walkinshaw will wait upon you as soon after his arrival as possible, and will show you all the documents, and ask your advice and assistance in carrying out my views.

It is needless for me to say more, than that I count on you as a friend who will lend your best assistance to bring this negotiation to a good account, and as you inform me that you are proprietor of two 'barras,' it will be for your interest, and that of all others concerned, that every means may be used to make the most of it. I have sent up a small sum of money to make a beginning, and if Mr. Walkinshaw is of opinion that the business ought to be carried on to a large extent, the necessary apparatus will be ordered, and ample funds sent to carry on the business properly.

I have for the present only sent one hundred and fourteen iron bottles, but I can get a large quantity in this country when they may be required.

Mr. Walkinshaw will inform you that everything is left open respecting the interest which he and others may take in this enterprise, and I trust you will also leave to me the regulation of the affair which must depend on after prospects. For the present I wish no one to run any risk or to incur any expense but myself, which, however, you must be aware will be very considerable; but if the mine turns out well there will be sufficient for all.

I, in conclusion, beg leave to recommend most strongly my friend, Mr. Walkinshaw, to your best attentions and assistance, and I am sure you will find him most worthy of your confidence.

I am, my dear sir, yours most sincerely,
ALEX. FORBES."

We have seen that Mr. Walkinshaw did wait upon Mr. Forbes ~~as soon as he could accomplish his overland journey from the south, where Mr. Halleck met him~~, and that he did ask his advice and receive it, and what it was. It will be noted that Mr. Alex. Forbes, in the spring of 1847, first sends up "a small sum of money to make a beginning," and that everything was then "left open respecting the interest that he (Walkinshaw), and others may take in the enterprise."

Whilst Walkinshaw was gone, José Castro, constrained to abandon California, came within reach of Alex. Forbes. The General was always notorious as a prodigal, and we are not surprised to find that the foresighted Scotchman easily got possession of his four *barras* or shares for about three thousand eight hundred dollars. In each of these acts of sale—executed of course before the immaculate Mr. Vejar—the property is described solely by reference to the writing of partnership of the second of November, 1845, so often alluded to.

I have already told how, on the return of Walkinshaw from California, Alex. Forbes went up himself ~~in the William~~, how he explored and doubted for weeks, and finally discovered the vein. Here is one of his letters to James Alex. Forbes, of contemporaneous writing with the copying of the Act of Possession:

"New Almaden, 19th January, 1848.

My Dear Sir:

I am very much obliged to you for your very prompt attention to the matter in hand, and return the expediente immediately.

I am much surprised at the result of your assay, and shall try what I have.

It will, of course, be better to say nothing about it, particularly as I have already written to Monterey that there is no mine, nor does there appear to be any quantity of this kind of stuff. I hope soon to see the Alcalde.

My dear sir, yours truly,
A. FORBES.

James Alex. Forbes, Esq., Santa Clara."

This is one of the best letters on record. It contains a whole history.

We have seen what the Alcalde did, and how the two square leagues were surveyed.

Alex. Forbes now quarrels with Jas. Alex. Forbes, and the occasion was the obstinacy of the latter in not letting him have, on satisfactory terms, the shares of the Robles which were in his disposal. The quarrel culminated, (several letters having passed, as they were both writing men,) just before Alex. Forbes sailed for Mexico, terminating his first and last ever memorable visit to Upper California. This was his parting shot:

"Monterey, 28 March, 1848.

James A. Forbes, Esq., Santa Clara.

My Dear Sir: I have to apologize for not writing you before this, as I promised I would, respecting the purchase of your shares in the mine of New Almaden; but, really as your opinion of their value is so widely different from mine, I considered it almost hopeless to make you any further proposals.

I do not, however, leave this without making the necessary arrangements to effect that object, and have therefore authorized Mr. Walkinshaw and Manuel Diaz to wait on you with my final offer for the purchase of those shares.

Were I not already so deeply interested in this negotiation, I would never think of investing another dollar in it; but this interest renders it necessary for me to have the control of all the shares, in order that I may dispose of the whole whenever an opportunity may offer, and save myself from the heavy loss that would ensue should it unluckily leak out that in fact the documents procured by Castillero, in Mexico, as his title to the mine and lands, were all obtained long after the occupation of California by the Americans.

This unfortunate irregularity cannot be easily repaired, and serious objections might be made even to the legality of our new Act of Possession.

I need scarcely remind you of the importance of preserving profound secrecy in all these matters, and in case you do not accept my offer, I hope you will not fail to send me your power to act for you in any arrangement I may make.

I send you three vols. of the Mechanic and Engineers' Magazine, which I beg your acceptance of, and I hope you will continue your correspondence as usual and inform me of what is passing in California.

I am my dear sir, yours, very truly,

ALEX. FORBES."

In their sworn answer filed to the bill for the injunction, the defendants, Parrott, Halleck, Bolton, Barron and Young, say this letter was "never written on the 28th day of March, or on any other day, by the said Alexander Forbes, but that the same is a forgery." If they mean what they say, they mean that there is such a paper written by some one other than Alexander Forbes, and if so they must have seen it, and should produce it that others may judge whether it is a forgery or not. James Alex. Forbes says it was stolen from his carpet-bag, in his locked chamber, at the Railroad House in this city, on the night of the 30th day of June, 1858, on which day he had been called to this city by the New Almaden Company, and at their instance given testimony in the U. S. District Court. Birnie, who is an unassailed witness, swears that in the employment of Wm. E. Barron, he had on the evening of the 29th, obtained from Mr. Forbes the privilege of reading this letter, and on the morning of the 30th had repeated its contents to Barron, who after hearing all that the letter contained, expressed the strongest desire to get possession of it, or at least a copy; and accordingly that on the evening of the 30th he got the letter again, made a copy and returned the letter to Mr. Forbes; further, that on the 1st of July he carried his copy to Wm. E. Barron who now expressed himself indifferent about it, but still received it, and paid him for his services which had been continuous in the pursuit of documents from Mr. Forbes, since the month of January. In corroboration of the story of Birnie, the New Almaden Company produced the copy which he had delivered to Barron, and he remains in every other particular, to this day uncontradicted. Here is an affidavit made by Birnie, after having given his testimony more fully in a deposition:

"AFFIDAVIT OF ROBERT BIRNIE.

In the Circuit Court of the United States for the Districts of California, in and for the Northern District.

THE UNITED STATES OF AMERICA,
v.
JOHN PARROTT,
HENRY W. HALLECK,
JAMES R. BOLTON,
WM. E. BARRON,
JOHN YOUNG, and
ROBERT WALKINSHAW.
} IN EQUITY.

Robert Birnie being duly sworn deposeth and saith, that in January or February last he was employed by William E. Barron to obtain from James Alexander Forbes a paper purporting to be a document of title to the mine of New Almaden to Andres Castillero, purporting to be an order to the Governor of California to put Castillero in possession of the mine, or something of that nature. I made inquiry for that document of Mr. J. A. Forbes, and reported to Mr. Barron that I was unsuccessful in my search for that document. I was also employed by Mr. Bolton and Mr. Billings to get from James Alex. Forbes any document that would be prejudicial to the mine. Mr. Bolton asked me to go and try and get a copy of any papers which Jas. Alex. Forbes might have. I applied to James Alex. Forbes, and he informed me that he had papers which were prejudicial to the mine. I reported it to Messrs. Bolton, Billings and Barron. Mr. Bolton and Mr. Billings said that they would pay liberally for any document that Mr. Forbes might have in his possession that would be injurious to the mine, and would pay me liberally for my services. I made proposals to Mr. Forbes for any paper or papers which he had, prejudicial to the mine. Mr. Forbes objected to have anything to do with any of the agents of Bolton, Barron & Co. I afterwards got a copy of a letter from James Alex. Forbes. I made the copy myself. It was a letter directed to Jas. Alex. Forbes from Alexander Forbes, dated I believe, on the 28th March, 1848, from Monterey. I made the copy on the 30th day of June, 1858, in a room at the Railroad House, in San Francisco. I left it with Mr. Barron. A copy of the same original letter is hereto attached. It is the same as the copy I left with Mr. Barron. I am acquainted with the handwriting of Alex. Forbes, and the original letter which I copied as aforesaid, was in his handwriting. I got from Mr. Barron, the day that I gave that copy, two hundred dollars, and two hundred dollars a few days afterwards. Mr. Barron afterwards told me that he could explain that letter away. This was after I gave him the copy. My traveling expenses were also paid. They were between two and three hundred dollars. I traveled from San Francisco to Oakland, San José and Santa Clara four or five times for Mr. Barron. The distance is about fifty-four miles. It was about nine o'clock in the morning of the 1st July, 1858, that I gave the copy of the letter aforesaid to Mr. Barron. I had made the copy at about six or seven o'clock on the evening preceding. I had told Mr. Barron before I made the copy that I had seen the original in this city in the possession of Mr. Forbes. After I made the copy I gave the original back to James Alexander Forbes.

ROBERT BIRNIE."

"Sworn to and subscribed before me this 13th day of September, A. D. 1858.

CUTLER McALLISTER,
U. S. Commissioner."

For services, which contained nothing substantial but the procuring this copy, and were not in the least troublesome to himself, Birnie received from Wm. E. Barron about *seven hundred dollars.* Barron is the only witness needed to prove the genuineness of the stolen letter, his own oath to the contrary notwithstanding. If the letter is genuine it is difficult to avoid the further conclusion, that some one has been guilty of burglary. The title to lands alluded to in the letter was the Walkinshaw version of the Castillo Lanzas document, none other having yet appeared in California; the title to the mine was that Act of Possession which James Alex. Forbes had just copied. These are the titles which Alexander Forbes says "were all obtained long after the occupation of California by the Americans." The new Act of Possession, was that recently granted by Weekes, of *four pertenencias.*

It will be borne in mind that the genuineness of every other letter is admitted by the New Almaden Company.

One year now elapses. We come down to April, 1849. On the 9th, Alexander Forbes writes to James Alex. Forbes, to inform him that he had resigned the chief direction of New Almaden affairs, to younger hands, as he touchingly observes, but not to abler, as events have proved. The successors are the great house of Barron, Forbes & Co., of Tepic. They assure Mr. James Alex. Forbes that the mine will now be worked energetically, "to the utmost of its capabilities of production," as will be seen in the following letter, written on assuming the command:

"TEPIC, 11th April, 1849.

JAS. ALEX. FORBES, Esq., San Francisco.

Dear Sir:—We beg leave to refer you to Mr. Alex. Forbes' letter of the 9th inst., respecting the arrangement of the affairs of the mine of New Almaden, and beg to recommend that negotiation to your best care and management until we can forward the necessary instructions for your government. You may now rely on this mine being worked to the utmost of its capabilities of production and sale of quicksilver on the arrival of the apparatus, and we hope to make up for the delay which circumstances have hitherto prevented this important concern from being productive. We shall soon have the pleasure of sending you a list of the company of which the 'habilitadores' are composed. The House of Yecker, Torre & Co., of Mexico and Mazaltan, and our own are chiefly interested, and as Don Ysidoro de la Torre has gone to Europe, he will concert with Mr. Barron everything which can tend to the successful development of this enterprise.

We are, dear sir, your most obedient servants,
BARRON, FORBES & CO."

James Alex. Forbes, upon the receipt of the above, goes down to Tepic. There this letter is put into his hands by the new rulers:

"TEPIC, 20th May, 1849.

JAMES A. FORBES, Esq.

Sir:—From certain circumstances which you have communicated to us, it may be necessary to purchase some lands in the vicinity of the mine and hacienda of New Almaden, California. We hereby empower you to make such purchases as may be necessary to secure the possession of this mine and hacienda, or to effect such other arrangements as you may deem necessary for that purpose. The prices of such purchase not to exceed five thousand dollars, without consulting with us upon the subject.

We are, sir, Your most ob't serv'ts,
BARRON, FORBES & CO."

The land intended was part of the rancho of Berreyesa. Why it should be necessary to purchase any land to secure the mine and hacienda is not explained. A year before they had surveyed and marked out two square leagues of land, including everything that could be wanted in every direction. But as they were going to purchase their own property, we ought not to be surprised at the moderate limit of five thousand dollars.

Whilst he was at Tepic, James Alex. Forbes wrote and delivered to Alexander Forbes, for Andres Castillero, a memorandum, the translation of a copy of which is as follows:

"(Very private.)

MEMORANDUM

Of the Documents which Don Andres Castillero will have to procure in Mexico.

1. The full approbation and ratification by the Supreme Government of all the acts of the Alcalde of the District of San José, in Upper California—in the possession given by the said officer of the quicksilver mine situated in his jurisdiction, to Don Andres Castillero, December, 1845.

2. An absolute and unconditional title of two leagues of land to Don Andres Castillero, specifying the following boundaries: On the north by the lands of the Rancho of San Vicente, and Los Capitancillos; on the east, south and west by vacant land, or vacant highlands.

3. The dates of these documents will have to be arranged by Don Andres; the testimony of them taken in due form, and besides certified to by the American Minister in Mexico, and transmitted to California as soon as possible.

TEPIC, May 27, 1849.

[Indorsed.] Copy of Memorandum left with Alexander Forbes for Castillero, May 27, 1849."

The genuineness of this document is admitted, also the fact stated in the indorsement. Comment is impossible.

With a power of attorney to take the management of the mine out of the hands of Walkinshaw, James Alex. Forbes now returned immediately to California. His attempt to use this authority, in August, caused the breach with Walkinshaw and caused him to rush vehemently into law, as I have stated. Whilst this danger was hardly yet passed, Forbes wrote this letter to Wm. Forbes, of the house of Barron, Forbes & Co., to "again call your attention to the importance of my suggestions *relative to perfecting the title* of the mine of Almaden," and wishes to impress upon the Tepic mind "the vast importance of securing from the Supreme Government of Mexico the documents comprised in the memorandum left with Mr. Alex. Forbes."

"(Private.)

SAN FRANCISCO, Oct. 28th, 1849.

WILLIAM FORBES, Esq., Tepic.

My Dear Sir:—I have been detained in this place until the present moment, occupied in completing the arrangements, explained to B., F. & Co., under the date of yesterday, having raised the sum of twenty-seven thousand one hundred and eighty dollars and sixty-seven and one-quarter cents, from Probst S. & Co. and Webster, alone.

I must again call your attention to the importance of my suggestions, relative to the perfecting the title of the mine of New Almaden, and without entering now into the particulars, already explained to yourself and to Mr. Alex. Forbes, verbally, I desire only to impress upon your mind the vast importance of securing from the Supreme Government of Mexico the documents comprised in the memorandum, left with Mr. Alexander Forbes, when I was in Tepic, for Castillero. By my own letters of this conveyance, you will be informed of all the particulars of the transactions that have occurred recently in the affairs of the mine, and you will see the risk in which this valuable property is placed by the delay that has occurred in the acquisition of the documents referred to.

I remain my dear sir, yours sincerely,

JAMES ALEX. FORBES."

And also this letter to Mr. Alex. Forbes on the same subject, more urgent and graphic, and more specific, as to Walkinshaw:

"(Private.)

SANTA CLARA, Oct. 30th, 1849.

ALEXANDER FORBES, Esq.

My Dear Sir:—By my letters to yourself and to B., F. & Co., from the 22d to this day, you will be informed of the great danger in which the mine of New Almaden has been thrown, and the disagreeable and vexatious proceedings caused me by Mr. Walkinshaw and his associates in their denunciation of the mine for abandonment; you will, however, have the satisfaction of knowing, also, that I am to be reinstated in the possession of that property, both mine and hacienda, in two or three days hence, by judicial process.

Although I feel much gratified at my successful defense of the case, yet I am extremely apprehensive of further difficulties in the event that those parties should succeed in purchasing the part of the land of the Berreyesas that they have offered to purchase, (which embraces the mine and hacienda,) for twenty-five thousand dollars—just five times the amount you all authorized me to pay for the same identical tract.

Figure to yourself the position of the affair of the mine, if I do not strike boldly at our opponents by purchasing the land at a higher price than they have offered to pay for it, and by thus frustrating their plans, secure the mine and hacienda from further risk.

You will now readily perceive the great importance of my advice to you to purchase a part both of the lands of Cook and of the Berreyesas. You were of the opinion that this measure would not be necessary, in view of the supposed facility of getting the title to the mine perfected in Mexico.

It is now more than five months since it was decided that Castillero should procure the necessary documents in that city, and that they should be sent to me as soon as possible. On the one hand, I depend upon the precarious and illegal possession of the mine granted by the Alcalde of this District to Castillero, who was in reality the judge of the quantity of land given by the Alcalde, and on the other side, I am attacked by the purchasers of the same land, declared by Castillero, himself, to comprise the mine. In the absence of the all important document of the ratification of the possession so given, I am compelled to purchase the part of the land of the Berreyesas which Walkinshaw and his party have offered to purchase, and you must not be surprised if I shall go far beyond the price that they have offered, because it is the only mode of securing the title to the mine and hacienda, for if Castillero should fail in getting the desired documents from Mexico, it is the sole mode of safety of this property.

I shall endeavor to procrastinate, as far as possible, this purchase, and, moreover, to frustrate all the plans of Walkinshaw and his associates for accomplishing *their* purchase, and I do entreat you to use every effort to send me the document of the ratification of possession of the mine, and the grant of land thereon, at the very earliest opportunity, properly authenticated and certified, as explained by me when I was in Tepic. In one of my precited letters I requested you to send me a certified power of attorney from B., F. & Co. to you, authorizing you as the representative of the Compañia de Abio, to appoint other attorneys in fact under you.

The object of this is to be able to refute the allegations of the lawyer of Walkinshaw, that you had no power to authorize me to take charge of the mine.

I remain, my dear sir,
Yours truly,
JAS. ALEX. FORBES."

Then Barron, Forbes & Co. wrote to James Alex. Forbes, thanking him warmly for his able and successful conduct of the war with Walkinshaw. They send him a notarial copy (doubtless from Mr. Vejar—possibly the very one now on file as an exhibit with Vejar's certificate attached) of a forged grant to Castillero, which they think will be cheaper than buying a title. This letter, like others of the same correspondence, is in the handwriting of Wm. E. Barron, who was then confidential clerk in the establishment at Tepic. Here it is in full:

"TEPIC, 30th November, 1849.

JAMES A. FORBES, Esq., Santa Clara.

Dear Sir:—We had the pleasure to write to you on the 13th inst., by the steamer 'Oregon,' the chief object of which was to inclose a notarial copy of the grant of land by the Mexican Government to Castillero, and which we hope has come safe to hand.

We have perused with much interest and attention the whole of your letters and documents received by the steamers, the 'California' and 'Panama,' and we beg you will excuse us from minutely entering into a reply to those valuable and important papers. Suffice it to say, that we not only approve of your proceedings, but have to give you our most sincere thanks for the most energetic and able conduct in the whole affair, and we hope to request that you will not hesitate continuing to take such steps as may seem to you fit for securing the mine from all attempts made by evil-minded persons to impede its being freely worked for its legitimate owners.

We are glad to find that you had not been obliged to purchase Berreyesa's land. This is certainly a most important point, and we trust that the document sent will be of great consequence in that respect; but you will of course take care that no risk is run, and you will do in this affair as your best judgment shall direct you, keeping in view that at all hazard and at whatever cost the property of the mine must be secured. Castillero we expect will soon be here from Lower California, and if anything can be done in Mexico, he is the fittest person to procure what may be wanted. It is incredible that Mr. Walkinshaw should lend himself to such proceedings when he considered the very large capital invested in this enterprise, and when he well knows that by the mining laws no 'denuncio' could possibly be heard under the circumstances in which this mine has been occupied. We trust, however, that these vile machinations will by your active proceedings be put an end to.

We hope you will, by the time this reaches you, have got up at least a part of the apparatus, and that some of it will be soon at work. The price of quicksilver here still keeps up, and the supply as yet not abundant. Every body writes of the very high price it bears in California, and we have no doubt you will in a short time be able to supply the demand and to send us the surplus to San Blas. Trusting to the continuance of your best exertions in behalf of all concerned in the mine of New Almaden.

We are, dear sir,
Your most obd't servants,
BARRON, FORBES & CO.

NOTE.—Castillero we expect will soon be here from Lower California, and if anything can be done in Mexico he is the fittest person."

Alexander Forbes writes to James Alex. Forbes—two Castillo Lanzas documents in view at once—and some instructions in sleight of hand are given:

"(Very private.)

TEPIC, 1st Dec., 1849.

JAMES A. FORBES, Esq., Santa Clara—

My Dear Sir:—The document sent up to you by the last steamer for the grant of the lands to D. Andres Castillero, was, by mistake, not the one meant to be sent. I find now that the proper one was registered by me in Monterey, and the original deposited there.

The one sent you was directed at foot to the Governor of California, and the one deposited at Monterey was directed to D. Andres Castillero. The difference is, that by one the delivery by the Governor was perhaps necessary to make the grant valid, whereas the other, being addressed directly to D. Andres, did not require that formality, nor was any other proceeding necessary; thus making it a better document than a greater part of the other titles for lands in California. I fear you may have made use of the notarial copy sent; if not, you will of course apply for the copy of the one at Monterey. I, however, have hopes that your well known cleverness will have enabled you to find out this mistake, which would show itself, if you had applied for the document from Monterey; and at all events, you may be enabled to withdraw the one sent and substitute the other. Either, however, I take to be as good as the usual California titles, few of which have been officially delivered or sanctioned by the local authorities.

Another difficulty, however, occurs. A document was made out in the city of Mexico when I purchased the bars from Castillero, for the purpose of securing his consent and approval of the contract of habilitation; in this document is also inserted the grant of the two sitios, being an exact copy of what has been sent you, and directed to the *Governor*. All this will show you how that matter stands. And as I think this document may be of use to you, I send a copy of the whole, leaving you to your own good judgment to make such use of this document and of what I communicate, as you shall think proper.

I shall send the document alluded to in a separate cover to Probst, Smith & Co.

I am, my dear sir,
Yours, very truly,
ALEX. FORBES."

This letter is supposed to contain the first introduction into California of the useful theory of lodging and finding public documents.

On the 7th of January, 1850, Alexander Forbes writes another letter to James Alex. Forbes. It is long, but the interest is confined to the following extract:

> "By the tenor of your letters, I have hopes that you will have got rid of the villainous proceedings of Walkinshaw and his party.
>
> I hope the document which now goes up, (the habilitation, etc.) will be useful. Castillero is still somewhere in Lower California."

And again on the 3d of February, 1850:

> "Castillero has returned. * * * * I have every reason to believe that the documents you mention will be found in the city of Mexico, and as Mr. Castillero will return there, they will no doubt be procured; but we are at some loss to know what is exactly wanted, and I beg you will by the next steamer give a sketch of the documents you allude to, *particularly a description of the limits of the grant.* I think you must not have received information sent you of the existence of the grant of the two sitios directly to Castillero, and registered at Monterey; *nor am I sure that will mend the matter. In a few days, however, we will hear again from you, and act accordingly.*
>
> One last-resort I will mention—and it is with great reluctance that I do so—which is, that if the Berreyesas were *unreasonable and intractable*, or insist on the extension of their lands to our hacienda, the company will be justified in promoting the invalidation of their own rancho. * * * This I throw out for your consideration; *and I should think these people would do themselves no good in opposing you.* We think at present *it may be the best plan* to get an authenticated copy of the approval of the Mexican Government of the grant of three thousand varas given by the Alcalde on giving possession of the mine, as a doubt may be started as to whether the Alcalde, acting as the *Juez de Mineria*, (Judge of Mining,) had a right to make this grant; *yet, if approved before the possession of the country by the Americans*, there could be no doubt on the subject. This takes in our hacienda, and *unless opposed by the Berreyesas, would, I should think, settle the question.*
>
> Castillero *says such approval was given*, and that on his arrival in Mexico he will procure *a judicial copy* of it. This is *the plan* we shall adopt if we hear nothing from you *to alter* this resolution. Since writing the foregoing, I have looked over your private letter to Mr. Forbes, dated 18th October, and find you state the limits or boundaries, as follows:
>
> The boundaries must be expressed as joining on the north and north-west by lands of the Ranchos de San Vicente and de Los Capitancillos, and on the east, south and west by Serrania or 'tierras baldias.'
>
> Castillero is not certain of accomplishing this *latter plan*, and thinks the first, that is, the three thousand varas, the best."

James Alex. Forbes writes to Alex. Forbes, expressing his dissatisfaction with Castillero, and repeats his memorandum of the 27th May, 1849, making it clearer, by adding these words that I underscore: " Both these documents to be of the proper date, *and placed in the proper governmental custody in Mexico.*" Here is the letter in full:

" (Private.)

NEW ALMADEN, Feb. 26, 1850.

ALEXANDER FORBES, Esq.

My Dear Sir:—Your favor of the 3d instant, came duly to hand, and in answer to that part of it relating to the documents sent up to me in Nov., serving as titles to the property, I will again address you 'por seperado.'

I really did have more faith in the tact and ability of Castillero, to perceive the important object set forth in my memorandum of what was to be done nine months ago in Mexico by that eccentric individual, and that with the powerful influence he was to have exercised, by the efficient aid that was to be lent him, he would meet with no obstacle to the attainment of the important documents explained in that memorandum. But Castillero has deceived himself, for he thought that boundaries were not necessary, as I shall presently show you. He succeeded in obtaining the grant of two sitios to himself in the mining possession in *Santa Clara* while that very act of possession declares that the mine is situated on the lands of José R. Berreyesa, five leagues distant from Santa Clara, and you will at once perceive that such a discrepancy would not fail to attract the attention of the U. S. Land Commissioners and to put the case of the mine in great risk in the judicial ordeal to which its title will be subjected.

Without troubling you with what I have so many times written and explained to you verbally on the importance of the acquisition of the *document*, I will only say now what it *must* be and it is this:

1. A full and complete ratification of all the acts of the Alcalde of this jurisdiction in the possession of the mine.

2. A full and unconditional grant to Castillero of two sitios of land, covering that mining possession, expressing the boundaries stated by me in the memorandum I left with you in Tepic. Both these documents to be of the proper date, and placed in the proper governmental custody in Mexico. And

3. The necessary certified copies of them, duly authenticated by the American Minister in that capital, taken and sent to me at the earliest possible moment.

You will receive my advice of the 19th inst., regarding my views of not supplying W. with any quicksilver.

Yours sincerely,

JAS. ALEX. FORBES."

Barron, Forbes & Co. wrote to Jas. Alex. Forbes, of date, Tepic, March 2, 1850, to say that Mr. De La Torre, one of the partners of the New Almaden Company, after consulting with Mr. Barron, had consented to go up "to arrange respecting the future operations of this enterprise." Also, that "Mr. Barron and Don Andres Castillero, are about to proceed to the city of Mexico *and will attend to what you have recommended.*"

Then Alex. Forbes writes, Tepic, 1st March, 1850, to the same person, that " Mr. Barron and Castillero have gone off to Mexico and I wrote them to-day *respecting the document you know of, which if possible will be procured.* * * * *Let us have quicksilver* and all will be well."

The same to the same. " Tepic, 7th April 1850. Mr. Barron and Castillero have arrived in Mexico and *have every prospect of finding* the documents *you are aware of* and which will of course be forwarded as soon as possible."

They did find them just sixteen days afterward, as we discover from the following certificate:

"IT IS A COPY.
Mexico, April 23, 1850. O. MONASTERIO."

Which is appended to each and every of the separate writings which made up Exhibit C., which annexed to the petition of Andres Castillero was filed before the U. S. Board of Land Commissioners on the 30th day of September, A. D. 1852.

After this there are other letters, but they decline in interest.

" (Private.)

TEPIC, 6th June, 1850.

JAMES A. FORBES, Esq., Santa Clara.

My Dear Sir:—I had the pleasure to receive your letter of the 28th of April, by the steamer, but of course not in time to reply by the one from Panama, which arrived the day after that from San Francisco.

I remark what you say of Dr. Tobin and the cylinders, which has caused me some uneasiness, and I wait with anxiety to know how those he is putting up himself will succeed, which we expect to do by the steamer which ought to arrive at San Blas on the 10th inst.

I find that it has been deemed necessary to appoint an American citizen as manager of the mine, and am most happy to know that this meets with your approbation. This approval on your part, I am quite sure will be estimated as it deserves, and shows to those interested in this enterprise, that you do not hesitate to sacrifice your own private interests for the general benefit of the concern. For my own part, I feel most grateful and highly obliged, and the members of the house of Barron, Forbes & Co. express strongly the same feeling.

We are all convinced that whoever may be in the management of the New Almaden will receive the assistance of your knowledge and experience, and the company and proprietors cannot fail to be sensible of your services. It gives me great pleasure to hear from yourself as well as from M. La Torre, that the closest friendship had existed between you, and that both were animated by the same desire of making the mine productive. I had the pleasure to know Mr. Halleck at Monterey, and I think a better selection could not have been made. I think he is a gentleman with whom you will be much satisfied as manager of the mine, and who I have no doubt will be glad to avail himself of your experience in whatever may be new to him.

I am very happy to hear that Mr. Walkinshaw has been settled with, and that all annoyance from that or any other quarter has ceased.

I shall avoid saying anything respecting the Berreyesa affair till the letters by the steamer come to hand, which will no doubt confirm the arrangement between them and Mr. La Torre.

I am, my dear sir,

Yours truly,

A. FORBES."

We gather that they have no longer use for the man who sketched their title for them as far back as May 5th, 1847, and that James Alex. Forbes is to be discharged, and Mr. Halleck to be honored with the succession, because "it has been deemed necessary to appoint *an American citizen* as manager of the mine." Mr. Alex. Forbes says, "I had the pleasure to know Mr. Halleck at Monterey, and I think a better selection could not have been made." This was when Mr. Halleck was Secretary of State, in the days of the military government of California.

The following shows the amiable feelings of the New Almaden Company toward their former friend, but more recent adversary, the late Judge of the U. S. District Court for the southern district of California; and also gives us the results of Mr. Eustace Barron's researches into California land titles:

"TEPIC, 10th January, 1851.

J. A. FORBES, Esq., Santa Clara.

My Dear Sir:—I was duly favored with your obliging letters of the 12th and 29th of Nov., in which you mention that I had stated some disappointment by your not writing, and allude to some other matters I have no recollection of. I have always reckoned upon you as a friend, and am well convinced that you have every disposition to promote the interests of the mining negotiation as much as in your power, which William Barron confirms in his late letters to the house.

We have nothing to fear from the lawyer Jones should he come here, but I understand he has gone to the Sandwich Islands, and is likely to make a journey to the other world. Mr. Barron has caused a most minute examination to be made in the archives in the city of Mexico, the result of which has been, that neither Alvarado nor Micheltorena were authorized to grant titles for lands in California, nor does there appear to have been any approval or confirmation of such grants as they took upon themselves to grant—so that the title to Berreyesa's land, either by Alvarado or Micheltorena, if opposition is made, is valueless.

This being the case, few of the California titles would be good if determined by the vigorous application of the Mexican law. Mr. Barron has procured documents to confirm this view of the case, but we have resolved not to make use of such documents except in our own defense, as we do not wish to injure any one; but in the case of the Berreyesas we are compelled to use all means in our power to counteract their proceedings or those of their abettors if they persist in their late proceedings.

If I was not an interested party I would recommend to them to secure their rancho by silence, for I am well assured that by adopting hostile measures against us they may lose it altogether. The Rothschilds have a large quantity of quicksilver on hand, and the miners thought that by competition between them and New Almaden it might come down greatly in price, and kept off from purchasing, but an agreement has been come to between both parties, by which the competition is done away with, and the price will be maintained at a fair rate.

In consequence however of the expectations of the miners, few sales have been made, and little of the proceeds of sales realized, but from the arrangement alluded to it is hoped that the sales will soon be considerable. You will find by B., F. & Co.'s letter that your wishes have been complied with in debiting you with the one thousand seven hundred dollars in the account of your share of the sales of quicksilver. With best respects to Mrs. Forbes and your family.

I am, my dear sir, yours very truly,

ALEX. FORBES."

This closes my inquiry.

The New Almaden title without papers is a naked occupancy in its inception. Another Indian might have entered the cave and dug by the side of the first; another operator with try-pots might have set himself down by the creek, and extracted quicksilver within three feet of Chard. There was no mining right of square miles in extent, nor colonization right of square leagues in extent, nor any other known quality or color of right to any portion of land, which furnished subject matter for the operation of guarantees of title. Father Real, Chard and his Indians had the possession which travelers hold of the spot on which they encamp for the night, and on the morrow may be occupied by the next wayfarer. It was nothing.

The possession of Walkinshaw and Forbes was a fraudulent seizure by alien enemies in time of war, and of a nature which could confer no right if it had been taken with honest intent by an American citizen.

The title papers, valueless if genuine, are all forgeries, executed at different times and places, of which the forgers were the founders of the New Almaden Company. Eustace Barron, one of these, is reputed to be the largest shareholder, and from the city of Mexico is now directing the maneuvers of the association in the pending controversy with the United States.

Under these pretenses, the New Almaden Company have in eight years, taken from the soil of California eight millions of dollars.

The members of the New Almaden Company are Eustace Barron of the city of Mexico, Martinez Escandon, E. W. Barron, Wm. Forbes, the heirs of Walkinshaw, John Parrott, J. R. Bolton, Wm. E. Barron, and it is said, some English and South American mercantile houses. All of these persons are non-resident aliens but three—which three assert between them ownership to but two twenty-fourths in the New Almaden Mine.

Wm. E. Barron is an English-Mexican and resides in San Francisco. He is a partner in the house of Bolton, Barron & Co., who act as agents for the New Almaden Company in commercial business; he is the local manager of the prosecution of the company's claim before the United States District Court.

John Parrott was born an American, but has passed in trade in Mexico, those years of his life in which the commercial character receives its strongest impressions. He has also held the office of American Consul at Mazaltan. It may be otherwise, in other parts of the world, and Mr. Parrott may have been an exception there, but the experience of too many luckless Americans has taught us that on the western coast of Mexico the trader who has the keeping of our consular flag regards it merely as a part of his trading capital. The mode of making it available is very simple. It is only to sacrifice his countrymen to his customers.

James R. Bolton, also, was born an American, received his education in Mexico, and once in the absence of Parrott acted as American Consul at Mazaltan. He is supposed to be the man whose name occurs in the reports of the Supreme Court of the United States in the case of Yecker, Torre & Co., against Captain Montgomery of the American Navy, for unlawfully capturing the American ship Admittance during the Mexican war. The ship was condemned for trading with the enemy. In the evidence, is a letter from the house of Yecker, Torre & Co., to the Master of the Admittance, persuading him to go into San Blas, and assuring him, on the word of Mr. Bolton, that he could do so without risk. If this was true, Mr. Bolton was encouraging the trade of the enemy, giving him aid and comfort; and engaged in that which contained all the elements of treason and for which a man ought in justice to be hung.

Such is the New Almaden case—such the New Almaden Company, who plead improvements on land to justify a breach of public morals; and because they are arrested in a career of profitable fraud, stun the public ear with their clamorous lamentations, and endeavor to stifle the Judges with newspapers.

The public will render an unhesitating judgment against the criminals, unembarrassed for a moment by the fact that the crime lies at the bottom of a great trade, and with its punishment may be seriously involved the chief material interest of the State.

The public may then turn the opportunity to its profit. It may dwell upon the fabulous wealth which has been the prize, the eager greed with which it has been pursued, the singularity of the plan adopted to secure it—yet the gross inadequacy of the measures and grosser ignorance manifested in their execution—and from this veritable Californian prodigy, learn the chaotic nature of the times through which we have been passing.

And the Government of the United States may learn the inefficiency of its machinery which did not put a stop to this plunder until it had amounted to more than half the sum stipulated in the treaty as the price of California and New Mexico together. Let it learn, also, its relations to that State at whose capital this knot of conspirators make their head-quarters, all of whose public offices they assuredly use at pleasure, and the very highest of whose functionaries, they say, are devoted to their service.

My business is not to moralize. I have sought fairly to relate and explain the New Almaden case, which the newspaper commentators seem unwilling or unable to do. Much I have left out on both sides, which I deemed not material to an understanding of its merits. If I have rendered the case intelligible, I have accomplished all my purpose. In any event, I shall recur to it no more.

BURGHER.

SAN FRANCISCO, January 3, 1859.

4

In the United States District Court,

NORTHERN DISTRICT OF CALIFORNIA.

THE UNITED STATES,
vs.
ANDRES CASTILLERO.
ON CROSS APPEAL.

Claim for the Mine and Lands of New Almaden

ARGUMENT

OF

HON. J. P. BENJAMIN

DELIVERED ON THE

24th, 25th and 26th October, and 5th November, 1860,

IN REPLY TO THE GOVERNMENT'S SPECIAL COUNSEL.

SAN FRANCISCO:
COMMERCIAL STEAM BOOK AND JOB PRINTING ESTABLISHMENT.
1860.

NOTE.

The following Argument is printed from the notes of Messrs. Sumner & Cutter, who reported it. It is due to MR. BENJAMIN to say that he had no opportunity to revise it before leaving California.

ARGUMENT.

WEDNESDAY, Oct. 24th, 1860.

MR. BENJAMIN said:—

May it please your Honors: It seems to me convenient in opening this case, to ask your Honors to recur in memory to the condition of the subject-matter of this litigation at the date of the breaking out of hostilities between the United States and Mexico in the year 1846. I desire first to call the attention of the Court to so much of the testimony contained in the Transcript of this case, as will satisfy the Court in relation to the knowledge that had been acquired by the officers of the Government of the United States in relation to the fact of the possession and ownership of this mine prior to the breaking out of the war.

On the 13th of May, 1846, the Congress of the United States declared by resolution, and the President of the United States announced by proclamation to the people of the United States, that war existed between the United States and Mexico, by virtue of the commencement of actual hostilities on the part of the Republic of Mexico.

On the 7th of July, 1846, according to the established jurisprudence of the Supreme Court of the United States, recognized also by Congress, the conquest of California was effected by proclamation made of that conquest by the forces of the United States.

On the 2d of February, 1848, the war was closed by the Treaty of Peace; and by that treaty California, previously a conquered province, became a ceded territory—part of the domain of the United States.

Prior to the breaking out of the war, the Government of the United States had public officers in California, whose duty it was to report to the Departments at Washington the condition of things as they existed in this (then) Mexican Province. I propose to call the attention of the Court to what was known by the Government of the United States, through its officers, in relation to the possession and ownership of this mine early in the year 1846, and prior to the breaking out of any hostilities whatever.

On page 2678 of this record, we have the testimony of a man of the highest distinction, whose name is known not only from one end of our own Republic to the other, but to every civilized nation on earth. I refer to John C. Fremont. He had crossed the continent under the orders of his Government. He came hither for the purpose of ascertaining the most direct route across the continent. He came for the purpose of examining the country to which the jurisdiction of the United States then extended, and of ascertaining its adaptation to the purposes of habitation, occupation, cultivation, and its general value to the country.

In January, 1846, in pursuit of information to be communicated to his Government in relation to everything that could interest his country, Capt. Fremont visited the New Almaden Mine; and there he found it in the possession of Andres Castillero, as owner. He found Castillero working the mine. He saw the piles of ore. He became impressed with the great value of the mine. He, and a gentleman who accompanied him, each spoke to Castillero in relation to the purchase of the mine, and the propositions of both were by Castillero coldly received. I state this merely *en passant*, in answer to a remark which fell from the lips of the special counsel for the Government the other day: that Andres Castillero had made a false statement to the Government of Mexico, when he returned and said to the Junta that foreign houses wanted an interest in this mine, but that he had reserved all of its benefits for his own country.

Fremont in his examination says:

> I think no one went with me to the mine but Hinckley; arrived there, I should think, about noon; at the mine Capt. Hinckley introduced me to Mr. Castillero, the owner of the mine, who showed me about; showed me the excavation from whence he

had the ore, and showed me two or three heaps of ore, and gave me some specimens, some of which I brought away. Before visiting the mine, Captain Leidesdorff and myself had had some conversation together with regard to purchasing the mine. When there, I spoke slightly with Castillero on the subject, and Mr. Hinckley also said something to him, at greater length, tending to the same end; but Castillero was not at all disposed to converse about selling. At this time, I think Castillero was engaged in building a house below in the valley, to be used for the occupation of himself or workmen.

He also went through the process roughly of extracting the quicksilver from the ore, by putting some on red-hot iron and collecting the fumes in a cup. We remained there perhaps some two hours."

This is not the whole of the statement of the visit of Capt. Fremont.

Captain Fremont on that visit acquired information which he subsequently put to practical purposes. He had a conversation with Castillero about the means by which mines were acquired. Castillero told him that he had acquired his mine by denouncement. He told him what a denouncement was; how it was made; and gave Fremont the information upon which that American officer, years later, denounced the mines upon his own property in Mariposa.

I know not whether this testimony is to be contradicted or not. I have listened to the arguments upon the other side of this case until sometimes I was tempted to doubt my own existence by reason of the persistent denial of facts that appear to me plain as the noon-day sun. We have not been favored by any comment by brother Randolph upon this testimony of Captain Fremont; and I am not aware whether his testimony is to be attacked or his character impeached—I hope neither.

Mr. Randolph, (interrupting.) No, sir. Col. Fremont is my personal friend.

Mr. Benjamin.—He is your personal friend. Very well, then. May it please the Court, we have got some common starting point now. We have got one witness, whom we can all believe. Captain Fremont is to be believed! That was the condition of the mine then.

But these things rest not upon the frail tenure of human memory. Captain Fremont was not the only officer of the United States that knew of the existence of this mine. There was another active, intelligent, competent public officer, whose duty it was, under instructions of the Government, to examine into and report upon these things.

Thomas O. Larkin, United States Consul, did examine, did make a report; and that report is spread upon this Transcript, as taken from the archives of the Government of the United States in the City of Washington.

Your Honors will find on page 2657, extracts from the correspondence in the Department of State, certified by Lewis Cass. This certificate bears date 28th November, 1859. The documents there presented are mere extracts from letters which your Honors will find at length on page 2669, and following. I read from a letter addressed by Thomas O. Larkin to James Buchanan, Secretary of State:

CONSULATE OF THE UNITED STATES OF AMERICA,
Monterey, California, May 4th, 1846.

SIR: The undersigned has the honor to forward to the Department, the following information respecting the mines of California, most of them discovered within six or nine months; for many years previous to this the inhabitants have supposed the places in question contained metal of some kind. Ninety miles (by sea) south of San Diego, there are some very extensive copper mines, belonging to Don Juan Bandini; the undersigned is informed by D. José Rafaël Gonzales, that on his rancho, sixty or eighty miles south of Monterey, there are coal mines; at San Pablo, in the Bay of San Francisco, there are others. At the Mission of San Juan, twenty-five miles north of Monterey, there are sulphur beds, or mines; fifty to eighty miles north of Monterey, there is said to be several silver mines. There are several places throughout California where the people obtain a bituminous pitch to cover the roofs of their houses; some make a floor of it by mixing earth with it. At these places, rabbits, squirrels and birds often get half-buried in the pitch, and some die; even horses and horned cattle are lost there. A few miles north of Santa Barbara, the sea for several miles upon the coast is colored by the pitch oozing from the banks. Five or six miles from the town of San José, and near the Mission of Santa Clara, there are mountains with veins of quicksilver ore, discovered by Don Andres Castillero, of

> Mexico, in 1845, which the undersigned has twice seen produce twenty per cent. of pure quicksilver, by simply putting the pounded rock in an old gun-barrel, one end placed in the fire, the other end in a pot of water for the vapor to fall into, which immediately becomes condensed; the metal was then strained through a silk handkerchief. The red ore produces far better than the yellow. There appears no end to the production of the metal from these mountains. Working of quicksilver is but now commenced under great disadvantages from not having any of the materials generally used in extracting that metal.

So, then, prior to the declaration of war this mine was not only possessed but it was *owned*, as the Government of the United States was informed, by a Mexican. And it was not only so owned, but it was worked, although the working was imperfect. The Consul had twice seen the work. He describes it. The accuracy of the description is unchallenged. The fact is not controverted. It comes from under the very eye of the Attorney General [Black], who hoped that it would be impossible for us to get our proofs in this case.

This is not all that is contained in this letter. The letter tells your Honors what the laws and customs of Mexico were understood to be in California at that time, in relation to the acquiring of mines. Mr. Larkin goes on to say:

> By the laws and customs of Mexico, respecting mining, every person or company, foreign or native, can present themselves to the nearest authorities and denounce any unworked mine; the authorities will then, after the proper formalities, put the denouncer in possession of a certain part of it, or all, which is, I believe, according to its extent; the possessor must hereafter occupy and work his mine, or some other may denounce against him; in all cases the Government claims a certain proportion of the products; up to the present time there are few or no persons in California with sufficient energy and capital to carry on mining, although a Mexican officer of the army, a padre and a native of New York are, on a very small scale, extracting quicksilver from the San José mine.

Now, who was this "Mexican officer"? Who was this "Padre"? Who was this "native of New York"? The Mexican officer was Andres Castillero. The padre was Padre Real. The native of New York was Chard. And we make our acknowledgments on this, as we shall have occasion to do in several other instances, to the astute and persevering special counsel for the Government, who brought out the fact from Chard on his cross-examination, that he was a native of New York; thus making his testimony correspond precisely with the archives of the United States Consul at Monterey, which at that time we did not have in our power.

Then, may it please your Honors, without reference to another syllable of testimony in this case, I have secured through our Government officers and Government archives, conclusive proof of the fact that so far as the Government of the United States was concerned, it had not merely the constructive notice which the law would imply, but it had actual notice, brought home to it prior to the declaration of war, that this mine was private property, claimed, possessed and worked by private owners.

But this is not all. From all parts of the world the evidence of the facts sought to be controverted in this case rises up before us. From the distant Sandwich Islands comes back the echo, at that date, of this discovery and ownership, and of the means by which the ownership was acquired.

At page 2223, your Honors have an extract from *The Polynesian*, printed in the Sandwich Islands on the 25th of July, 1846.

And what does that contain? A letter written by this same Consul, under date of 24th of June of that year, addressed to the Minister of Finance of that Government, giving him an account of this discovery—of the denouncement and ownership of the mine.

First, from this *Polynesian* is extracted a letter of G. P. Judd, the Minister of Finance, to the editor of *The Polynesian*, inclosing Thomas O. Larkin's letter.

Now, here is Mr. Larkin's letter, dated "24th June, 1846;" it is addressed to G. P. Judd, Esq.:

CONSULATE OF THE UNITED STATES OF AMERICA,
Port of Monterey, California, July 2, 1846.

SIR:—I have the pleasure of forwarding to you a specimen of California quicksilver ore, from a mine seventy miles north of Monterey, and ten miles from the Pueblo of José, discovered in 1845 to have quicksilver in it. The place was known for eighteen years, and supposed by the Californians to be a silver mine; they, in 1828, having with some foreign quicksilver extracted the other metal. In 1845, a Mexican being in the vicinity, heard that the mountains contained rock different from any other, went to examine it, and immediately denounced the place before the nearest Alcalde, and then made known what it contained.

The owner, with a priest, in a small and imperfect manner has commenced extracting the metal. The mine is in the top of a steep mountain, a mile or more from the plain, to which it is brought down on a mule, piled up with a whaler's pot covered over it, well cemented with clay, some six or eight cords of fire-wood placed over and fired; in fourteen or sixteen hours the quicksilver is found below in a small wooden tank of water, though much of the rock is thrown away afterwards that has not been well heated. They obtain about fifteen per cent. of the metal.

The receipt of that letter in the Sandwich Islands is known by the party who edited and published this paper [*The Polynesian*]. His testimony is unimpeached. The fact of that announcement appearing on that day in that paper, is proved by a gentleman of San Francisco, who read it, and had his attention particularly attracted to it. The fact of the receipt of the letter by Mr. Judd is apparent on the face of this Transcript, by the production made by young Larkin from his father's papers, of Judd's reply—having Judd's sign-manual affixed. And that reply is proven.

MR. RANDOLPH—Of what date is that?

MR. BENJAMIN—This is dated on the 20th of July, 1846. It is produced by young Larkin from among the papers found after his father's death, and the signature of Mr. Judd is proven by those intimate with him—men who had lived with him.

This letter gives the name of the vessel which brought Mr. Larkin's letter:

TREASURY OFFICE, HONOLULU,
Oahu, 20th July, 1846.

SIR: I have the honor to acknowledge receipt of your letter per bark "Angola," of the 24th ulto., together with a specimen of California quicksilver ore.

I thank you sincerely for your kind attention in sending me the specimen, as well as the very interesting particulars relative to the mine.

I am happy in thinking that this is but the beginning of discoveries which will tend to make California a valuable country.

My onerous duties as His Majesty's Minister of Finance, will not permit me to assay the ore in order to test its quality, as I might do if still in practice as a medical man.

I have sent your letter to the editor of the "Polynesian" for insertion, and have no doubt it will be found as interesting to others as it has been to me.

I beg to assure you that I shall always be happy to receive information on any subject of interest connected with California, whenever it may suit your convenience to favor me.

I am, sir, your obedient servant,

G. P. JUDD.

Thomas O. Larkin, Esq.,
U. S. Consul, &c., &c., &c., Monterey.

[Endorsed.]
G. P. Judd, July 20th, 1846, S. Islands.

Now, may it please the Court, in the year 1860 we are told that this mine never was denounced; that all our proofs to the effect that the mine ever was denounced are falsehoods; that the papers of the denouncement are forgeries; that the witnesses who prove the denouncement and the papers are perjurers.

And this comes from the Government that holds in its own archives the proof to the contrary. And this comes from the Attorney-General of the United States who, when implored, besought in every possible manner by the claimants to send and satisfy himself by inspection of the records in this country and Mexico—to take his own commissioners and send them out at our expense, and satisfy himself directly of the justice and equity of our claims—utterly refused to do so, and contented himself with denouncing them as forgeries.

He answers to all our appeals of this nature: "I will not satisfy myself; I will not look; I will look at nothing. I say it is forgery, and I will not assist in procuring any evidence which may tend to prove the contrary."

Fool! Fool!

"Truth crushed to earth will rise again."

All the efforts of men cannot strangle her. Strangle her in San Francisco, she reappears in the Sandwich Islands. Choke her there, and, lo! she is under your very eyes in the archives at Washington. She permeates the air; she is in the atmosphere you breathe. As well might man endeavor to destroy the Almighty as to destroy his essence, the truth. And yet this is what the United States is trying to do; seeking, as the assistant of a band of unscrupulous speculators, to acquire a valuable property developed by the capital and labor of others; undertaking to say that that does not belong to us which they were thoroughly and officially informed did belong to us before the United States Government had an interest in one foot of ground in California.

Now, may it please your Honors, having shown you that this mine was private property to the knowledge of our Government before the declaration of war, I proceed to the examination of some of the testimony in this case that puts that fact beyond the possibility of human controversy. I do not mean to say that it cannot be denied. I do not mean to say that no human being can assert the contrary; because, with all due respect to my brother Randolph, I must say to him, that his power of assertion exceeds anything that I ever imagined could exist in a human being; and having now seen and confessed that the contrary can be *asserted*, I venture to say that it cannot be *proved* to the satisfaction of any intelligent, disinterested mind.

I will proceed now to take up what is disclosed in this record in relation to the action of Andres Castillero, from the time he found his mine to the date of his departure from California—to which he has never returned.

He finds his mine in November, 1845; leaves California in April, 1846, and has never returned.

Now, the first point to which I wish to call your Honor's attention is this: Years and years after the title of this property claimed by us had been presented to the inspection of the United States Land Commissioners, with such evidence of title as was sufficient to satisfy them *prima facie* of our right to the mine, not one syllable was breathed against or in question of this denouncement, or of the truth of these documents. It was long subsequent to that period that a controversy arose on the allegation made that these papers were forged, ante-dated and fraudulent. Serious charges, requiring prompt repulse.

For this purpose, search was directed to be made in the archives of Mexico, and there was found what we had never seen before; that is to say, that prior to the date of the grant made by the Mexican Government to us, there had been a short correspondence between the President of the Republic and the Governor of California—a thing never dreamed of before. That correspondence was brought here. And now, if your Honors will refer to page 1805, you will see what it was.

On the 13th of February, 1846, the Governor of California communicated to the President of Mexico, through the Minister of Relations, the fact of the existence of this mine, of its denouncement, and of the joy experienced by the public officers in California by reason of so happy a discovery. And the announcement was made by inclosing to the President of Mexico the letter which the Governor of California had received from Andres Castillero, making the announcement to him. This letter of Andres Castillero, which I will first read to the Court, is dated on the 10th of December, 1845, and will be found at the foot of the page which I have just given [1805]:

To His Excellency, Governor Pio Pico:

MISSION OF SANTA CLARA,
10th December, 1845.

My Most Esteemed Friend:—I send you a sample of the quicksilver I have taken out in the presence of many witnesses. The mine has been denounced by me, and between a few we have formed a company. I am sure that yourself and the Departmental Junta will appreciate a discovery which will form the riches of the country, and we wish that the vacant lands near to our works be conceded to us, to cut wood, with the order of possession.

There is such an abundance of quicksilver, that eight arrobas of ore gave one of metal; and, in my belief, there is much, and a great extraction can be made.

I will also thank you to order that possession be given to me of the Island of Santa Cruz, which was granted to me by the Supreme, at the same time as to the Messrs. Carrillos; the cattle which is to be shipped, is already bought, and Don Anastacio Carrillo can give me the possession.

May you continue in good health, and order your wishes to your friend, who esteems you, and regards your orders.

ANDRES CASTILLERO.

P. S.—My kind regards to my friends Covarrubias and Valle; and to Mr. Hijar, why he does not reply to the three letters I have sent him, giving him also my remembrances.

Now, this letter may be said to constitute the first action of Castillero, after the denouncement of this mine. It is barely a week afterwards. What does he propose then? He says: "I have now denounced the mine; I want a grant of land close to it, on which to cut wood; I want that from this Department; I want it from you, the Governor of California. I want a title here. I also send to you my title to the Island of Santa Cruz, and beg that you will order me to be put in possessiòn.

Now, this letter was transmitted by Governor Pico to the President of Mexico, through the Minister of Relations, on the 13th of February, 1846, in these words:

OFFICE OF THE DEPARTMENT
OF CALIFORNIAS.

April 6th, 1846.
Received and noted with satisfaction, and with respect to the other matters contained in the letter, let him inform attentively what he may think fit.
[Rubric.]

Excellent Sir:—By the accompanying letter of Señor Don Andres Castillero, which I respectfully transmit to your Excellency, original, you will be informed of the important discovery made in this Department of a quicksilver mine. In consequence thereof, I avail myself of the good opportunity to send to your Excellency, by the Commissioner of this Government, Don José Maria Covarrubias, the quicksilver, which, as a sample, was sent to me by Señor Castillero, and to which he refers in the above mentioned letter.

With such a motive, I beg your Excellency will be pleased to put this in the superior knowledge of his Excellency the President, showing him the quicksilver which said mine produces, so that his Excellency may be made aware and satisfied at so happy a discovery.

I repeat anew to your Excellency the assurances of my consideration and respect.

God and Liberty. Angeles, February 13th, 1846.

PIO PICO.

To His Excellency, the Minister
of Exterior Relations.

Upon the margin of this letter is the order of the Minister of Relations in reference to a reply. This will be found on page 1805. I will call your Honor's attention to this marginal reference, particularly, because it is an answer to the whole tirade about the "Hannah."

This is the answering order of the President of Mexico, to be sent to the Governor of California. The answer is accordingly sent on the same day. See the next page of the Transcript, page 1806:

Excellent Sir:—His Excellency, the President *ad interim*, has seen with satisfaction by the letter from Señor Castillero, which your Excellency sent me with your official communication of the 13th of February last, the important discovery which has been made of a mine of quicksilver in that Department. His Excellency having seen the sample of that ingredient cited in said letter, and which your Excellency sent me by Don José Maria Covarrubias, I have the honor to say this to you by Supreme order in reply to the said communication, and that with respect to the other matters referred to in Señor Castillero's letter, that Government will please report attentively what it may deem convenient.

D., April 6th, 1846.

To His Excellency, the Governor of the
Department of Californias, Port of Los Angeles.

Now, a very remarkable fact occurred. When this paper came back from Mexico—and this was not until January, 1859—the question arose: Where is the original of this correspondence, that emanates from California, goes to Mexico, and comes back here from Mexico, in 1860? Nobody had ever heard of any such correspondence here. The parties claimant employed Mr. Hopkins, the keeper of the archives, to examine the early California records and find the original of these communications. Did they exist in California? No man knew of it. Mr. Hopkins' testimony is here on file. He swears that at the request of the parties claimant, he searched and found the original. I will read his testimony.

Now, if your Honor, will look at page 3068, you will find what Mr. Hopkins tells us about the California archives, and how this paper came to be found here. They were not found until last year, and not until our attention [illegible] been directed to them by the copy sent here from the City of Mexico:

> I hereby certify, that I am, and have been for the last five years, in charge of the Spanish archives in the office of the United States Surveyor General for California; that during this time, I have, from time to time, been employed by Messrs. Halleck, Peachy & Billings, to search said archives for any document in relation to the discovery and development, by one Andres Castillero, of the quicksilver mine of New Almaden, and generally to search for any evidence tending directly or indirectly to sustain the title of said Castillero to said quicksilver mine; that in the prosecution of said searches I have found—
>
> *First.* A letter from Andres Castillero to Governor Pio Pico, dated Monterey, December 15th, 1845, saying: That at the distance of thirty leagues from Monterey, he had discovered a mineral of azogue of the best quality, etc., etc. This letter was first seen by me about the month of May, 1856.
>
> *Second.* The *borrador* of a letter from Governor Pio Pico to the Minister of Exterior Relations in Mexico, dated February 13th, 1846 (Angeles), in relation to the discovery by Andres Castillero of a quicksilver mine, forwarding at the same time a letter of Castillero in relation to the matter, together with a sample of the ore, which he asks may be presented to the President; the *borrador* is in the handwriting of Agustin Olvera, and was first discovered by me in the early part of 1859.

Now we are on the track. Olvera is brought in. I need not say who he is. I do not know him personally. I know him by reputation. I have been told by those familiarly acquainted with the early native California population, that he is a gentleman of the highest respectability; that he was admired as well as respected by his fellow-citizens. I have been told that he was selected by them as one of the Presidential electors at the last general election; and I judge, that from the granite of his character, the attacks of the special counsel for the Government would have recoiled, defeated. I think he ventured to put to him no cross-questions.

MR. RANDOLPH.—You will observe that I pursued the same course in regard to other witnesses of the same class. There was no need of cross-examining such witnesses.

Mr. Benjamin.—Ah! now I understand. The special counsel for the Government never cross-examines unless he thinks it will be for his benefit. And this is all proper and right; for if you cannot gain anything by cross-examining never attempt it.

Olvera's testimony is found at page 2609. These letters are presented to him. He is asked if he wrote them; or if he knows in whose handwriting they are.

At page 2610, he says—speaking first of this rough draft:

> Look at this document, produced from the office of the United States Surveyor General of California, purporting to be a *borrador*, or rough draft of a communication, addressed on the 13th February, 1846, to the Minister of Exterior Relations of Mexico, in which is made known to him the discovery of a quicksilver mine in California, a copy of which *borrador* is on file in this case, marked "Exhibit Pio Pico No. 1, W. H. C." and state in whose handwriting is said document?

[The counsel for the United States admits that said document is found on file among the archives in the office of the United States Surveyor General.]

> A. It is in my own handwriting.
> Q. When was it written?
> A. I don't know; but I suppose I wrote it on the day it bears date.

Now, observe that this testimony was taken in 1859, in relation to a letter written thirteen years before, found in the archives in this city, by the keeper, who is an officer of the United States, and identified as in the handwriting of Olvera. He does not remember the date on which it was written, but he supposes that it was written on the day on which it bears date.

> Q. How came you to write that *borrador?*
> A. Because I was Secretary of the Assembly at that time; and it was also my duty to assist in the office of the Governor's Secretary, when called upon, and I suppose that the Governor directed me to write it.

He says that it is a copy of the *borrador* written by himself. The letter of Castillero was sent by Pico.

So that here we have this irrepressible TRUTH rising up again; rising up in despite of all opposing efforts of the Government through the Attorney General; rising up thirteen years afterwards to confound the men engaged in the conspiracy formed against the owners of this property.

But this was not all that was found here in the archives. What else did Mr. Hopkins find?

He found, also, a letter from Manuel Castro, page 3068:

> *Third.* A letter from Manuel Castro, Prefect of the Second District, to the Secretary of State, dated Monterey, December 31st, 1845; in relation to the denouncement and working by Andres Castillero of a quicksilver mine in the jurisdiction of San José, and saying that he has made a petition for two square leagues of land in the immediate neighborhood of the same. This document was also discovered by me about the beginning of the year 1859.

Now, let us look at these letters; or, in other words, let us look for a moment at the California General Archives referred to in my index, at page 9; from which it will appear that they are to be found at page 2546 of the Transcript.

We find at page 2550, Manuel Castro's letter, directed to the Governor. This is dated on the 31st of December, 1845:

> Prefecture of the 2d District:—Don Andres Castillero has denounced and is now working a quicksilver mine which was found in the jurisdiction of the town of San José Guadalupe, on private property; and this prefecture which interests itself in the encouragement of all branches of industry in the department, felicitates your Excellency, and through you the most excellent Señor Governor of the department, upon so beneficent a discovery; inclosing also a petition which the said Señor Castillero makes, soliciting a piece of land of two square leagues which is adjacent to the said mine, so that your Excellency, if you think fit, order what may be proper, so that this prefecture may be able to make the necessary reports.
>
> Please accept my esteem and distinguished consideration.
>
> God and Liberty,
>
> MANUEL CASTRO.
>
> Monterey, December 31, 1845.

For Secretary of Departmental Government.

Now, what is the letter of Andres Castillero, inclosed in this letter of the Prefect to the Government? Your Honors will find it at page 2552:

Excellent Señor Governor, Don Pio Pico.

MONTEREY, December 15, 1845.

Esteemed Friend whom I value:—I have the grateful satisfaction of informing you, if you have not received my other letter through the Prefecture, that at thirty leagues from here, in the jurisdiction of the town of San José Guadalupe, I have discovered a mine of quicksilver of the best quality, eight arrobas of ore having yielded one arroba of liquid metal.

Señor Don Pablo Noriega, the bearer, will present to you a petition from me, which is based upon an order (disposicion) of the Supreme Government, asking that you order that possession be given me of the Island of Santa Cruz, the Messrs. Carrillo having already chosen that of Santa Rosa, which impediment prevented my occupying it, but now I have already purchased the cattle to occupy it, and I will be obliged by your sending me by said gentleman the title and order of possession.

May you continue in good health. Salute Messrs. Valle and Covarrubias for me, and order your affectionate friend who kisses your hand.

ANDRES CASTILLERO.

What can be answered to all this? The archives are searched and nothing was found till 1859. Why? Because what Mr. Hopkins was looking for were formal petitions to the Governor, and acts of the Departmental Assembly in relation to the petition for two leagues. He was not looking out for correspondence with the President of Mexico not known to exist, and accordingly did not find it.

But when, in 1859, we return from the City of Mexico with a copy of the espediente in the Department there, showing that such a correspondence as this had occurred, his attention was directed to what had taken place in Mexico; and at once he finds these originals in the archives here.

Did we put them there? Did he put them there? How came they there? Is the Surveyor General—is anybody in that office—engaged in fabricating titles, and putting them there while Mr. Hopkins is searching for them, and in order that Mr. Hopkins may find them? How came they there? All these papers, we are told, are forgeries and frauds. This we hear, not as proven by anything in the record, but by repeated assertions.

And here allow me to say, that one would be almost inclined to believe that by some rule of this Court causes are permitted to be argued on the assertions of counsel, and not by reference to the proof in the record. Then, to the assertion, that not a solitary paper presented here, by us, is true and genuine, we oppose our denial. And if your Honors establish such a rule, how are you to determine whose assertions are true? I take for granted that you have established such a rule, for we have heard statement after statement—that men were perjurers, that documents were forged—all made with perfect conviction by my brother Randolph, but without a solitary word in the entire Transcript to back these assertions.

I heard brother Randolph, the other day, accuse a poor man who came into Court, compelled by the process of your Honors, to testify that he knew certain books, because it was his misfortune years ago to be a clerk in the Consul's office, of perjury and forgery. I say that man was denounced as a perjurer and forger because he stated that he knew certain books. Yet he had written in those books, and knew them to be genuine. Not a syllable in the record, not a word in the Transcript, to impeach the character of this gentleman; and for aught the Court knows, he stands as high in point of reputation for personal integrity as the humble individual who addresses you, or even the special counsel for the Government. There is nothing in the record to the contrary; yet that man is denounced in the name of the Government by my brother Randolph, over and over again, in a volume of words; and by their repetition in distant countries, his family, his relations, his friends, will shrink back with a blush of shame whenever his name is pronounced, because they could not believe that he would be so denounced by an officer of the Government when there was not a syllable of testimony on which to lay the foundation for such charges. This is cruel, cruel indeed!

Now, may it please your Honors, Andres Castillero is still in California. Let us see if there is any other archive in California, establishing beyond contradiction the existence of this denouncement and registry—independent, I mean, of the papers themselves produced to the Court.

Let me refer the Court to some of the archives in San José. Look at page 807 of the Transcript. By the Mexican law the outgoing officer takes a receipt from the incoming officer of all the former delivers up to the latter.

On the first day of January, 1846, or the second day rather, Antonio Maria Pico ceased to be the officer properly charged with the keeping of the archives of San José, and Pedro Chabolla took his place; and on that day, in compliance with law, an inventory was made of everything delivered up by the outgoing to the incoming officer, and the latter gave his receipt therefor. That inventory is produced at page 807 of the Transcript. It is there in Spanish. It comprehends everything in the line of "papers" existing in the Alcalde's office. Nothing is omitted, everything is enumerated, even to the old tin candlestick, to the piece of board used in the office for publishing orders, to an old padlock, of which the key was lost—everything delivered up by the old Alcalde is put down in the inventory and receipted for by the new officer. Now, here is the inventory of what was delivered up on the 2d January, 1846; and if your Honors will look towards the bottom of page 807, you will find in Spanish, though you will readily understand the meaning of the words:

1. *Posecion de la Mina de Sta. Clara á D. Andres Castillero.*

The old Alcalde, on the 2d January, 1846, delivered to the new one "the record of the possession given to Don Andres Castillero of the mine of Santa Clara."

The possession had been given but two or three days before. So that you have the Mexican Archives in the City of Mexico; you have the California General Archives; you have the Archives in the Alcalde's office in San José; you have the papers of contemporaneous dates coming from the Sandwich Islands; you have the records of consular communications describing this mine in Castillero's possession and working, from the Department of State in the City of Washington—all of which stand in direct proof of the origin of our just and equitable claim to this property. And yet your Honors will be treated with the same assertions as heretofore: that not one word of this is true; that these omnipresent forgers in all parts of the world are forging newspapers, records, letters, archives, in every possible place in which it could be conceived that a forgery would be beneficial to their interests. In this the special counsel for the Government is but carrying out the attempt of the Attorney General of the United States—to prevent your Honors seeing any evidence upon our side at all. The settled, persistent, continuous efforts to head off these claimants by every possible means that human ingenuity could suggest, are shown in this record. If they can only strangle all the evidence, then they can take our property. If they cannot suppress all of the evidence, they will conceal as much as possible, and then coolly deny, without contradictory proof, the truth of whatever evidence is introduced. And all this is done in violation of the plighted faith of the nation, given before the civilized world.

In 1848, when this country was acquired, our Government said to Mexico, in the face of Christendom we will respect the property titles of your people. They shall stay with us and become our citizens if they choose. If they do not so choose, they shall go home in peace. Their property rights shall be respected. The plighted faith of the United States of America is given to you, that your citizens shall not be despoiled of what was their own before you ceded the territory to us. We promise this; we pledge the honor of the Nation to its fulfillment, and this promise has been fulfilled to all, except to those who hold title to property in California under Andres Castillero.

Now, may it please your Honors, from amongst the papers produced in evidence in this case, testimony is rising up every hour to confound the designs of those who are seeking to rob us of our property.

After eight or ten years of painful uncertainty and search, the original documents of our title are found amongst the papers of a deceased individual to whom we once intrusted them as our agent, and who basely betrayed his trust, and endeavored to pervert his possession of them into an instrument for despoiling us—they had passed from his hands to those of my brother

Hall McAllister. They are found by accident. They are produced in Court, and they throw a flood of light on this whole proceeding.

Now, your Honors will find in this paper what seems to me the most incontrovertible evidence, proof conclusive that these papers were made early in the year 1846. And that proof comes from the certificate of Mr. Hopkins. How does this occur?

Most fortunately for us, the Alcalde Chavolla, in making a copy of the act of possession to hand over to Castillero for his title, omitted a line. When he handed the paper to Castillero, the latter saw the deficiency; and upon the face of the paper appears the correction in his own handwriting. Now, we have already seen that he left California early in the year 1846, and has never since returned. Will it be pretended that this paper was sent to Mexico to Castillero, in order that he might put in an interlineation? How did the handwriting of Castillero get upon this certified copy, unless it was made in '46, before his departure from California? There are but two possible solutions to these questions. Either this interlineation was made by Andres Castillero in '46, before he left California, or this paper has been sent back to Castillero, in Mexico, for him to interline these words. Certain it is that these words are here, interlined. Certain it is that Andres Castillero has never been back to California since his departure in 1846, in the month of April of that year. Tell me now how these words got there in his handwriting? Hopkins swears that they are in Castillero's handwriting, and most fortunately does it so occur that the interlined words contain his signature. There is the date and signature.

It occurred in this wise: The Notary or Alcalde in making out a copy of this testimonio, in regard to giving Castillero possession of this mine, copied out the different denouncements; and in copying the first denouncement, neglected to copy into it the date and signature, and these are filled up in the handwriting of Andres Castillero as proven by Mr. Hopkins' certificate. Again, I say, how did it get there?

Now, this little circumstance was not known until about two months ago; so we find that nothing transpires in relation to these papers, here or elsewhere, which does not point to their truth and genuineness. Nothing occurs in any part of the civilized world in connection with this case which can serve to raise or create a doubt as to the authenticity of the documents. All concur in forcing conviction of the truth of our claim on the most incredulous human mind. They force conviction in spite of all opposition and prejudice against us—compelling belief, so that no reasoning man can escape it.

Mr. Hopkins' testimony is on file in relation to this matter, and none of it is disputed.

Now, may it please your Honors, we have got certain facts thus far established; established by what may be considered as the history of the day, of the age.

We have the fact that the mine was discovered, was taken possession of by an individual as its owner; that this possession was not clandestine, as has been frequently urged against it, but was open, notorious, and communicated to all the public authorities of California and Mexico, and that so far from disapproving that possession, those authorities expressed gratification and delight; and that all this occurred before the United States acquired one foot of ground in California. We have the fact, that as soon as Andres Castillero discovered this mine, he told everybody that he had denounced it. His letters abound in that assertion. We have the fact that the United States Consul informed the public through the newspapers that Castillero had denounced this mine. We have the fact that the United States Consul informed the Government of the United States that Castillero was in possession and working this mine as owner. We have the fact that Castillero declared to Fremont that he had denounced this mine. We have the fact that the archives contain what purports to be a record of denouncement and possession. We have the schedule of papers in the Alcalde's office in 1846, in San José, in which these Castillero documents of denunciation and possession are enumerated. We have copies from the Mexican archives. We have the archives in the keeping of Mr. Hopkins, substantiating our claims; and we have about forty witnesses who all swear to the facts demonstrative of the genuineness of our title. Not one man swears to the contrary. And yet, I am here in the presence of an intelligent Court, arguing to your Honors, that these papers are true, and are not forgeries.

And all this is proven, not merely by our own witnesses, but by the evidence introduced by the Government. We might, I think, safely agree that your Honors should take up this record and decide it by the evidence introduced by the Government. For, we say again, that *that* evidence itself gives a direct contradiction to the assertions made by the counsel of the United States. I will not say the *Government*. Of course the Government of the United States makes no such averment. They are made in its name, but do not emanate from it.

Now, I say I put this point—of the existence of this record of possession—upon the testimony of the Government witnesses alone; and I agree that you shall forget everything else, —take up everything else in this record, and walk to the windows and throw it out, as the special counsel invites you to do.

MR. RANDOLPH.—Your certificates?

MR. BENJAMIN.—Exactly; take them and tear them all up, and throw them out of the window. I have no fear of the result; because the Government has taken pains to prove our papers for us. I say again, you may take all our evidence and throw it out of the window, and decide this case on the evidence produced by the Government.

And yet, my brother Randolph has a curious way of treating even his own witnesses. When they say anything that he don't want them to say, he calls them "perjurers."

There is one witness who, I believe, brother Randolph does not call a perjurer, although he identifies these papers. I refer to Mr. Weekes. He brings Weekes up into Court. Now, he informs us, he is going to prove that our papers are forgeries. Now I have found you out. Come up here Mr. Weekes! Did you give a copy of certain documents to Alexander Forbes in January, 1848?

I did. Were the original in your office? They were. They were in a little paper book which I saw as far back as when Burton was Alcalde in 1846—and again in 1848, when I was Alcalde.

Weekes is then shown the original record of registry and possession from the County Recorder's Office, and he identifies it.—*Trans.* 306.

Now brother Randolph dismisses this witness for the Government, who has proven contrary to his expectation, that the papers are genuine, with the exclamation that he is nothing but a "drunken Alcalde."

MR. RANDOLPH.—Do you vouch for his sobriety?

MR. BENJAMIN.—I am not a witness in this case. There then we have the testimony of one Government witness. Being a "drunken Alcalde," the Government turns him out of Court.

Then the Government introduced A. M. Pico, and examines him very closely. Unfortunately, Pico persists in stating that these documents are genuine. What says the Government in such a predicament? "Your Honors know what credit to attach to California witnesses."

And so with all the witnesses that come up at the call of the Government, and tell brother Randolph: "You are mistaken in regard to these papers; they are genuine, and we know them to be such." All are disposed of, one after another, with "California witnesses—your Honors know what *they* are;" drunken Alcaldes!—what credit can you attach to their oath?"

Well, how are we ever to prove this thing? We can never prove anything according to the theories of the Government. Our own witnesses are all to be denounced as perjurers, and the Government's own witnesses are dismissed as false and drunken. All on the other side consists in bare assertions. Now, my brother Randolph can out-assert us all day long, and if your Honors have established that rule of ascertaining truth, we give up our case at once. But if you are going to decide this case upon the proof contained in the Transcript, then it does not admit of discussion so far as the question of the genuineness of this record of possession is concerned. In this particular, there is no case before you.

I was much struck with the contradictions in my brother's argument. At one moment he charges that we commenced forging in 1850; in a few moments he says that the forgeries began in 1847; and still again, that the record of possession was forged in 1848. In this assertion he ran foul of several pieces of stubborn record evidence, and amongst others he encountered the testimony of his main witness.

James Alex. Forbes, as Vice Consul of Her Britanic Majesty, wrote an official letter, which was found in the archives of San José in 1847. And in that letter, brought from the archives and filed in this case, Her Britannic Majesty's Consul complains to the Alcalde that persons have intruded on the "*juridical possession of the mine.*" By looking at page 810, your Honors will see what the Consul says to John Burton, Alcalde:

British Vice Consulate for California,
Santa Clara, 14th August, 1847.

Sir: I have received information from the person in charge of the Quicksilver mine of Sta Clara that two persons have commenced digging a pit by the direction of Mr G Cook, *within the limits of the juridical possession of the said mine*, and upon remonstrating with them, they have refused to discontinue their operations.

Permit me to refer you to the documents which exist in your office upon which was founded your conviction of the justice of your decision in relation to the claim of Mr Cook in March last, and to request that you will be pleased to adopt such measures for protecting the rights of the owners of the said mine and of those who are legally interested in the same as you may deem most conducive to that end.

I have the honor to be sir,

Your most obedient servant,

J. Alex. Forbes,
Vice Consul.

John Burton, Esq.,
Justice of Peace, Pueblo de San José.

Thus, may it please your Honors, we have gone back from the pretended forgery of 1848, to James Alex. Forbes' letter in 1847, and the existence of the documents of possession in the Alcalde office—the previous month of March, 1847.

Here my brother Randolph—and we must renew our acknowledgments to him—produces the record of the previous suit in the month of March. See page 815 of the first volume of the Transcript:

G. C. COOK
vs.
JAMES ALEX. FORBES.

On complaint of plaintiff that Andres Castillero, James Alex. Forbes, José Maria del Real, José Castro, Secundino Robles, and Chato, alias Theodore Robles, were to work on his land contrary to law, and prayed that they be removed.

Here we have got these miners at work on the land claimed by Cook; and this in March, 1847.

A summons was issued bearing date March 17th, 1847, returnable on Friday next, which was served and returned according to law. The parties having appeared the case is continued, until the mine can be surveyed.

Just here: What was to be surveyed? What was to be surveyed?

MR. RANDOLPH—That's the question.

MR. BENJAMIN—If there was no title to the land, if there was nothing which the Alcalde could order to be surveyed under this title, how could a survey have been ordered at all? How could the surveyor do anything without any title with which to make a survey. Something then in the shape of a definite title paper did then exist, by which the surveyor was enabled to execute his duty of perfecting a survey. What was it? James Alex. Forbes says, "*The juridical possession of the mine, according to the documents which exist in your* (the Alcalde's) *office.*"

Two men were sent to the mines to measure and report thereon, who went and returned their report.

What did they measure? Did they go there and measure any quantity of land *ad libitum?* Or, did they find something definite to measure? They go to the mouth of the mine. How far do they measure around it? There must have been some paper declaring the limits which they were to measure. They go and make the measurement, and return and report. What is the result? It appears in a letter of James Alex. Forbes that the Justice decided in favor of the mine owners, on the survey of their mining possession. What was that mining possession? On the 5th May, 1847, you have James Alex. Forbes' letter, so often referred to, in which is a description of the mining possession as being a *mining possession of* 3,000 *varas on all sides.* That is what James A. Forbes certifies was surveyed. That was what existed in the archives, and was called a "juridical possession." That was the direction the surveyors received from the Justice.

Thus, may it please your Honors, we have Andres Castillero claiming the mine in California before his departure. We have him proved to possess a full knowledge of the mode by which mines are acquired, and the mode by which lands are acquired. His mining possession he asks from the Alcalde. His lands he asks from the Governor. He had previously obtained a grant of land from the Supreme Government. It was an island. And that island was immediately given to him in accordance with the order of the Supreme Government, when he presented his claim. Being now absent from Mexico, and desirous of obtaining a two-league grant in California, he was obliged to make application to the local authorities.

But, before action is had on this petition for two leagues, Andres Castillero leaves California; and when he gets to the City of Mexico, remembering his success in relation to the former grant of the Island of Santa Cruz, he determined to make his petition for a two-league grant directly to the Government; and he abandoned his proceedings before the local authorities here. Accordingly, the moment he reaches the City of Mexico, we find him carrying out precisely what had been designed in California.

He goes before the Mining Junta. The first thing he does is to apply for aid in carrying on his mining operations. He says to the Junta, I want my *mining possession* confirmed by the Supreme Government. In all his plans there stated, he followed out precisely what he had commenced in California. There was no variation, no interruption, no change of purpose. His plan was the straightforward one of a man who had one object in view, and who seeks and adopts the best measures to secure its prompt execution.

He had previously sent a special messenger with his specimens of ore and his letters, and now that the Governor required to send a special commissioner to Mexico, he attends to his interests in person.

But it is said that he sent no special messenger. It is said that Lazaro Piña went with him, and did not go previously on the "Hannah."

The statement on the other side is, as I suppose, that the "Hannah" did not leave the port of Monterey at the time indicated in evidence. This is one of the most puzzling subjects in this whole case for me to treat. I do not understand the pretext of the argument to the contrary.. I cannot make it out. I can clearly show to your Honors by direct testimony that the "Hannah" did leave the port of Monterey at the time we specify. How is the contrary made out? I listened attentively to the gentleman for two days, and could not get at what he meant. I could not make out by what species of ratiocination he hoped to satisfy the Court that all the documents proving that fact did not exist; that they were all forged.

What is the evidence?

At page 2605, we have two letters of Andres Castillero, written to General Vallejo in February or March, 1846. Now, unless General Vallejo had forged these letters, the proof is there complete—that Lazaro Piña did leave the port of Monterey, and that he was sent from that port by Castillero early in March. What is the proof? Andres Castillero writes to General Vallejo. Now, let your Honors read those letters; look at them, and you will see on the face of the papers themselves, the intrinsic, absolute proof of their verity. You will see from the statement in these letters that they cannot but be true. They refer to matters shown to have connected both the parties in strict intimacy. General Vallejo explains that a short time before Andres Castillero acted as godfather at the christening of one of his children. Hence he is called "*compadre*," a sacred tie amongst the Spanish population.

Now what does he write to his "*compadre?*" He writes on the 21st February, 1846:

MISSION OF SANTA CLARA, Feb. 21, 1846.

Colonel Commander of the Line of the North,
Don Mariano Guadalupe Vallejo:

My Dear Compadre.—I have the pleasure to transmit to you a letter from His Excellency the President, in which he informs me of the reasons why the expedition should not have come here, but in an official communication received by Don José Castro, he is advised by the Ministry of War that Colonel Don Tanacio Triesta had set out.

By the brigantine schooner which brought these communications, we have received information that the Republic is in perfect peace. This vessel sails shortly, and will carry communications of what has occurred lately.

Myself or Piña will leave in it, or both together. I am only detained waiting the arrival of the division which may touch here in a day or two.

Tell me what commands you have for the Capital, and I shall execute them faithfully in person, or order Piña to do so, as the circumstances may be.

Nothing has been done regarding the uniting of the Government to the Commandancy-General, and this matter will not be decided until I have an interview with the Supreme Government, or communicate with it.

Do not fail to reply to this soon, and write to me with the frankness which is congenial to you.

Respects to my comadre, and a kiss to my godson, and order your affectionate compadre and obedient servant,

ANDRES CASTILLERO.

On the 11th March he writes to General Vallejo:

MISSION OF SANTA CLARA, March 11, 1846.

Colonel Don Mariano Guadalupe Vallejo:

My Dear Compadre.—In the mountain range of the Gabilan, over against the Natividad, Captain J. C. Fremont has fortified himself, and he has been joined by some foreigners; but the Commandant-General is upon them, and I set out immediately to accompany them. This I advise you of for your information.

Piña embarked on the fourth of this month in Monterey, and was dispatched in perfect order. He will travel post to Mexico.

Respects to my comadre and family, and order your affectionate compadre and obedient servant,

ANDRES CASTILLERO.

P. S.—Expressions to Don Salvador and Don Victor.

Were these letters forged in Mexico by Castillero, and sent up here for General Vallejo to swear to? So the Government's attorney would intimate.

The statement of General Vallejo is direct and positive—that he received these letters in due course from the day of their date. He presents the originals. Do they contain the truth? How do we prove that they contain the truth? We produce the archives of the United States Consul, and in the letters of that Consulate the fact is found that the "Hannah" did leave at the time we specify; that Larkin stopped her two or three days in order to send important letters by her; that he sent a courier to meet her at Santa Barbara to take later dates; and that letters by the "Hannah" of that date were received in Mazatlan.

Now, may it please your Honors, if Andres Castillero forged these letters, he must have known what was in the Consulate archives. Because it does so occur that this vessel, the "Hannah," was intended to leave on the 4th. She was "up" to leave on that day, and therefore it is, that Castillero, from Santa Clara, writes to General Vallejo that Piña embarked on the 4th, and was dispatched in perfect order.

But the American Consul finds Fremont in a dangerous position; and discovering that Fremont wanted to write home, he detains the "Hannah" three days. When the Consul's memorandum book is brought into Court, which states that the "Hannah" left for Mazatlan on the 7th of March, 1846, no human being could read these several papers and give any other construction to them—always excepting the Government counsel.

There are numerous other letters reading the same way. The books of the Consul are in Court.

[Mr. Randolph objected to introducing as evidence any portion of the Consul's books, except such parts as were directly proven at the time the books were introduced and sworn to before Commissioner taking the testimony.]

Mr. Benjamin—The book was introduced before the Commissioner. Here it is.

On page 2660, I read from Mr. Swasey's testimony—

Ques. 7.—Where did you next go, and what was your occupation?

Ans.—I went to Monterey, where I arrived about the last of February or first of March, 1846, and immediately engaged with Mr. Thomas O. Larkin as his Consular clerk.

Ques. 8.—What were your duties as such?

Ans.—Writing and copying official and other dispatches. I also kept some of his private books.

Ques. 9.—Did he keep copies of all his official correspondence; if yea, in what books were they kept?

Ans.—He did. They were kept in one book, entitled on the back: "Correspondence with the Department of State. Thos. O. Larkin, Monterey." Also, in another book, entitled: "Copies of Official Letters. Thos. O. Larkin, Monterey." They are large record books, strongly bound in calf. These books are now here before me.

Now I say, as a matter of law, that the Commissioner represents the Court in receiving the testimony, and these are the same books which were before him. The Consular archives are brought into Court—the books were placed before the Commissioner first, and now they are here for inspection. The witness swears that he was the clerk who wrote in them, and that these are genuine Consular archives. In opposition to these we have—what? The denial of the Government. Passages are read from official documents of the year 1846, with a view to have your Honors draw the conclusion that these are forged papers. And then when the books themselves are handed in for inspection, the special counsel for the Government gets up and tells your Honors that the case is closed, and you must not look at the books. That is it. Shut your eyes. If they can only keep your eyes shut they can gain this case, Don't look at anything. This is perfectly consistent with his entire management of this case. If the Judges will only shut their eyes, the Government may possibly gain this case.

But we mean to open this case to full examination. We intend that the Court shall see all. We never yet feared the closest scrutiny. We never raised an objection to the taking of any testimony. If in the whole range of facts existing upon earth in the shape of evidence, there is one which in the judgment of the counsel militates against our title, we say let him bring it in now. We never shut the doors. You have got the universe before you; range it. Find something. Find, if you can, *some one* fact inconsistent with the genuineness of these papers, and we give up our case. That is not all. We produce volumes of Mexican official newspapers. We first bring them before competent witnesses. We prove them to be genuine newspapers, published in Mexico. We offer these volumes in evidence. They are Mexican daily newspapers for the year 1846. This is the "Diario Oficial." The other volume is a bound copy of "El Monitor Republicano," for the year 1846. We point out to the witnesses in these papers certain extracts having reference to this mine. We have them copied into the record for our use.

Mr. Randolph—That is in evidence; the rest is not.

Mr. Benjamin—Now, brother Randolph has spent two days before the Court, arguing about what? That it is not likely, it is not to be believed, it is against all human probability, that the "Hannah" carried the dispatches which this gentleman, Piña, was to carry. Why? Because the Mexican newspapers would have spoken of Fremont's affairs; whereas they only speak of the mine. Now these newspapers were before my brother's face; and he examined them with reference, of course, to other passages than those we offered in evidence, as well as in reference to what we did offer—he himself offering extracts from them in evidence. [See *Trans.* pp. 2361 to 2365.] We could not copy the whole newspaper into this record. But it so happened that the very pages from which we copied our statements about Andres Castillero, *do* contain the statements about Fremont.

[Mr. Randolph objected to the introduction before the Court of any portion of the Mexican papers which were not displayed or referred to in the Transcript.]

Mr. Benjamin—That is it. Shut the eyes of your Honors, and the Government may gain this case.

Mr. Randolph—I do not know of any evidence but what is in the record. If the claimants have any evidence outside of the record they should have introduced it in the proper place and time. I had no opportunity to examine these papers after the examination of them before the Commissioner. I had to make my argument on the basis of what was contained in the record.

JUSTICE HOFFMAN—What would you estimate the effect of your argument on this point to be, if after these assertions of Mr. Benjamin's you close the books? How is the Court to know that these papers do *not* contain a notice of the Fremont affair, if we cannot look into them?

MR. RANDOLPH—If your Honors please, I pointed to the printed Transcript, and showed the evidence put into Court on that subject. It is to that evidence that your Honors are confined in the trial of this cause; when there is no rule of evidence by which I am called upon to answer the matter introduced to our notice for the first time at the present moment.

MR. BENJAMIN—If your Honors please, I will read the statements in this paper concerning Captain Fremont, as a part of my speech. I anticipated this objection. It is in perfect accordance with everything which has been done by the special counsel for the Government here, and the *Attorney-General* at Washington. Keep out the evidence, they say, and we can gain the case.

MR. RANDOLPH—What do we know about what has been placed in those newspapers?

MR. BENJAMIN—Well, I am now going to read some sentences which we have *newly forged!*—since we heard brother Randolph's argument—and placed in this pretended Mexican newspaper.

MR. RANDOLPH—I have little doubt about its being a forgery.

MR. BENJAMIN—Very well. I will, with your Honors' permission, proceed to read this "forgery" as a part of my speech. Your Honors will have the paper to examine hereafter; and you can place such reliance upon this "forgery" as you think proper, while you are weighing my brother Randolph's argument on this particular omission which we have within the last two days taken particular pains to supply.

Now, in the "Diario Oficial" of the 5th of April, 1846, is the statement of this arrival from California, and of the Fremont affair.

> The Supreme Government has also received news from Upper California, down to the 5th of last month, and nothing particular had occurred in that department.
>
> Commandants Castro and Vallejo express themselves full of enthusiasm to defend that important Territory, and are resolved to sustain it even if the enemy should pass over their dead bodies. Our hearts swell at noticing the noble enthusiasm of the Mexicans who, at the places of greatest risk, bravely sustain the sacred rights of their country.

Now what did my brother Randolph say? He said "your 'Republicano' newspaper, published in the City of Mexico, contains nothing but the forged story about your quicksilver affairs. All Mexico is represented as mad with astonishment and joy about the quicksilver discoveries in California." Can the Court believe, urges my learned brother, that they received intelligence of nothing but the quicksilver mine, when Fremont was here with his flag flying on the Gavilan? At great trouble and expense we procured these files of old Mexican newspapers, placing such extracts in the record as had reference to this mine, which we supposed was all that was in litigation. We had no idea that Fremont's expedition was in litigation before your Honors. But as soon as it was said by my brother, that this omission proves that the files are not genuine, we "forged" these volumes afresh, and here they are in Court, or, at least, here a small portion of one of them is in my speech.

The "Monitor Republicano" of the 12th of April, contains this extract from the Tepic newspaper, of which we quote in the record only the first paragraph, relating to the discovery of the mine, that being all that concerned us.

We have now forged this additional portion, so that your Honors may be prepared to answer that portion of brother Randolph's argument relating to the supposed omission to mention

Fremont's expedition. This forgery appears in my argument, not in the Transcript.

After stating all about the quicksilver mine, this Mexican newspaper goes on to say:—

> Recently, the greatest alarm has been produced by the entry into the country of a small force of Americans under the command of Capt. Fremont, of the Engineers. The military authorities of the department were preparing themselves to fulfill their duties by driving these invaders out of the limits of the Republic.
>
> The copy of the document which we transcribe (which has been given to us by a respectable merchant of this place to whom it was sent) will inform our readers of this remarkable event.

Then it copies a letter of José Castro, directed to the Minister of War and Marine, stating these facts:

> In my communication of the 5th current, I announced to you the arrival of a Captain, at the head of fifty men, who came, as he said, by order of the Government of the United States to survey the limits of Oregon. This person presented himself at my headquarters some days ago, accompanied by two individuals, with the object of asking permission to procure provisions for his men that he had left in the mountains, which was given to him. But two days ago I was much surprised at being informed that this person was only two days' journey from this place; in consequence, I immediately sent him a communication, ordering him, that on the instant of its receipt he should put himself on the march and leave the department, but I have yet received no answer; but in order to make him obey, in case of resistance, I sent out a force to observe their operations, and to-day I march in person to join it and to see that the object is attained. The hurry with which I undertake my march, does not permit me to be more diffuse, and I beg that you will inform his Excellency the President, assuring him that not only shall the national integrity of this department be defended with the enthusiasm of good Mexicans, but those who attempt to violate it will find an impregnable barrier in the valor and patriotism of every one of the Californians.
>
> Receive the assurances of my respect, etc.,
>
> God and Liberty. Monterey, 6th March.
>
> JOSE CASTRO.
>
> To the Minister of War and Marine.

Now, what becomes of the argument about the "Hannah's" not leaving the port of Monterey, and not reaching Mazatlan at the time we name? It appears that we have not only forged in these papers an account of the arrival by the "Hannah" of important quicksilver intelligence, but we have also forged an account of news from Fremont's expedition, of the latest dates. Of course this is all forged and fabricated. Everything connected with this trip of the "Hannah" is forged; and I should not be surprised to hear that the "Hannah" herself was forged for the special fraudulent purposes of these claimants.

[The Court took a recess for half an hour.]

ON RE-ASSEMBLING,

Mr. Randolph said:—Before Mr. Benjamin resumes his argument, I wish merely to notice at this particular time an inference which might be drawn by the Court, or intended to be drawn by the Court, that I was at the time of making my argument acquainted with or cognizant of the rest of these articles in the newspapers, but did not candidly make my argument on that point. In answer to that, I have to say, that I was unapprised of any such matter existing at all, much less as evidence in this case. As to what the fact may be, I shall of course make observations in my own proper place. I merely rise now to disabuse the mind of the Court of any such impression, accidentally or intentionally conveyed.

Mr. Benjamin said:—I will answer for my brother Randolph. Nobody who knows him, could by any possibility suppose that he would endeavor to impose upon the Court. No one supposes that he would have made use of arguments which he did, if he had supposed we could overthrow them in the manner we have done. And that makes my argument all the stronger, and shows him and the Court how dangerous is that style of argument in which my brother Randolph indulges all through this case; when he dwells upon certain prominent facts in general history which he supposes to be inconsistent with this particular case, without giving us any opportunity of explanation. We cannot explain the entire history of the country in this record. We cannot put in our record everything that occurred in Mexico and the United States for ten years, but must select only that which bears on this mine. And I trust that my brother Randolph will see himself, that arguments which he hourly draws from just such facts as these, have no more foundation than the argument which he sought to draw from the supposed omission of these papers to speak of Fremont's affairs; that his whole fabric of similar arguments has just as little basis as the one which has just been destroyed and is now abandoned.

Mr. Randolph—No, sir; I abandon nothing.

Mr. Benjamin:—Now, may it please the Court, I take it to be a matter of some consequence, since the question has been raised, that there shall be no shadow of doubt left upon a human mind, that that brig "Hannah" left Monterey at the time we name, that she carried this correspondence, and had Lazaro Piña on board. I have not done with the proof.

The official documents which Mr. Randolph himself introduces, show the facts.

The facts are: that the "Hannah" is to leave on the 4th of March; that the Consul detains her until the 7th, and then sends correspondence by her. Now, we say that this vessel stopped at Santa Barbara, on her way down; and we say, that although Consul Larkin had written by her before her departure from Monterey, other facts had occurred in the interval which rendered it necessary to dispatch a courier down to Santa Barbara to the "Hannah," and send communications to the American squadron at Mazatlan. My brother Randolph has read a letter of the 9th of March, written by Consul Larkin to President Buchanan, then Secretary of State. It shows that after the 7th of March Mr. Larkin got frightened in relation to Fremont's position. On the 9th, he had intelligence that a company were being raised to proceed against Fremont; and there was danger of this American officer's being overwhelmed by the enemy. It was this fresh danger that incited Larkin to send couriers to Santa Barbara, and to send double couriers to Fremont. And I call upon brother Randolph to tell me this: *How came Mr. Larkin to know in Monterey that there would be a vessel at Santa Barbara to take his dispatches down to Mazatlan?*

MR. RANDOLPH:—He took his chances.

MR. BENJAMIN:—Pretty chances. He took his chances to INTERCEPT the vessel by his messenger, because he KNEW that the brig "Hannah" had been dispatched three days before from Monterey for Mazatlan, intending to call at Santa Barbara.

Do your Honors want further proof? Look at page 3020, at the letter of Mott, Talbot & Co., which I read:

U. S. PORTSMOUTH,
Port of Mazatlan, 1st April, 1846.

T. O. LARKIN, Esq.,
Monterey,

Dear Sir: It has been hinted to us that this ship is bound to Monterey, and although the fact is doubtful, we avail of the chance to acknowledge receipt of your much valued favors of the 2d, 4th, and 5th ult., the former enclosing a remittance of a Russian bill for $2000 for account of Mr. A. B. Thompson.

Your letters have this moment reached us per "Hannah," and we are much obliged for their contents. You were correct in supposing that the destination of this vessel when she sailed from this was not known to us. We have only time to return you our sincere thanks for your kindness in collecting the debt of Mr. Thompson, which we frankly confess we had written off as lost. We are also much obliged for the fruit, which, however, as the Hannah has just anchored, we have not yet received.

Now here we have got this fact: the arrival of the brig "Hannah" at Mazatlan on the 1st of April, her arrival from Monterey, bringing down letters of the 2d, 4th and 5th of March.

My brother says that there is no proof in this record that the "Hannah" ever left Monterey from the 1st to the 10th of March.

There is Consul Larkin's original book with the entry of the 7th of March—"The 'Hannah' for Mazatlan." Here is Mott, Talbot & Co's letter, dated on board the ship Portsmouth on the 1st of April, announcing the arrival of the "Hannah" at Mazatlan, with letters up to the 5th; and what occurs on the arrival of the "Hannah." The "Hannah" has just cast her anchor. Suddenly the intelligence is spread among the persons on the Portsmouth, that that vessel is going up to Monterey. How is this? For what purpose is this sudden dispatch of the Portsmouth? It is not known publicly. It has been hinted to Mott, Talbot & Co. by some friendly officer. But this fact is known on ship-board, and preparations are at once made agreeably to the requirements of such a determination; and in twenty-one days from the date of the arrival of the "Hannah" at Mazatlan, the Portsmouth is in the Port of Monterey.

And the next thing that we find is a letter from Consul Larkin to Mr. Gillespie, who is sent out with confidential instructions. Gillespie is there in pursuit of Fremont, who is on his way to Oregon. Gillespie goes in pursuit of Fremont, and brings him back. The Consul, in the meantime, writes and sends a letter to Gillespie, telling him of the arrival of the Portsmouth, by reason of letters dispatched to the American squadron at Mazatlan, by the "Hannah." Now, brother Randolph says that the "Hannah" never left for Mazatlan at the date we fix, and that consequently it was not in reply to any letters sent by her that the Portsmouth made her trip to Monterey. You have the entry of her arrival here in the newspaper:

> 1st day of April, American hermaphrodite brig, Hannah, of 89 tons, Captain Benjamin F. Thusum, crew 10 men, proceeding from San Blas, 5 days' sail, in ballast. Passengers, Anselmo, Latayada, and Gregorio Aguirre.

This gives ample time for the "Hannah" to leave Monterey, stop at Santa Barbara and receive further Government dispatches for the Portsmouth, which secured the prompt dispatch of that vessel to Monterey for the succor of Captain Fremont.

Now, let us look at what the Consul writes on April 23d, 1846, to Mr. Gillespie. It will be found on page 2674–5 of Transcript:

CONSULATE OF THE U. S. OF AMERICA,
Monterey, April 23, 1846.

SIR:—Captain Montgomery, of the "Portsmouth," being under sailing orders (the 1st or 2d instant) at Mazatlan, was waiting for the Mexican Mail, when Commodore Sloat heard, per brig "Hannah," of the situation of Captain Fremont near San Johns, and immediately dispatched the ship. She was twenty-one days from Mazatlan to Monterey. I send to you four or five New York, and one Mexican, newspapers—the former to 5th February, the latter of March. New York papers of Feb. 25 was in the hands of the Commodore. Captain Montgomery has not any certain information of Mr. Slidel's situation in Jalapa, in March; he says that the Commandante General of Mazatlan had later news by six days than Commodore Sloat; that all Custom-House and other Government officers had left Mazatlan, taking away the archives and Government property, publishing in the street that Commodore Sloat would in all probability declare a state of blockade the next day, thereby giving reasons to suppose they were aware of the cause.

The "Portsmouth" will remain here and in San Francisco some weeks, perhaps a month, according to circumstances. I have (as my opinion) said to Señores Castro, Carillo, and Vallejo, that our flag may fly here in thirty days. The former says, for his own plans, war is preferable to peace, as, by war, affairs will at once be brought to a close, and each one know his doom. I answered, without war he could make certain officers, and secure to himself and his friends fame, honor, permanent employ, and pay. He and others know not what to do or say, but wait advices from Mexico, per their Commissioner, by "Don Quixote." She ought to be here by the first of July.

In the meantime, Andres Castillero, on the 4th of April had gone down to Mexico, as Commissioner, on the Don Quixote. He had left on the 4th of April. The California local officers were awaiting his return by the Don Quixote, which was expected by the 1st of July, in order to determine what their own conduct should be.

Now, I want your Honors to look at another little circumstance, insignificant perhaps, but yet, when an entire body of papers and transactions—as in the present case—are stated to be forged, when the most trifling fact is denied, every little particle of proof serves as some guide, some indication by which you can be enabled to arrive at a conclusion satisfactory to yourselves.

How about Captain Paty's testimony? Let us look at it. First volume of the Transcript, page 424.

Brother Randolph has read from the memorandum—"Information for whom it may concern"—annexed to Captain Paty's deposition, a statement, which he says he took from his wife's journal, of what occurred upon that trip; and the third entry, to be found on page 429, reads:

> *Third.*—Don Andres Cästillero and his servant, or companion, ("Lazaro Piña" I think was his name,) Mrs. John Paty, child and servant, were passengers on board.

Now, may it please the Court, this testimony of Captain Paty's was given on the 15th December, 1857. The name of the servant in the memorandum is put in with marks of quotation, and in parentheses, to indicate that it did not come from the original memorandum, but was an impression upon his memory; or, in other words, he did not here quote from his wife's journal, but he thinks that "Lazaro Piña" was the name of Castillero's servant. It is placed separately from this paper; evidently it is something interpolated—no doubt in perfect good faith—by Captain Paty. Having heard it remarked by some gentleman interested in this case in the City of San Francisco, that it was important for the Government to prove that Castillero had a companion by the name of "Lazaro Piña," he was induced to imagine that such was the name of a person who sailed with him as passenger on the trip referred to. They said to him, "Didn't Castillero have a companion on that trip?" "Yes," he replied. "Wasn't his name 'Lazaro Piña'?" Naturally enough he answers, "Yes, I think that that was his name." This is the whole story. The evidence of it is on the face of the paper. It is in the past tense, "*was* his name." Evidently somebody had been talking to Captain Paty, and had directed his memory as to the names of passengers, ten or twelve years ago, in this way. If this memorandum had been a contemporaneous entry, it seems to me that it would not have expressed any uncertainty as to the name of the person in company with Castillero.

And this is the only evidence, introduced by the Government, tending to shake the truth of the circumstances we allege as connected with the whole of these papers and Consular archives.

Now, my brother Randolph has got something like testimony. I congratulate him on that, and hope that he will make a proper use of it.

But the sixth item of this same memorandum:

> *Sixth.*—I agreed to wait twenty days at Acapulco for Don Andres Castillero, and after waiting until the 16th of May, I heard that he wished to meet me at Mazatlan; consequently I left Acapulco on the 18th of May for that place and St. Blas.

I ask your Honors to remember that Castillero's bargain with the Junta in the City of Mexico was, that they should give him a draft on *Mazatlan.* He had to go there to get his money. He expected to receive his money at Mazatlan.

And here we find the evidence furnished by the Government itself, in an out-of-the-way place, in a memorandum of Captain Paty. Instead of waiting at Acapulco for Castillero, as the terms of his first agreement bound him to do, he got information on the 16th of May from the City of Mexico from Castillero, that the latter wanted him to go to Mazatlan to meet him; not to wait longer at Acapulco. This is in precise accordance with the arrangement made by Castillero with the Junta when he did get to Mexico.

Andres Castillero followed Lazaro Piña very closely. The date of the latter's arrival in Mexico does not appear. We know this, that on the 13th of April Herrera, the President of the Republic, communicated to the Junta extracts from two letters of Castillero's, dated late in February, 1846, which he said he had just received in relation to the quicksilver mine; and we know that Don Tomas Moral received also a letter dated 19th February, and we know that specimens did reach the City of Mexico early in April, and were placed in the Cabinet of Minerals, and were exhibited to and inspected by the professors. That we do know. How they got to Mexico it was not incumbent upon us to say. In order to prove the genuineness of our title, it is not incumbent upon us to prove every fact in regard to the passage to and from Mexico of letters, documents and minerals which the United States may think proper to question.

Really, it appears to me as if all legal principles were inverted in this case. Everything we have done is denounced as fraudulent; and when we produce documents and papers, and witnesses to prove our title, the Government of the United States seems, and actually is disposed, to call upon us to prove that forgery is an impossibility. Not to raise a doubt themselves, not to prove themselves that anything is wrong, but we are called upon to prove that it is *absolutely impossible* that any of our papers *could* be forged. Now that is a hard burden to place on any man.

I do not know how far the art of the forger has gone. I cannot tell what can or what can not be done by accomplished forgers. I only know that we prove these documents to be true. Whether they could have been forged by accomplished forgers I do not know, I cannot tell. Certainly it is no part of my duty to prove that it would have been an impossibility to have forged them.

Now Andres Castillero had reached Mexico, and commenced a series of communications with the officers of the Government. But, says brother Randolph, he did not get there until the 6th of May. Well, the argument upon that point was very much like the argument upon all the other points,—in relation, for instance, to the Fremont news not reaching Mexico until the 5th or 6th of April. Because an evening paper in the City of Mexico, on the 6th of May, inserts in its issue, at the last moment before going to press, a statement that the Supreme Government had received news from Upper California; because that evening paper did not receive, or did not publish that news till the 6th May, my brother Randolph argues, as if he was perfectly certain of it, that Andres Castillero did not arrive till that date—that he did not arrive in the City of Mexico until that paper got that news. Now I would have drawn just the opposite conclusion. I would have supposed that a messenger sent by the Governor of California to the President of Mexico with special dispatches, would not first run to the office of an evening newspaper and tell its editor what tidings he had brought, before even going to see the President. I should suppose that the first thing which he would do would be to call upon the President of the Republic, or the Minister to whom his dispatches were addressed, and give his dispatches; and that after they had examined the dispatches, and consulted in relation to their contents, they would allow the dispatches to be published, or not, as they might judge best for the interests of the country. But it did not occur to me, that because the evening paper did not have this news before the 6th May, therefore it was impossible that Castillero should have arrived in Mexico before that day. I am willing to leave that point of inference to your Honors. I do not think that it is worth spending breath upon.

We find communications in relation to Andres Castillero on the 5th of May. That we know. We are therefore authorized in saying that he arrived on the 5th of May.

And here let me comment on a series of papers obtained from Mexico, which are most remarkable. We have again to thank brother Randolph for a most important piece of evidence.

We had sent to Mexico to obtain from the different public offices, copies of the proceedings in those offices in relation to this mine.

We applied to the Junta de Fomento for a copy of the espediente there. We applied to the Faculty of the College for a copy of their proceedings relative to the assay of this mineral, and what the result was, and the richness of the ore, was spread before your Honor. We applied to the Ministry of Justice, and all that appeared in this connection in its archives is brought here. We applied to the Minister of Relations, and obtained a record of the espediente existing in that office in relation to this matter; and here we rested our case.

But brother Randolph's acuteness put us upon a new track, inoculated as with a new and valuable idea—just as he cross-examined Chard and proved that he was a native of New York—thus making his testimony exactly tally with the consular archives. It was brother Randolph's acuteness that put this question to the witness [Couto]: "You say that all these things were done by the Junta?" "I do." "You know that they were done by them?" "I do."

Q. 173. Was there any record kept of the discussions of the Junta on the subject of such applications?

A. 173. The result of each day's deliberations was written down in a book, and signed by the gentlemen of the Junta. This record was called the book of the *Actas.*

Q. 174. Where is that book now?

A. 174. In my possession, in the office in Mexico. Those books are not allowed to leave the office.

Q. 175. Were not the final resolutions of the Junta on the subject of any application extended more formally than in the book of the *Acta*, or journal of their proceedings, to which you have referred?

A. 175. This book of the *Acta* is a formal record. The first and last sheets in the book are stamped. The book is stamped in the stamp-paper office, and the pages are all numbered in that office before it is stamped, so that it is the same as if each leaf was stamped. The same amount of fees were paid to the stamp office as if each leaf were stamped. The *Administrador de papel Sellado* certifies on the first page of the book the number of pages in it. This book undergoes all this preparation before it is used by the Junta.

Q. 176. Is this the only book in which the final resolutions of the Junta are recorded?

A. 176. Yes.

* * * * * * *

Q. 188. Have you brought with you a copy of the *Actas* of the Junta in reference to the application of Andres Castillero?

A. 188. I have not.

Q. 189. Why did you not bring a copy of the *Acta* of the Junta upon his petition, that being, as you have said, a mode by which the Junta executed contracts and assumed obligations?

A. 189. Because my business here was only to prove my own signatures, and to prove that the dates upon the documents in the expediente of which I have spoken, were the true dates of those papers, and to prove that they had been in my custody. I had nothing to do with any other matters.

Now, brother Randolph has got us. We have been keeping back all these actas, which would demonstrate that the whole of our papers were forged, fabricated, simulated, etc.

But we send to Mexico, and we find not only the minutes of the Junta, but the original rough draft of the minutes, as taken down in brief, whilst the Junta was in session; and we bring up traced copies of these original borradores and traced copies of the clean copies drawn from them. These copies of the actas and minutes contain the entire proceedings relating to the mining body of Mexico; contain thousands of facts and names, embodying all the doings of that office, and afford a complete picture of the whole mining business of Mexico at that time. We have here every possible indication which any human being could desire of the accuracy of all our statements in regard to the acts of the Mining Junta. Take up any one item in these thousands of statements. Here is a whole year's business of the mining body, their proceedings day after day and hour after hour. Every two or three days, everything that has been done during the two or three days previous, is entered carefully into a well-written volume, in order that the record may remain. We have done in this instance just what we did in reference to these newspapers. We have brought in files of the public newspapers of the day. You say that they are not true; that we have forged entries; that we have forged proofs in them which the true papers do not contain. We have brought in these entire files of papers which prove and vindicate themselves. We anticipated these charges. We bring in these minutes as we brought in the papers, and we challenge you to prove *one single fact* in them to be untrue. You have not brought a witness to disprove a single fact in them. If the newspapers are forged can't you get a true copy? If this official newspaper is forged, we say, bring in a true copy. *Then we will give up the case.* The whole mining proceedings of the Republic for fifteen months are thrown open to you. Prove one statement forged; prove one single entry forged by us and we give up the case. You have had years to do it in.

MR. RANDOLPH.—These papers don't belong to me.

MR. BENJAMIN.—Don't belong to you? No. They were offered in evidence. They are produced; the dates are given; the full record is there.

MR. RANDOLPH.—We don't keep them.

MR. BENJAMIN.—No; but mark what you do have. The Department of State has duplicates of them. The Department of State at Washington keeps the official newspapers of all nations with which we hold any relations. Now, prove that we have forged or interpolated one solitary newspaper item, and we give up the case. You have got the evidence. You can prove that we are forgers, and drive us out of Court in shame. Make us hang our heads for our attempt to impose upon this Court. You can do it with the greatest possible ease, if your charge is true.

They offer no evidence on these points. They offer no proofs in this connection. And it is because all the evidence proves the charges unfounded, that we have this regular, persistent determination that your Honors shall see nothing that they can keep from your view.

Hence the refusal at Washington, when we urged the authorities there to send down their own officers to Mexico at our own expense to examine the archives and witnesses there. Let them look at the records. If you do not feel authorized to draw on the Treasury for such an object, here is the money to pay for all expenses. Name anybody you please. Let them go down to Mexico, investigate, and come back and make their report. Take any men you choose. Send down such men as you sent before—such men as Henry May. Let them search the entire archives. Give them ample time and opportunity.

Now, we say to you, Mr. Black, if your object is to do justice, if you uphold in your office those traditions of the honorable men who have occupied your seat before you—if you have any regard for the memory of the Wirts, the Legares, the Berriens and the Johnsons, who have illustrated that office—pursue their example. Send out intelligent, skillful, scrutinizing, honest men to examine into the truth of this whole business, and if they satisfy themselves that our titles are forged then we will admit that we are in the wrong, and we will do what we can to repair the injuries we have inflicted upon the just owners of this property. But Black exclaims, "No; *I* know that you are forgers, and *I* will not agree to your bringing any evidence into Court." "Then you won't send down a commission to look into this matter?" "No." Well, we will do one thing; there is one thing remaining which we can do. We think that under the law we have the right to take testimony in Mexico before the United States Consul. We are going to take our witnesses before the Consul, and we give notice to you what examinations we propose to make; so if you choose to take any steps by way of cross-examining the witnesses, or introducing evidence of your own, here you have an equal opportunity with us. The names of our witnesses are given. What is the answer to that?

The Attorney General runs post-haste to Secretary Cass, and gets him to issue an order to the United States Consul at Mexico to take no testimony for us. That is in the record. That is the way our Government does justice; with the plighted faith of the Nation, published to the world, that it would respect California titles.

Now, may it please the Court, these documents, these archives, are sworn to by witnesses by the dozen. Men have been brought up here from the City of Mexico, of high position. It has cost a great deal of money. My brother can make any thing from that admission which he pleases. We have been compelled to charter a steamer for the work. We have been compelled to send down agents upon her to Mexico. We have been compelled to get brother Billings to go down to Mexico and induce some of these officers to come up here and give us their testimony. He succeeded in his mission.

These men were not coming to a distant country without some indemnity, and no sensible persons would ask them to do so for utter strangers. They could not afford to leave their business and come up here on a chance of payment for their trouble and losses, or for a trifling consideration.

But there is one of these men who would not receive any indemnity, and to him I will again refer. All the rest were examined by us on this point, and they stated that they had received money for coming up and giving in their testimony, and made no secret of the amount.

Who were they that came up from the City of Mexico?

Manuel Couto. He was Secretary of the Administration of the Mining Fund.

The next man is José M. Bassoco, a member of this Mining Junta that made these very bargains with Castillero which we allege. He was not a Government official. He was elected by the creditors of the Mining Fund to sit in that Junta and watch their interests. He represented $5,000,000 of the creditors of the Junta.

The next man is Blas Balcarcel, Director of the Mining College.

The next man is Antonio del Castillo, Professor of Mineralogy, who divided out the specimens into different departments, and marked them. And this witness testified to the intense interest with which these specimens were received and examined.

Then comes Yrisarri, Fifth Clerk in the Ministry of Justice. Brother Randolph sneers at this witness, as "only a clerk." Clerks can't tell the truth. He is only a clerk, the same as any clerk in one of the Federal Departments, he says. Are our Department Clerks here incompetent to tell the truth? Does the fact that they are clerks effect their credibility?

Who else will you prefer to bring up to testify to a certain writing, rather than the man himself who did the writing?

Here is Mariano Miranda, a former Clerk in the Ministry of Justice. Here is Velasco, Clerk in the State Department. Then here is Castillo Lanzas, Minister of Foreign Relations. Then here is José Maria Lafragua, Minister of Foreign Relations, who made a report in 1846, speaking distinctly of the matters now in controversy. Then here is Francisco Villalon, Notary Public, who put his signature and seal to a large number of the instruments introduced in this record from Mexico.

Every official in the City of Mexico, whom we thought could be of use in explaining and verifying any of our papers, was brought up here and examined before the Court—and, need I say it, *cross*-examined. Those cross-examinations are a part of the judicial history of the country—a remarkable portion. Upon that cross-examination I may have something hereafter to say. It is something totally unprecedented in the whole history of jurisprudence. Six or seven hundred questions to one witness are what is termed, in familiar language, a mere flea-bite. That constitutes a mere commencement. Every possible thing which human ingenuity could devise, in the shape of a cross-question in such a case, is brought up and propounded.

Men are not only asked their age and birth-place; their entire domestic relations are inquired into. They are asked where they went to school, who were their school-mates, and *schoolmasters.*

They are asked whether they are the men they profess to be, *and if they have brought proof of their own identity!*

Castillo Lanzas is called upon the stand. My brother Randolph asks him: Who are you? What is your name? Can you *prove* that you are the person you say you are.

Well, I am Castillo Lanzas, is the reply. Mr. Buchanan knows me. I knew the whole diplomatic corps in London, when he and I were there together. It did not suggest itself to me to come here with certificates of identity. "Who knows you here?" inquired brother Randolph. "I think that there is a gentleman here by the name of Arce, who keeps a tobacco store, who knows me, and to whom I gave a passport in London."

"Well," says brother Randolph, "I give you permission to summon this witness, in order to prove that you *are* Castillo Lanzas." Now, my friend Mr. Peachy plays rather a scurvy trick. Brother Peachy pretended that he was very apprehensive that Castillo Lanzas would be proven to be not Castillo Lanzas. At least I take this to be so, for he objected very strenuously. Brother Peachy would not allow of the introduction of this tobacconist on the stand. Brother Randolph then insisted upon his own right to bring him forward, and summons him in behalf of the United States. Well, in comes Mr. Arce. Castillo Lanzas is pointed at, and the question is put: "Do you know that man?" "Yes." "Who is he?" "That is Castillo Lanzas." "Where did you know him?" "I knew him in London. He was Mexican Minister there." "Well, now," exclaims brother Randolph, "who are you, sir? Who knows you?" That is the question next put to the witness.

[The Marshal had to call "order" in Court, the laughter and demonstrations of applause being very loud.]

The moment the man said that he knew Castillo Lanzas, brother Randolph wants to know who knows the witness that he himself had summoned!

Now, may it please the Court, I will do my brother Randolph the justice to say, that towards the close of the examination, the mild conduct, the gentlemanly bearing, the evident respectability of the witness upon the stand, was such that my brother became somewhat repentant of the mode in which he had conducted the examination; and he testified his admiration of the witness and his respect for his character, by asking him for his photograph, *and has his thanks for the portrait* carefully recorded in the Transcript.

Now, there is Castillo Lanzas. I suppose we have afforded sufficient proof of his identity. Mr. Head, who likewise was called by Mr. Randolph, knew him at the Mansion House, Philadelphia. He remembered Castillo Lanzas.

"But," says Randolph, "Who knows you, sir? Who are you?" I presume that the result of all this must have been, that my brother Randolph became satisfied of Castillo Lanzas' identity.

Mr. Randolph.—No; I am in doubt yet.

Mr. Benjamin.—You don't believe it yet! May it please the Court, my brother still remains in doubt on that point!!

Well, may it please the Court, so it happens with all the rest of our witnesses.

This large body of unimpeached witnesses, men peculiarly competent to testify in this case, against whom not a solitary word of reproach has been produced, have sworn that these papers are genuine, written by themselves, and bearing the date at which they were actually made.

How are all these witnesses disposed of? Brother Randolph disposes of them with the facility peculiar to himself: "I say that these papers are all forgeries, and every one of your witnesses is a perjurer." That disposes of them effectually. Not a syllable in the evidence, not a syllable in the Transcript, going to show that any one of these gentlemen is capable of telling a falsehood; but the whole of them are disposed of by a single statement to your Honors, that they are all perjurers, and that all they have sworn to are forgeries.

Now, amongst these witnesses there was one old man whom I have never seen, but who has been spoken of to me with affection and veneration by gentlemen in no way connected with these claimants' interests, who made the old gentleman's acquaintance while he was in San Francisco.

Francisco Martinez Negrete has been represented to me, by gentlemen outside of this case, who know him as a model of a Castilian merchant of old, as a man above suspicion or taint of reproach; as a man whose every action was always open as the day; who, to save the life of himself, or the lives of the members of his family, would not utter a syllable of falsehood. This man, in 1845, was a merchant in Guadalajara; he is yet living in the same place, in his sixty-second year. Mr. Peachy received a letter from him a few days ago, which he was kind enough to show to me.

In 1846, owing to some circumstances disclosed in the record, he was in the City of Mexico. He was an old correspondent of Alexander Forbes of Tepic. Alexander Forbes of Tepic, had just made a bargain with McNamara, the agent of the owner of the mine, that he would supply this mine for sixteen years on certain terms. Forbes writes to Negrete in the City of Mexico, informing him that he wishes to buy some mining shares, and begs him to act as his agent.

Negrete and Eustace Barron were old friends, and when in the year 1858 or 1859 Eustace Barron, in the City of Mexico, was on his dying bed, Francisco Negrete, being then in the City of Mexico, was requested by him to go up to San Francisco, and vindicate the character of his old friend, by proving that he himself bought these barras from Castillero in Mexico, in December, 1846; that he paid for them then; that he received the two-league grant, and forwarded it to Tepic; and to produce such evidence as was in his power to vindicate Eustace Barron from the aspersions thrown upon his character in the Courts of California. And it was because Eustace Barron was dying that Negrete promised to do this. He died, and that Castilian merchant complied with his pledged word, and did come up to this city to give his testimony in this case. And it was because he was performing a friendly service, acting from his love and affection to a dying friend, that he agreed to make this journey, and give his vindicating evidence at great personal inconvenience and without pay or reward.

He is asked, "What did you get for coming up here?" "I got nothing," was the reply. "If anything had been offered me, I would not have come." He did not come up here as a matter of business. He came here as a matter of duty to a dying friend, whose character had been aspersed, and whose last hours were embittered by charges of fraud brought against him. And this dying man told his son to spend the last dollar of their fortune, and never to compromise this case until his memory was cleared from these foul assaults; and it is for that reason that no compromise has ever been made. All the wealth that was left by Eustace Barron, and it is large, will be expended in this case until his character is vindicated. Many offers have been made to buy us out, and proposals made to secure the withdrawal of the injunction by compromises. All these efforts have been made. All propositions for compromise are useless and idle. We expect and ask for nothing but justice from your Honors.

And now we say that we repel this charge of fraud made by a body of speculators who have succeeded in deceiving the Attorney-General of the United States, and cause him to issue some of the most extraordinary productions that ever emanated from any public officer; bringing the whole power of the Government to bear against the claimants; suppressing, so far as lay in his power, all testimony which was suspected to be of a tendency favorable to our interests. We repel the charge and defy the proof. Finally, at a cost of nearly $200,000, we have obtained the evidence in this case now before the Court; and this we never could have done if we had not had large means wherewith to bear up against the whole power of the Government. Against persons of only moderate means, this vile conspiracy against rights would have succeeded.

Well, all these witnesses come up here; and amongst them is old Francisco Martinez Negrete. Here we had in our possession the letters which he had written to Alexander Forbes in 1846. Alexander Forbes left their correspondence behind him in Tepic, when he departed for England. He is now in England, eighty odd years of age. These letters were produced here. Negrete at once recognized them as the letters written at the time at which they are dated. He gives his testimony calmly and consistently from the beginning to the end. The whole of his transactions with Andres Castillero are spread before the Court. Castillero's first letter is received. He offers Negrete two shares for himself. His reply is, that he don't wish to go into the mining speculations. This prudent old merchant had never done anything but attend to his mercantile business, and the idea which he entertained of engaging in carrying on Mexican mines was, naturally enough, that it was like throwing a fortune into a bottomless pit. He could not believe that anything was to be realized from this mine. To use his own very expressive language, "his very flesh quaked" at the thought of a mine.

Now I want to refer your Honors to the letters of Negrete, which give a picture of what occurred in Mexico at the time of this purchase.

I do not intend to detain you by reading largely from the deposition of Negrete. I merely wish to read his letters, produced here in the original, and inquire if, from their bare inspection, they do not in themsevles rebut the possibility of forgery. Indeed, the pretense that they are forged is not in the record. Only my brother Randolph says they are forged.

I will read from pages 2484–5–6–7. The first things that we have are three checks. Negrete procures them from his banker in Mexico, and brings them up with him. Here is the first check:

Señor Don DONATO MANTEROLA:

Mexico, December 18, 1846.

My Esteemed Friend: I beg of you to deliver to Don Andres Castillero the sum of four thousand dollars, for account of D. Alexander Forbes, charging the same to the account of your sincere friend.

FRANCISCO MARTINEZ NEGRETE.

Received—Andres Castillero.

At the bottom of this check we read "Received—Andres Castillero." There is the payment. This comes out of the banker's vaults. Check No. 2 reads:

Señor Don DONATO MANTEROLA:

Mexico, December 22, 1846.

My Esteemed Friend: I beg of you to deliver to Señor Don Nasario Fuentes the sum of one hundred and thirty-seven dollars and twenty-five cents, for account of the Sres. Barron, Forbes & Co., charging the same to the account of your sincere friend.

FRANCISCO MARTINEZ NEGRETE.

Received on the above date—Nasario Fuentes.

We read at the bottom of this: Received on the above date, "Nasario Fuentes."

There is the order on the banker to pay the Notary his fees for drawing up the papers; and this paper also he procures direct from the banker's vaults.

Again, on the 2d of February, 1847, as appears on the face of these papers, Forbes wrote to the City of Mexico, and asked Negrete to send him a second copy of the contract. Under the Mexican law, Negrete was obliged to go before a Judge and request him to order the Notary to make out this second copy; otherwise, the Notary could not furnish one. The Judge's order is here. The petition to the Judge is here. The copy delivered by the Notary is here. And here again is the check on the banker for payment of charges on this second copy:

Señor Don DONATO MANTEROLA.

S. C. Mexico, February 6, 1847.

My Esteemed Friend:—I beg of you to have the kindness to order the payment of the sum of seventy-five dollars to the Señor D. Nasario Fuentes, charging the same to the account of your sincere friend.

FRANCISCO MARTINEZ NEGRETE.

Received—Nasario Fuentes.

Now, not only are these banker's checks here, showing the payment by Negrete at that time, but there is a letter here showing the whole transaction precisely as it occurred.

On the 5th of December, 1846, Negrete first acknowledges the receipt of orders from Forbes to buy for him:

Señor Don Alejandro Forbes:

Mexico, December 5, 1846.

My Esteemed Friend:—Pursuant to your favors dated 24th ultimo, I have spoken to Señor Castillero in the terms which you express in one of them, and he has promised to think over the business and bring me his propositions to-day, and also the document of the ownership of the mine which he has in his possession. It is now eight o'clock at night, and he has not brought his proposals, from which I understand that he has not been able to finish them, and should it be so I shall send them to you by next mail.

Your affectionate friend and servant,

Francisco Martinez Negrete.

Postscript.—After having signed the above, Señor Castillero has come in and has brought me the contract of partnership in the mine, with a copy of the original, which I transmit, as I have not time to make a second copy. You will observe the simplicity of that document, and that it is wanting in explanation. By article second, none of the associates can alienate his share. Señor Castillero says that he drew up this article to prevent any of his partners from disposing of any share (barra) to the North Americans. He has also handed to me the letter, the original of which I send you, for the purpose that having informed yourself of their contents, you may communicate to me your orders in the terms you may think proper. According to Señor Castillero, the half of the proceeds belongs to the supplier (aviador) of a mine. You, in view of the contents of the contract, and of the proposals which he makes in the letter addressed to me, can decide upon what is most expedient, and I assure you that on my part I will obey your orders to the best of my ability. Said Señor Castillero places much value on the Island of Santa Cruz, which is his property. He says it is thirty-two leagues in circumference, with a good harbor, timber and fresh water. He is disposed to sell it rather than have it taken from him by the Yankees. It is distant four leagues from the port of Santa Barbara, and he considers that it would be of much importance to England, should the United States take possession of the Californias. If you are inclined to purchase, you can inform yourself of all this leisurely.

The mail is about to close, and without time to say more, I remain your affectionate friend and servant,

Francisco Martinez Negrete.

Now, here is a letter (page 2486) dated Mexico, December 9th, 1846:

Señor Don Alejandro Forbes:

Mexico, December 9, 1846.

My Esteemed Friend:—Don Andres Castillero delivered to me, just as the last mail was leaving, a copy of the papers of the mine in Upper California, and a letter addressed to myself on the subject of the terms on which he would agree to enter into a contract with you. That you may carry this business into effect, it is requisite to make it sure that it be done in a manner which shall leave no room for disputes afterwards; and as the said documents sent to you in my letter of the 5th, furnish some information, it would be conducive to this end to submit the business to the judgment and opinion of a good lawyer, who will draw up the conditions in conformity to the ordinances of mining and the existing laws. With this and the instructions you may give me, I can do everything else here which I may be ordered. Señor Castillero appears to be a sedate person, and he manifests a great interest that this negotiation may be placed under the protection of the English flag, as being the only means of securing that property, in which he owns twelve shares (*barras*), having ceded the other twelve out of consideration to the persons who now own them.

I had written thus far when I received late through the English Minister your esteemed letter of date 28th ult., and in consequence of its contents I have spoken with Señor Castillero again on the subject of the negotiation of the quicksilver mines, and find him entirely disposed that the half of the mine which belongs to him be supplied (se refaccione ó habilite,) or to sell four shares (barras) as may appear best, on account of the interest which he has in defending this negotiation under the protection of the British flag. Seeing him so well inclined, and desiring to acquire information regarding the value of the shares, I have resolved not to enter into any complete arrangement before speaking first with Father MacNamara; neither has it seemed to me proper to divulge what I know about the contract you have made there, until the arrival of the Father and I have a conference with him, and it be seen whether it will not be better that he himself inform Castillero of said contract, which I have read carefully, and find that it has not all the formalities prescribed by the laws, because, in the power of attorney granted by Señor Castro should have been inserted the power which the other two parties interested gave to him, that is, the Father Real and Robles. I would have been glad that you had fixed some starting point for me, as I find myself in the dark and unable to form any opinion as to the value of each share; but let it be what it may, and whatever may be the opinion of Father MacNamara, I will not go beyond the price of fifteen hundred dollars, or at the utmost, seven thousand dollars for the four shares which Señor Castillero is disposed to sell, as appears from the letter which he has addressed to me to-night, a copy of which I inclose. I shall inquire of said Father what price Don Diego Forbes gave for the two shares which you mention, and be guided by the same; and you will please observe, that should said price be more than two thousand dollars each, I will suspend making the purchase till I receive further orders from you; as in truth, not being a miner, nor inclined to that branch of business, my flesh quakes at only thinking upon the precarious nature of such negotiations and their results, etc.

I am, your affectionate friend and servant,
Francisco Martinez Negrete.

Now, what is it that Castillero wrote to Negrete, in the City of Mexico, and which the latter forwarded by copy to Alex. Forbes:

Señor Don Francisco Martinez Negrete.

Home, December 9, 1846.

Dear Sir:—To the proposals which this morning you were pleased to communicate to me, regarding the quicksilver mine, I will say briefly that you may assure Señor Don Alejandro Forbes of the sale of four shares, and that to conclude the contract I only await the arrival of Father MacNamara, that, in view of his authority, more validity may be given to the instrument, and we may make arrangement of all the matters of the company. The Board of Encouragement (Junta de Fomento) has offered me one distilling apparatus for quicksilver, *of the two which it has ordered from England*, and two thousand flasks which it has in Tasco, which is important news for our business.

I am, etc., Andres Castillero.

Just here I stop a moment. Brother Randolph, in his cross-examination, refers to the translation of these words:—*La Junta de Fomento de los dos aparatos que ha mandado traer de Inglaterra para la distilacion de azogue me ofrece uno.* That is to say, that the Junta, of the two apparatus for distilling quicksilver which it has ordered from England, offered him one.

Now, by reference to the actas of the Mining Junta, we find an entry corresponding with this very matter. It appears that when Castillero made his bargain, which was broken off because the Government consumed in their war operations all the funds in the public treasuries, he proposed to the Junta that they should give him some iron retorts which it had, and some flasks from Tasco. The Junta agreed to this proposition. The negotiations were broken off. Nothing was done. There was no habilitation of the mine. Castillero remained in Mexico. Alexander Forbes leases the mine; and in December Castillero tells Negrete that the Junta *offers him one* of the distilling apparatuses for quicksilver recently ordered from England. Now, where is the entry in relation to the distilling apparatus?

At page 1495 your Honors will find, in Spanish, the acta for the Session of the 10th of September, 1846; and the last entry but one in that acta reads:

> There was read a petition from Don José A. Nieto, requesting that there should be sold to him, at cost and charges, one of Doctor Ure's apparatuses which the Junta has bought, to put up at Guadalcazar. The Junta acceded to the request, asking Sōr. Nieto whether it would suit him to take the apparatus at Havana.

Now, we find, by following on these entries, that the Junta sells, on petition, at cost and freight charges, one of these distilling apparatuses.

The Junta enter into an agreement for the disposal of one of these apparatuses, provided that it might suit him to receive it at Havana. It had not yet got to Mexico.

At page 1529 you find that on the 26th of November, 1846, the second entry is:

> From Messrs. Baring Brothers, in London, 31st October, advising having placed in Havana, at the disposal of Messrs. Picard and Alven, the two distilling apparatuses ordered from them, with the corresponding plans to put them up, and with the invoice of same.
>
> Let the receipt of said communication be acknowledged, and let the amount remaining in their hands, of £270 0*s.* 5*d.*, be drawn for. For this purpose Mr. Bassoco is commissioned.

Here, then, in every little circumstance of their proceeding, nothing ever issues from the pen of Castillero, or any of these parties, that does not receive some emphatic confirmation in these actas.

Now we have all these actas brought in. What are the entries?

Here is Castillero's letter of the 9th of December, noticing the offer made to him by the Junta of one of these distilling apparatuses. Here are the records of the Junta selling one of these apparatuses in September. These papers descend into all these little details of circumstance. Let the United States prove one of them false or forged.

Negrete, on the 12th of December (page 2488), again writes:

Señor Don ALEJANDRO FORBES.

Mexico, December 12th, 1846.

My Very Esteemed Friend:—I have given orders at the stage office to inform me immediately when the Father Mac-Namara may arrive. I do not believe that he has arrived by to-day's stage, because if he had they would have sent me word. As the business which you have on hand is of great magnitude, as I conceive it to be, and as its success depends entirely on Señor Castillero, I intend to submit the arrangements to be made in conformity with the requirements with the laws, to a lawyer in whom I have all confidence; as in such cases it is better to spend at the beginning five hundred dollars, than to have to incur afterwards a lawsuit when the negotiation is fully established and productive. In whatever way it may be done, this business will be managed in the best possible manner.

I am neither a miner, nor do I like the business. From the beginning Señor Castillero offered me two shares (*barras*), which I declined. Reckoning, with your consent, I might perhaps take one share for some friends of mine, but this would come in, like all the rest, in the contract of supply (*avio refaccionario*). In this manner, if it should be that the holders did not gain any great advantages, they would know that at most they would lose only what the share had cost them.

Wishing you good health, I remain, your obedient servant,

FRANCISCO MARTINEZ NEGRETE.

There are two young men who had got it into their heads that a share in this mine would be worth a good deal. One of them was a relative of Negrete. Castillero told Negrete that he might have two barras. Negrete cannot consent to enter into a mining company; but he has two young friends who would like one share between them. Then Negrete writes to Forbes.

That share was taken; and of these two young men, one of them holds his half-barra. He lives in Mexico, and is owner of a half-share to this day; and Negrete gives his name, and tells his place of residence. This we offer in evidence for the benefit of the Government, who may prove Negrete a perjurer in this particular instance.

On the 16th December Negrete again writes:

Señor Don ALEX. FORBES.

Mexico, December 16, 1846.

My Esteemed Friend:—The Presbyter MacNamara arrived here on the 12th, by the stage, and yesterday, the 15th, he was in my house for about a couple of hours, when we talked particularly about the business of the mine in California, and what should be done as regards Señor Castillero. To-day at eleven o'clock we met again, together with Señor Castillero and a lawyer in whom I have entire confidence, that he might be informed of what was to be discussed, and draw up the articles of our agreement in conformity to law, or in the best manner possible. I have instructed him regarding all the essential points of the transaction, by means of extracts of your letters, that is, of such portions of them as favor our position, so as to treat on the conditions which may be most favorable to your interests, considering the present condition of the business, and I will inform you of the result of the whole, either in this letter, or separately; but, I advance these lines in case I should not have time.

The measures you have adopted in regard to the vessel which carries the cotton, are, in my opinion, very proper, and were even indispensable.

By to-morrow's mail I expect to receive accounts from Madrazo and Palacio of the result of the fair, and although all complain bitterly, I am sure that they must have sold all the stock from the factory notwithstanding the Yankee wagons which came from Santa Fé, which were allowed to enter San Juan without any difficulty. The Supreme Government is inclined to prosecute the war, and it is believed that the national representation is of the same mind; and such being the case, there will naturally follow a formal declaration prohibiting all communication with the North Americans, and even expelling those residing in the country, as was done with the French. The English courier has arrived; till now I have received no letter from my *compadre*, although I have received other letters. I hope to get it to-morrow.

I am, your affectionate friend and obedient servant,

FRANCISCO MARTINEZ NEGRETE.

And here is a postscript:

P. S.—Señor Castillero desires that you should maintain possession of the island, and for this purpose he has addressed me the inclosed letter, which I recommend to your attention.

And here is the inclosed letter:

[LETTER REFERRED TO IN THIS EXHIBIT.]

Señor Don FRANCISCO MARTINEZ NEGRETE.

Home, December 16, 1846.

Esteemed and Respected Sir:—I would thank you much if you would recommend to Señor Don Alexandro Forbes, that on taking possession of the quicksilver mine, my island of Santa Cruz, situated in front of Santa Barbara, may also appear as an English possession. Being distant only four leagues from the coast, it is a very important possession on account of the abundance of water and timber, and its good harbor. To English vessels, and even to the company, it may be of service for the absolute independence in which it is of all the country. Excuse me for repeating my request, and I remain always your most obedient servant,

ANDRES CASTILLERO.

Now, may it please your Honors, in relation to the question made by the U. S. counsel about this mode of passing property from under the flag of Mexico to that of some other power in order to save it from spoliation by the United States, then at war with Mexico, I desire to say a word. Why? Was it not the duty as well as the privilege of a Mexican, when his country was at war with the United States, to injure the United States as much as he could? Was not this according to the laws of war? And if he is the weaker party, is it not his duty, is it not his right, under the law of nations, to hide his property from the Government of the United States, and save it from spoliation? When the war's desolation breaks upon a land, does not the shepherd hasten to the field, and gathering his flocks and herds, fly with them to some secret place of safety? Does not the prudent housewife take her treasure and bury it in the earth, safe from the hand of the despoiler? Does not the merchant send his vessels and stores of goods to distant lands, where they will be secure from seizure by his country's enemies?

But the land cannot be moved. Then every possible stratagem is employed, and legitimately employed, to hide it from the power and use of the common enemy of the country. Does the gentleman suppose we are going to offer excuses for the Mexicans who avail themselves of this undoubted privilege? Far from it. Is not the instinct of self-preservation implanted in every created being, animals as well as man?

The little fish in the sea, when pursued by a superior foe, will eject an inky fluid, and conceal its flight 'neath the murky cloud. Every living creature is born with this instinct. Go out into the field, and observe the little bird hopping away from the wayfarer, simulating a wounded wing, until it has turned him from the place where its treasures lie concealed, and then, when its pretty stratagem has succeeded, it will rise buoyant in the air and carol forth its thanks to God, who gave it the instinct by which it preserved its offspring.

All this is natural and proper. Why excuse these Mexicans for doing this very thing? We do not offer any excuse. It was proper. It was justifiable. It was the duty of any Mexican when at war with the United States. So much for that point.

I proceed with Negrete's statement.

On the 16th December, 1846, another letter was written, and this letter first speaks of the success of the transactions, and the sending of the papers:

Señor Don ALEJANDRO FORBES:

Mexico, December 16, 1846.

My Esteemed Friend:—At last, to-day, a little after eleven o'clock, the Presbyter Don Eugenio MacNamara, Don Andres

Castillero, myself, and Señor Don José Antonio Romero, met together to arrange the final result of the business of the mine, and, as we had to deal with matters of law, I considered it proper that Señor Romero should attend, and certainly in this I was not mistaken, as he was of great service to me in the conference and in the illustration of some points—and he also sustained and elucidated my ideas with the judgment, wisdom and experience which he has acquired from his practice in the management of affairs—so that, had he not been so well posted on the subject relating to which we had already held various meetings, and fixed the starting points, and noted the flanks on which we might be approached, probably we would not have obtained the desired results.

Señor Castillero, then, conforms to the contract executed in Tepic by his associates, and takes part in it also for his twelve shares in the mine—and, after various debates, he decided to sell you four shares. Having agreed upon this, I requested him to cede to me another share for two friends (who are your friends also), and he acceded, stating that my mediation and the regard he professed for me, were sufficient motives for him to accede to my request. Thus it is, that I have contracted for the five shares, at $800 each, making in all $4000, which I shall pay over as soon as the writings are made out—it being understood that, although the $800 of the share for the two friends shall be paid by them, this shall be included in the avio agreeably to the contract which you made in Tepic.

Besides this instrument, there will be executed another for the supply (avio) for the part belonging to Señor Castillero. Señor Romero has taken a note of all the points, so as to order the instruments to be drawn up in such a manner as to prevent disputes afterwards. Señor Castillero engages that his associates will consent to the sale of these shares; and, if they do not, he will pay you their cost out of the proceeds of the twelve shares belonging to him.

He has in his possession the title paper of the Government, by which is granted to him in the mining district (*mineral*) two leagues of land in circumference, which he has ceded for the benefit of the negotiation for the sixteen years of your contract. He has assured us that the Board of Encouragement of Mining has entreated him to sell it some share, but that he declined, and I have told him that for no reason nor consideration ought he to alienate any more shares, as in such case you should be preferred. I believe that I have acted and worked for your best interest, and if after this you obtain the advantages you propose in this enterprise, my gratification will be doubled.

By next mail I will send you the writings, and give you any other details which at present I may have forgotten.

I am, your affectionate friend and obd't serv't,

FRANCISCO MARTINEZ NEGRETE.

And here follows the letter of the 19th of December:

Señor Don ALEJANDRO FORBES:

Mexico, December 19, 1846.

My Very Esteemed Friend:—Conformably to what I expressed to you in my last letter, there have been drawn up the writings of the treaty between Don Andres Castillero, as the owner of the half of the quicksilver mine, and myself, as your representative, the originals of which were signed yesterday by both, after having acquainted ourselves thoroughly with their contents, and in the presence of Father MacNamara, who was of opinion that they were expressed in the terms best for your interests, and for this purpose our lawyer, having taken note of all the points, superintended the drawing up and other matters connected with it, because being myself no lawyer, I desired to have the assistance of one, as this would prevent differences and disputes afterwards. I have been promised the legalized copies (testimonios) to-day, and shall transmit them with this letter, together with the instrument which you executed there, and the document showing the grant which the Supreme Government made in favor of Don Andres Castillero for two leagues of land (two ranges for neat cattle) at the place where the mine is situated, and which he cedes for your benefit for the term of sixteen years.

After having made the contract with said Castillero, and not having been able to obtain from him more than four shares for you, I requested him to cede to me one share for two friends of mine, and he acceded to my request immediately, as is shown by the inclosed letter addressed to you by said Castillero. I wish to have this share for my nephew, Don Francisco Maria Ortiz, and Don Martin Lapiedra, in consideration of the first having indicated to me that a small interest in this business would make them happy, and I have desired on my part to gratify them in the belief that you wish to do the same, as I know the regard and other considerations which you have for them. As a matter of course this share is to be included in the supply (*avio*) of the company, conformably with the contract made. If we are to believe the statements of Castillero, that mine is the richest in the world, and he surely says so in sincerity, and is to me a man of strict morality and probity. He expresses himself to the effect that the contract is very favorable to you, and says that my mediation overcame everything in the way of it, so that he would not have done so much with any other person. Be this as it may, after having done my duty, my satisfaction will be much greater when I know that by this means your fortune, and that of your respectable house, has been increased.

Señor Castillero has promised to give me a certified copy from the Mining Tribunal of all the concessions which it made to him, when on the proofs given by the Professional Board (*Junta Facultativa*) it engaged to favor the mine, but which it did not do, because the Government seized upon the funds.

Now, may it please your Honors, that paper was never seen by any of the owners until 1850, and they did not know that it had the slightest interest for them. They had not the slightest idea that it could be of any interest for them. What cared they for any agreement which Andres Castillero might have made with the Junta, when it was known it had not been carried out, because the Government seized the funds? That bargain had been replaced by a new one. They now themselves furnished the funds; and it did not enter into their brains that the old bargain that Castillero made with the Junta was of any value to their interests.

It was not then until 1850, when Castillero came to Tepic, and saw these letters of Forbes, which were shown to him, saying that he ought to get a "ratification" from the Supreme Government, that he said: "I have got one; I have got my grant; the Government gave me a 'ratification.' What do I want with another?" And then he and Eustace Barron upon this statement start for Mexico, where they both resided, promising to get a certified copy of the document showing the ratification of the mining possession. Where is it found? Not in the dispatch from the Minister of Relations to the Governor of California. Nobody dreamed where else it could be. But the Government communications were two. One says to the Junta de Fomento that the President had approved of the bargain made with Castillero for the working of his mine on the terms proposed; and the other says to the Minister of Relations, give him a grant for two leagues. Now the very language of the Government to the Minister of Relations induced the belief that there was nothing contained in the terms proposed but some bargain about working the mine; and men might have gone on under that conclusion, and looked over these papers forever, and never have dreamed that under these very words was concealed a ratification. Amongst the *terms proposed*, was one providing for a ratification of the mining title. Castillero tells Eustace Barron in Tepic that there is a "ratification." They go on together to Mexico and find it, and sent it on instantly. This is the paper which Castillero was to have given Negrete in 1846. It was the paper which proved the perfect folly and uselessness of the suggestion of James Alex. Forbes. If James Alex. Forbes had known that amongst Castillero's propositions there was one to ratify the mining possession, he never would have suggested the forgeries which he did. He proposed to forge titles because he did not know that amongst these propositions so made, was one involving the ratification of the mining title.

And the best possible proof of this fact is contained in James Alex. Forbes' letter of the 20th December, 1849. It will be found at page 846. This man is proposing to forge titles; he is proposing to forge them because he does not know that they already exist. Here is his letter of the 20th December, 1849. I read from foot of page 847:

> I know not what conditions Castillero may have proposed to the Supreme Government of Mexico, but, whatever they may have been, they, of course, cannot be fulfilled in California by reason of the change of government.

It never had yet suggested itself to any man, that amongst Castillero's proposals for working the mine, was one in which he asked for a ratification. The people in Tepic knew nothing of it. James Alexander Forbes knew nothing of it. James Alexexander Forbes had written down letters urging forgeries. Castillero arrives in Tepic from Lower California. James Alex. Forbes' propositions were spread before him. He exclaims, "Why, what in the world is he writing about? My mining possession was ratified when I went to Mexico in 1846. The ratification is there in the archives. What does he want now with another ratification?"

And then what is the answer written to James Alex. Forbes by the house of Barron, Forbes & Co.? "Your letter has been received. In reply, we would state that Castillero is now here, and he says that his ratification was given him in Mexico in 1846."

On the 7th of January, Castillero was still in Lower California. On the 3d of February, 1850, Alexander Forbes writes to James Alex. Forbes: "Castillero has returned, and is also here." * * * "He says such approval was given, and that on his arrival in Mexico he will procure a judicial copy of it."

Now this is the first time that it is ever suggested by anybody that the propositions for working the mine contained a condition that the mining title should be ratified. This is the very first thing that Castillero says when he is shown Forbes' suggestions.

From 1846 to 1850 there is a separation. War intervenes. Peace is declared. Castillero has been in Lower California. When he arrives we will show him James Alex. Forbes' letters and see what he will say. He does come over. The first words he utters are: "There is already a ratification. I got it in Mexico in 1846."

This brings us back to Negrete's letter of the 16th December, 1846:

> Señor Castillero has promised to give me a certified copy from the Mining Tribunal of all the concessions which it made to him, when on the proofs given by the Professional Board (*Junta Facultativa*) it engaged to favor the mine, but which it did not do, because the Goverment seized upon the funds.

Now, he goes on to say:

> At the end of this letter is a statement of the capital and expenses of the whole, with the only difference that the Señores Ortiz and Lapiedra will make good to you the eight hundred dollars which they have to pay for their share.
>
> I have not received the instrument which I have mentioned, but I remit the other documents.

He had been in hopes that the Notary would give him copies of the two acts—the power of attorney is sent to Tepic, as well as the grant of two leagues which Castillero gave him to send on.

Here, then, this grant of two leagues is traced directly from the Mexican Government to the hands of Castillero; from the hands of Castillero to Negrete, and from the hands of Negrete it is dispatched—as we have seen in this letter—to Alexander Forbes. Did Alexander Forbes receive them?

I read from page 2496:

Señor Don ALEJANDRO FORBES:

Tepic, Mexico, January 9, 1847.

My Very Esteemed Friend:—By your favor dated 29th ult., I noticed that you had in your possession the before mentioned documents, and I believe that on a close examination you will find them to be in order.

I shall mention your indications to Castillero, and according to his opinion the principal supplies for the mine should consist of goods of the country, mostly domestic cottons and brown sugar, which articles he noted in the report which I transmitted to you in one of my former letters.

About the end of September there sailed from New Orleans, bound for San Blas, a ship loaded with cotton, and I do not know whether the cargo belongs to Rubio or Drusina.

Without any other particular matter to communicate,

I remain, your affectionate friend and obedient servant,

FRANCISCO MARTINEZ NEGRETE.

This is from Negrete, acknowledging the receipt of Forbes' letter, advising the receipt of the report forwarded by Negrete.

From the top of page 2493, I read:

I have paid to Señor Castillero $4000 yesterday, which I have charged to your house, $120 exchange, at 2 per cent., making $4120, of which my house in Guadalajara will give your office advice.

I will send you, by next mail, a note of the other expenses.

Your affectionate friend and obd't serv't,

FRANCISCO MARTINEZ NEGRETE.

On December 19th, Negrete forwarded another little note:

To Don Alejandro Forbes:

Mexico, December 19, 1846.

My Esteemed Friend:—Immediately after having put into the post-office the package addressed to you separately, there were delivered to me the two instruments mentioned in it, and which I have the pleasure to transmit to you herewith.

Your affectionate friend and obedient servant,

Francisco Martinez Negrete.

Now, we have got *four* documents forwarded,—the two copies of the contract of avio, and the sale of the barras. Castillero's title for two leagues of land, and Castro's power of attorney, all leave Mexico for Tepic, and all reach Tepic and are acknowledged as received by Alex. Forbes on the 29th of December, 1846.

Now, these same papers are brought forward into Court, and they are exhibited to Negrete, who recognizes them all. He recognizes the Castillo Lanzas document as the very one which he at that date sent to Alex. Forbes in the City of Tepic.

But observe, before these papers went to the City of Tepic, the two league grant was used in making a notarial act.

When Castillero told Negrete, "I have got two leagues of land adjoining this mine; I have got a grant of it for cutting wood for burning in the mine; and as you are going to take the mine for sixteen years you will want it, I throw it in; I don't give it to you; but you may go and cut wood upon it, just as you need, to supply the mine. Here is the title; take it, and send it to Alex. Forbes."

The Notary is then required by Negrete's lawyer, Mr. Romero, to put this two-league grant in the deed of avio. The Notary does this. For what purpose? That it may be inserted in the copies sent out of this deed. They wanted them all to go out together.

And in this connection we have a little incident indicative of the good heart of this old merchant. He will not engage in the mining business, but he reserves a share for two young friends, who would be made "happy" on obtaining such a possession. He will divide the cost between them. The mine *may* turn out well. At least this share will make my young friends happy. I don't want anything for myself. I take this share for these young men, not for myself. That is the tenor of these letters on this subject.

In February, 1847, Negrete presents himself before a Judge in Mexico, and petitions for an order requiring the Notary to make him out a couple of additional copies of these papers. The Judge grants this order; the copies are made out; and then Negrete writes as follows:

Señor Don ALEJANDRO FORBES:

Tepic, Mexico, February 6, 1847.

My Dear Friend:—I have written you a separate letter, and with this I have the pleasure to transmit the inclosed writings, and also the receipt for their cost, which amounted to the sum of seventy-five dollars, which you will credit to my house in Guadalajara.

I am, your affectionate friend and obedient servant,

FRANCISCO MARTINEZ NEGRETE.

This closes the Negrete correspondence.

[END OF FIRST DAY.]

SECOND DAY.

THURSDAY, Oct. 25th, 1860.

MR. BENJAMIN—May it please your Honors, in the course of my argument yesterday I called the attention of the Court to the fact, that upon the last examination made in the Mexican archives, some papers had been discovered—the existence of which was previously unknown to the claimants—those papers being a correspondence between the Governor of California and the Mexican President at the date of the discovery of this mine, and of this denouncement. And I called attention to the fact that upon the return of these papers from Mexico, the keeper of the archives in California was requested to make his search, and there found the papers which corresponded with the archives that had recently been discovered in the City of Mexico.

Amongst those archives is found a statement that the dispatches from California to Mexico, were taken by a special commissioner, Mr. Covarrubias. In addition to the testimony disclosed by the archives themselves, and by the testimony of witnesses who state the fact of the transfer of these communications from California to Mexico at that date, we have what I had omitted yesterday to call to the attention of the Court. In the index [holding up a small pamphlet], which I have prepared for the convenience of your Honors, are stated two entries from the "Diario Official." One states the arrival of the brig "Juanita" in Mazatlan, on the 2d of March, 1846, from San Diego, in twelve days. That is at page 2354 of the record. And then, on the 12th March, by the marine news at Mazatlan, published in the papers of the day, the brig "Juanita" leaves Mazatlan for San Blas. The paper contains a list of her passengers; and amongst them is Mr. Covarrubias, the messenger from the Governor of California. This fact I omitted to call to the attention of the Court yesterday.

I have stated to your Honors what the archives in the City of Mexico are. I have detailed to you what they contain, and refer you to the testimony of the witnesses who prove the genuine character of the documents relied on by us.

All the testimony to which I have hitherto adverted, is the testimony of Mexican officials. We desire now to invoke, in behalf of these claimants, the testimony of a witness sent from California for the purpose of examining and comparing these archives; and that of the United States Minister, Mr. Forsyth, who was then in the City of Mexico.

Mr. Brodie, a gentleman well known in this city, of unimpeached, and I imagine, unimpeachable character, was employed by the claimants for the purpose of taking the copies to the City of Mexico. He had long been a resident of the Mexican Republic; knew the people, knew their language, and knew some of their public officers, as he states in his deposition. He took the traced copies which had been sent from Mexico back to the City of Mexico, and went to the archives there for the purpose of comparing them, and ascertaining their accuracy. His testimony is conclusive as to the entire accuracy of the copies, and their concordance with the originals there found. Upon the cross-examination of Mr. Brodie—whose testimony is at page 1059—the counsel for the Government propounded to him two questions, to which I will call the attention of the Court.

The first question is at page 1067. The witness had stated that he went with Mr. Forsyth, the American Minister, for the purpose of making this examination of the archives and comparison of the copies with the originals.

Ques. 27.—Did you explain to Mr. Forsyth that the papers that you wanted were to be used in a certain case in California, in which Eustace Barron, Escandon, and other *foreigners*, were claiming the New Almaden quicksilver mine against the United States?

Ans. 27.—I did not explain to him anything at all. I did not know that Escandon had any interest in the matter; do not know it yet. In conversation with Mr. Forsyth, after the papers had been examined, we talked about the purpose to which these copies were to be put, and he understood perfectly well that they were to be used in the United States Courts in California.

I call the attention of your Honors to this remarkable question, as exhibiting the entire theory of the Government in this case; that it is the duty of the officers of the United States, under no circumstances to lend any aid whatever in the taking of testimony, or in affording any facilities for bringing before the Court the evidence on which these claimants base their rights:

The next question is (*Ques* 28): "Were not those traced copies, Exhibits G. H. I. and K., all traced in California ?
Ans. 28.—I say no; impossible, unless they had the originals to trace them from here.

Now, those originals were in Mexico. Let us see what Mr. Forsyth says upon this subject. On page 1112, he states the facts on his examination.

How came Mr. Forsyth to go to the public offices of Mexico for this purpose? It was because the Government of the United States had refused to send any agent, or to authorize or facilitate any investigation whatever; for that reason, and in order to show the entire good faith of these claimants, Mr. Eustace Barron, of the City of Mexico, unwilling that it should be supposed that he was doing anything clandestinely or secretly, prevailed upon the representative of the United States Government to go to the public offices of Mexico, and there satisfy himself, by actual inspection, of the authenticity of the originals, of which copies were to be produced.

Mr. Forsyth says (page 1112):

In the months of July and August, 1858, I was Minister of the United States of America to the Republic of Mexico, and residing as such in the City of Mexico. In the months of July and August, 1858, at the instance of Mr. Eustace Barron, of Mexico, who was one of the parties claiming an interest in certain quicksilver mines in California, known as the New Almaden quicksilver mines, I went in company with the British Consul in Mexico, Frederick Glennie, Esq., Mr. John P. Brodie, of California, who had come as agent for the claimant of the mines, and the Licentiate Emilio Pardo, first to the office of the Junta de Mineria.

And then he describes the production of the originals by the proper archive keepers, one by one, and the careful examination made by him of those archives—by reason of which he is enabled to testify to the truth of the copies. He says that these copies were precisely alike in every respect; and to these copies he gave his certificate. At the foot of the page he says:

> These original documents were found in the several offices where they appropriately belonged, and were produced by the officers having the custody of them; and I saw nothing whatever to cause me to doubt their being genuine originals. I, as Minister, certified each of the copies hereinbefore mentioned, and the facts set forth in those certificates are true, and the certificates are in accordance with the laws of Mexico.
>
> The Government of Mexico will not allow the great seal of Mexico to be attached to copies of such documents, nor will they allow the originals to be withdrawn. And the manner in which the copies herein mentioned have been authenticated, is the only way in which such copies can be authenticated. The copies, so as above mentioned certified by me, are not now before me, but the printed volume hereto attached as a part of my deposition, and marked Exhibit A, and purporting to contain printed copies of those copies, I believe to be correct.

Now, having produced these copies, with certificates sworn by the United States Minister in Mexico, to be the proper certificates for authenticating them, and the only ones known to the Mexican law by which copies can be authenticated, I shall not detain your Honors by referring to the law book, because you have familiar in your memory the provisions of the Act of Congress constituting this very Court under which you are ordered to determine these cases according to the usages of Mexico, and yet your Honors are invited by the counsel for the Government to take these certificates thus made according to the laws and usages of Mexico, carry them to the window, tear them up and throw them out, as impertinent matters in this case.

They are good, valid, legal certificates. They are proof conclusive of that which they purport to state. They are good certificates in any Court of Justice in Christendom. They are good by the very words of the law under which your Honors are bound to decide the cause.

Now, it is said: True it is that all these documents are there in the archives. True it is that they purport to be original.

True it is, that the Minister of the United States, charged with the defense of their interests in a foreign country, has examined them, and can find no reason whatever to doubt their authenticity; but I, the Attorney-General of the United States, instruct the special counsel of the United States to say in Court that they are not true originals; that they are antedated, fabricated, forged and fraudulent.

Your Honors are called upon to say this, without a shadow of testimony in support of the assertion. What semblance of probability is there in this assertion? If our object had been to forge papers by which we could show to the satisfaction of this Court a grant of this mine and of this land—if the gentleman [Randolph] gives us credit for sufficient subtlety and ingenuity to carry on, without leaving a trace behind us, this long series of forgeries—why does he not then give us at least, credit for sagacity enough to make papers that would be undoubted grants? For, he says, the papers we have fabricated, and that we have taken all this pains to forge, are no grants, and are not legal conveyances of the property. If we wanted to fabricate papers to prove our title, the papers themselves, on their face, would have admitted of no two constructions. But he says our papers do admit of two constructions. He says they are doubtful, vague, uncertain, no title papers at all. And yet we forming this scheme to place in the public archives of Mexico, a body of documents which are to put our title beyond dispute and contradiction, fabricate titles open to all the objections as to their true construction which his legal ingenuity has suggested to the Court! He says the paper we rely on as title to two leagues of land, on its face does not purport to convey it. He says the papers we say are a ratification of our mining possession, are not such in law, nor do they purport to be such on their face.

Now, if we wanted to fabricate something, we would not fabricate something that admitted of these doubtful constructions; but we would have put in the papers a direct grant of what we claim—a direct and undeniable grant of the land to us, without any necessity of referring to local officers in California to put us in possession, when it is known that no possession was ever had. All these papers which we produce are such as he says do not carry out the object. We had skill, we had sagacity; we could put papers in the Mexican archives by the bundle; we could do anything we pleased; and yet it did not please us to forge plain and unequivocal papers—but only papers that are liable to all the legal objections which he has suggested to the Court; liable to double constructions, not purporting to be grants, and if grants, requiring further proceedings to give them effect according to their true interpretation!

What a strange system of forgery is this! All this risk, all this skill, all this labor and ingenuity, exhausted to forge papers that are not, he says, good titles! which, he says, are not good, if true! What probability, may it please your Honors, in all these wild assertions?

But the gentleman goes farther, and tells us that it is absolutely impossible that all these transactions should have occurred in the City of Mexico at the time that we say they did occur there; and why not? With his vivid imagination, with his artistic power, he has drawn a picture to the Court of the condition of Mexico at the time. He represents the American armies as thundering at the gates of the city; the entire Republic as in alarm; the whole mind of its public officers as intent on but one thing—the defense of the country. He says, that if a thousand witnesses came forward to swear to the fact that all these transactions about the mine occurred, the inherent improbability of the assertion is such that your Honors ought to reject it as an idle fable. And then, in the fervor of his imagination, he furnishes us with a comparison: he says, we may as well believe that such an act could have been performed by the officers of the beleaguered city, when Cyrus, with his Persian army, was thundering at the gates of Babylon. Does not my brother Randolph remember what was occurring in Babylon that night? With Cyrus thundering at the gates, did not Belshazzar and his Court that night engage in riot and in feasting? So far from the inhabitants of that doomed city keeping watch and ward, or fearing danger, mad orgies filled that night in Babylon. Cyrus was entering the gates, yet the people did not know it, so confident were they in their security. Vainglorious and presumptuous were the Babylonians; nor did they suppose it possible that their well fortified city could be taken.

Will my brother also call in doubt that relation, and say *that the dread handwriting on the wall was also forged and antedated?*

Mr. Randolph—Certainly not.

Mr. Benjamin—Yet he will see at once how very unfortunate has been his allusion to ancient history, for the purpose of satisfying the Court that all Mexico was ringing with cries to arms, and that it was totally impossible that any other business could have been under consideration. Let him look at the newspapers, which it is said we have forged, and which are here offered before the Court. All the daily operations of life were going on; the theatres open, people going to their usual evening amusements; the administrative acts of the country spreading over so vast an extent of territory as was then embodied in Mexico, going on in daily routine. And all this theory that it was impossible that the Government of Mexico should have been occupied with anything else than the war is utterly annihilated by the facts which we know to have occurred. Besides which, the gentleman's picture is overdrawn. At the time when these things were going on, it is true there had been some frontier battles on the Rio Grande; true that the American army had dispersed the Mexican army at Palo Alto and Resaca de la Palma; but the news of these events had not reached Mexico.

Mr. Randolph—The news reached the city on the 19th of May.

Mr. Benjamin—These things all occurred on the 5th, 6th, 7th, and 12th of May.

Mr. Randolph—The grant is dated the 20th.

Mr. Benjamin.—It is proven that all the arrangements were completed previously, and needed nothing but the President's "*acuerdo*" to make the whole complete. All the preceding forms had been complied with. All the operations, the bargaining, and the communications between the different Ministers, had taken place before even the news of the battles had reached the City of Mexico—so that my brother's argument is false in theory as well as unfounded in fact.

My brother Peachy recalls to my memory the ball in Brussels on the night before the battle of Waterloo, when the British officers were called from their dancing with the ladies to fight that memorable field.

But, if your Honors please, another ground is suggested. It is suggested that the demand for the land, alleged to have been addressed to the President in Mexico, could not in all probability have been acceded to, because upon the very face of the papers produced by Castillero himself, it was stated that his mine was upon private property; that it was upon the land of the "retired sergeant, José Reyes Berreyesa." Now, if the mine had actually been upon private property, this argument would have no force whatever, for the reason that there is no pretense that the land of Berreyesa extended for two leagues all around this mine; and, therefore, the grant of two leagues contiguous to the mine, and upon the mining possession, would of necessity have been considered by the local authorities, when giving possession, as subject to the rights of Berreyesa, and would have been so located as not to interfere with him. The very purpose of the Spanish law, in requiring the delivery of a juridical possession, was to take care that the grant—which is made very frequently in the neighborhood, and sometimes on the very boundaries of, private land—shall not intrude upon that private land, but that the land (given by the grant) shall be so laid out by the public authorities as to respect prior possession and prior title. So, under any circumstances, the authorities of California, upon the production of this title, would have laid out the land without encroaching upon the possession of Berreyesa. But all this is explained away at once by some documents that have since appeared in the case.

At page 2729, your Honors will find Berreyesa's title in the Spanish; and on the next page, in the English. The title purports to be issued by "the citizen Manuel Micheltorena," then the Governor of California. In the 4th article, the grant states: "The land of which donation is made is two square leagues, a little more or less, as is explained by the respective sketch."

That paper, purporting to be a grant of two square leagues, was handed by Berreyesa himself to Castillero. It is in Berreyesa's handwriting, as shown by the evidence. The fact that it was his handwriting is proven by the testimony of two witnesses.

Well, now, Berreyesa, as is admitted on page 2728, died about the month of June, 1846; so that this paper, which is a copy of Berreyesa's title, made by himself, was made prior to June, 1846.

Berreyesa, then, prior to June, 1846, furnishes in his own handwriting what he says is a copy of his title, and which purports to be a conveyance of two square leagues.

Now, if your Honors will look at page 542, at a letter written on the 7th of February, 1848, by James Alexander Forbes to Alexander Forbes, at the time that they were making the survey of the two-league grant through the agency of the United States Surveyor, you will find Forbes says: "My opinion of the title of the widow of Berreyesa, or rather my first view of that title, and the information given by her sons, was that the grant was for two leagues; but I have been at her house on my return hither, and I find that the title was given for *one* league, or sitio, and that the word one has been converted into the word two."

Now, when Castillero first applied to the Governor of California for a grant of two leagues, in the papers which have since been found here, and in which his petition is described, he asked for two leagues *adjacent* to his mine, believing his mine to be on Berreyesa's land—believing it by reason of this forged paper of Berreyesa's, in which he had erased the word "one" and inserted the word "two," and added an "s" to the word "sitio." Therefore, when he asks this land, before leaving California, he wants it *adjacent* to his mine. He goes to Mexico and determines that he will ask for the grant there directly from the President.

What occurred in Mexico? Will your Honors look now at page 3049? On that page is a letter written from the City of Mexico by Castillero to Alex. Forbes on the 14th of January, 1847, just after he had in the contract of *avio* leased his two leagues of land for sixteen years, and had sent the title to James Alexander Forbes:

> Esteemed Sir:—The Sōr. Don Francisco Martinez Negrete, has informed me of your willingness to place my Island of Santa Cruz under the protection of H. B. Majesty's Government. I thank you as well as Mr. Negrete for this favor, and to that end I enclose a letter for Sōr. Don Antonio Aguirre, a citizen of California, who holds my power of attorney and a document which proves my property.
>
> It has seemed to me proper to enclose you a copy of the title of possession of Don José Reyes Berreyesa, in which is situate the quicksilver mine; in my opinion it is not within the possession of said Berreyesa, but is situate on vacant land. I state this to you because I was so informed by several adjacent proprietors (colindantes). The copy which I send you herewith is given by himself, and bears a falsehood on its face; for Governor Micheltorena gave him only one league (sitio) of land, as that gentleman himself has informed me. I remark this to you, so that you, by an agent of yours, may examine Berreyesa's title in the archives office at Los Angeles, so that you may take possession of the other two which belong to the company and which the Government of Mexico has granted.

Now, compare Castillero's application to the Mexican Government, after he has gone to Mexico and learned this fraud, with that which he made before he left California. When he leaves California, under the impression that Berreyesa has a title for two leagues, he asks the Government here for a grant of two leagues *contiguous* to the mine. When he reaches Mexico, and finds that that title (Berreyesa's) is a fraud, and that the grant was indeed but for *one* league instead of *two*, he applies to the President of Mexico for a grant of two leagues *upon* the mine.

Is that plain? Is that natural? Is that consistent? There is nothing on the face of these documents that does not carry out our theory to the fullest extent. He (Castillero) wanted his land as near his mine as he could get it, evidently. It was for the purposes of his mine. In California he thinks his mine is on another man's land; he asks for land which is not *on*, but *near*, the mine. In Mexico he finds his mine is *not* on the land of another; he asks for two square leagues on the land of his mining possession. So much for land on another person's property.

Your Honors will find in the record in this case, the espediente of the Berreyesa title;. he has left out the Micheltorena grant, and he has put his claim upon a grant from another Governor (Alvarado) to one league. Mr. Lewis proves that there is enough land to cover the one league for Berreyesa, without at all infringing upon this mine, or this mining possession. Castillero's impression in Mexico was that it was vacant land, and as such he asks for it. But whether vacant, or not, was a matter of very little consequence to the President of Mexico, for the reason that Castillero had to be put in juridical possession by the local authorities; and that juridical possession would necessarily respect the boundaries of any preëxisting proprietor.

There is nothing in the record contrary to the testimony of these witnesses, that this copy of Berreyesa's grant was given by him to Castillero in his own (Berreyesa's) handwriting; the fact is sworn to by two witnesses, not controverted by any. You will bear in mind that Berreyesa's handwriting is here in different original papers; that it has been the subject of comparison by experts, and no attempt has been made on the part of the Government counsel to show that that writing was not Berreyesa's own handwriting.

Well, now, what is the next objection? The next objection is this, weighed upon and commented upon, detaining the Court for hours: That in all the early conveyances of shares in this mine, between the parties, the instrument of copartnership is referred to, instead of the registry and denouncement, as the title of the different individuals who sell their respective barras. Well, I am somewhat surprised at this, because I cannot imagine what possible title they had other than that instrument of partnership.

Where had Padre Real got a title to a barra in this mine, except under Castillero's grant to him? Where had Teodoro and Secundino Robles got a title in this mine, except through the grant by Castillero to them in the instrument of copartnership? The original denouncement and juridical possession gave no title to these other parties, because those stood in Castillero's name. The parties selling were not those who registered as denouncers. The registry and denouncement are in Castillero's individual name. What, then, more natural; what else could be done when Robles sold his shares, and Castro sold his shares, and Padre Real sold his shares? What else could be done to show a title, than to show the grant by the discoverer to them of one half the mine? What other title had they? None other.

And then it is said that these parties, all throughout, speak of three pertenencias, while the grant is of a mine of three thousand varas as a mining possession. From the very origin, the gentleman has harped upon this point; although it was answered in his own first examination of James Alex. Forbes, who gave him over and over again the whole theory of all the owners of this mine from the origin, in language too plain to be mistaken.

A *discoverer's* mine, under the ordenanzas, is three pertenencias; therefore, when these parties were selling out shares in the mine, they sold out their shares in the three pertenencias. That was the mine.

Now, the Alcalde says, after giving possession of the mine, "I have thought proper, ('*he venido en concederle,*') I have come to the conclusion, to grant three thousand varas, as a *gracia.*" The Alcalde had no earthly power to do it. It gave nothing. It was of no value as a grant or concession, but still it was there on the face of the papers. And what is that *gracia*, or mining possession? A tract of land, upon which the *hacienda* —the reduction-works—can be established, and upon which the mining workmen may live; land for stables for their cattle, and for every operation that is necessary in the working of a mine.

Now, the gentleman, after James Alex. Forbes had been introduced as a witness in favor of the Government, by every possible means endeavored to make him say that there was something inconsistent in these purchases and sales of shares "in three pertenencias." But James Alex. Forbes persistently told him it was all right. I refer your Honors to Forbes' deposition, at pages 446, 455 and 870. Page 446:

Ques.—Of what did he give you the possession?

Ans.—Of the mine itself, *the hacienda,* the mining utensils, and the ores that had been extracted from the mine.

Ques.—What do you mean by the mine. Do you mean the spot only where the ores were dug, or that spot with a definite extent of land about it; and if the latter, of what definite extent of land around the mine did he give you possession?

Ans.—I do not recollect that any definite extent of land was specified, other than that given by the Alcalde. It was understood that the *mine* contained three pertenencias at the time.

[The latter part of this answer objected to.]

Ques.—By "pertenencias" do you mean the quantity of land known as such in the mining ordinances of Mexico?

Ans.—I do.

There that stops. Now we will turn to page 448:

Ques.—Will you answer yes or no, whether he gave you possession of a definite tract of land about the *hacienda?*

Ans.—There was no definite tract of land stated. The possession of the *hacienda* was comprised in that of the mine.

Again:

Ques.—When you delivered possession of this mine and *hacienda* to Robert Walkinshaw, agent of Alex. Forbes, of what did that possession consist. Did you deliver possession of any tract around the mine and *hacienda*, or either of them?

Ans.—I delivered to him that possession which I had received, together with a considerable quantity of ore which I had extracted. *At the hacienda* I delivered what I had received, together with some utensils purchased by me. I did not deliver to him possession of any definite tract about the mine or *hacienda.*

Ques.—When you recovered possession of the mine and *hacienda* on your return from Tepic, of what did you regain possession?

Ans.—I did not state that I recovered possession on my return from Tepic; I said I received it by virtue of a power of attorney.

Ques.—Of what did you receive possession on your return from Tepic?

Ans.—I received possession of the mine, a large quantity of cinnabar ore, and *of the hacienda, comprising all the works* erected by Mr. Walkinshaw."

The gentleman is not yet satisfied; and goes on, at page 455, when Forbes again attempts to make him understand what he means:

Ans.— * * *. There was only one act of possession which I understood to have been given. *This embraced three pertenencias, so far as regarded the mine. Three pertenencias*, and *also lands about the hacienda*, I understood to have been given to Castillero in 1845.

Ques.—How much land do you mean to say was granted about the hacienda?

Ans.—I understood there were three thousand varas.

Ques.—When do you mean to say you understood this?

Ans.—I think I learnt this about the time I received possession from Real. I am not certain, it may have been subsequently.

Ques.—When you bargained and bought of the Robles two of their four "barras," did you not obtain from them the half of all their interest in the mine and its appurtenances?

Ans.—I did.

Ques.—How is it, then, that your deed, drafted by yourself, expressed only two of their barras in "each of the *three pertenencias* of that mine?"

Ans.—Quite correct. I purchased two barras, and as a *matter of course the deed expressed according to mining custom all the pertenencias supposed to be comprised in a mine.*

Ques.—How is it, then, that there was no allusion to their interest in the tract of three thousand varas around the hacienda, which is one mile from the mine?

Ans.—The terms of the deed of sale comprise everything; all their right, title and interest to *lands* and mine.

Ques.—Show what words in that instrument convey an interest in the three thousand vara tract around the hacienda.

Ans.—It is that clause which commences, "all their rights and shares in each one of the three pertenencias," etc.

By Mexican custom *a sale of barras in a mine includes an interest in the hacienda.*

Now, what plainer explanation can I give the Court, than this witness has given—for this witness does not lack intelligence? He has only too much of it. If he had a little less, or if one-half could be carried to the credit of honesty, he would be a very considerable man. How am I to explain to your Honors, better than the gentleman has explained, in his own testimony, that, according to the mining customs, all these deeds speak of the *mine* as a *mine* of three pertenencias, although there were other lands comprising the hacienda; and which were considered as *appurtenant* to the mine, and consequently needed no mention in the conveyances. James Alex. Forbes so understood it, when he took a title in the year 1847, and when he bargained for his title in 1846; and it never occurred to him that the three thousand varas were not included in the sale of the three pertenencias. Yet the gentleman stands up here day after day, and calls on your Honors to infer forgery, from the fact that in their deeds of sale no special reference is made to the three thousand varas, which, according to Mexican custom, went with the pertenencias, and required no mention.

Mr. Randolph—You argue, then, that the Junta, misunderstanding this document of Castillero's, supposed it to be for additional pertenencias, and as such recommended its confirmation.

Mr. Benjamin—Certainly.

I now come, may it please your Honors, to a paper somewhat celebrated in this record, called the Vejar certificate.

This Vejar certificate appeared to me, when I read the opinion of his Honor the District Judge upon this evidence, to have precisely the signification which his Honor attached to it. I read it over; and whilst I could not see what bearing it had upon the genuineness of these papers, I *could* see that it would certainly have a very prejudicial effect upon the mind of the Judge to have a certificate brought before him purporting to be a certificate of facts, known not to have existed.

Now, nothing surprised me more than that there should be a false certificate from a Mexican Notary. It surprised me for many reasons. When a student at law, I passed a two years' apprenticeship in a Notary's office in Louisiana. I was familiar with the old Spanish certificates in the notarial offices there; I knew the notarial mode of doing business of the old French and Spanish notaries; I knew the excessive and almost ridiculous particularity with which they carried out the forms prescribed by law—but in the whole course of my experience I have never seen such a certificate called into doubt or question, nor one of them forged or fraudulent. I might have looked anywhere else for false and fraudulent certificates; but the

Notary is so hemmed in with pains and penalties, the punishment so severe and exemplary both under the French and Mexican law (the Mexican law being derived directly from Spain), that it would require some most extraordinary temptation to induce such an officer to make a false certificate.

Yet this certificate (Vejar's) did upon its face apparently bear the construction which your Honor of the District Court had put upon it. But when I read the record through, and found a dozen other certificates of the same nature, and noticed the particularity with which Vejar made up each certificate in turn, then I began to be shaken in my belief of the correctness of the translation, or of the correctness of the meaning attached to the words of this instrument.

In the first place, the certificate, with the meaning which at first blush would be attached to it, appeared to be nonsense. I could not understand how a Mexican Notary could say that he had seen insertions of this instrument in acts done by executive officers in California. How could a man see an insertion of an instrument in an executive act? I did not understand that exactly.

Then, I did not see how the Notary in Tepic could certify that he had seen executive acts in California; nor could I see the slightest sense in the world in bringing up a certificate from Tepic to prove that something had occurred in California, with the remotest idea that any Court would admit it in evidence! because if any official act had occurred in California, the evidence would be in California. Why should we go to Tepic for the evidence of official acts in California? I did not understand it. I then took up Vejar's certificates in the Transscript, and examined them, and the whole thing became plain and clear as day, for it turns out that on every occasion throughout this whole record, in which he certifies to a signature (except when the parties had passed the signatures before himself in the usual form), he had stated the grounds upon which he certified it. He says: "I know such and such facts, and for that reason I say, that in my judgment that signature is true." I found that his (Vejar's) certificates did him honor for their scrupulous regard to facts; and I found that this very certificate, so harshly attacked, contains within itself the proof of the scrupulous regard of this Notary to truth and honor.

I propose now to call the attention of the Court to those certificates according to their date, to show how the language of each certificate changes according to the facts which come by degrees to the Notary's knowledge, how scrupulously he abstains from certifying a signature when he does not know it, and how, when a signature is brought before him to certify, that he does know, he leaves it to those who read it to ascertain whether the grounds upon which he attaches his certificate are sufficient, or not, in law.

The first certificate in this record, of this Notary, is on page 511. It is a certificate to the power of attorney, of the 23d of of April, 1849, given by Alex. Forbes to James Alex. Forbes. This certificate is signed by Jesus Vejar and Panfilo Solis. It is to the signatures of Alex. Forbes and the two witnesses, Joaquin Andrade and William E. Barron. What is the language of that certificate:

> The undersigned, Notaries Public, certify that the foregoing signatures are those of Don Alexander Forbes, Don Joaquin Andrade, and William E. Barron, the same that they use in all their business transactions. In testimony of which we have given the present in Tepic on the 19th May, one thousand eight hundred and forty-nine.
>
> (Signed) JESUS VEJAR. PANFILO SOLIS.

There is Vejar's reason for certifying those signatures. He says, they are used in all their business. It was not signed before him, and he does not say it was. But his reason for believing the signatures is, he says, because they are the same signatures they use in all their business.

On the 13th of November, 1849, he was called on to certify a copy of this Castillo Lanzas decree. Your Honors will find his certificate at page 546.

Now, there was the time, if anything fraudulent was intended, to certify that the original had the true signature of Castillo Lanzas. But the Notary did not know, had never seen, Castillo Lanzas' signature. He did not know whether the signature was his or not, and he would not certify it. Let your

Honors look at the particularity with which, when this instrument is first presented, he certifies the copy.

"The above is a copy taken," —not from "*the* original;" to use which words would imply he knew the original signature; but—"from '*its* original.'" * * * The certificate reads as follows:

> The above is a true copy from its original, which was presented in this office by Messrs. Barron, Forbes & Co., of this place, and the same being returned to them marked with my rubric, the present is given at their solicitation for the appropriate use.
>
> In testimony of which I sign and attach my signet to these presents, in Tepic, 13th November, 1849.
>
> JESUS VEJAR.

A paper is presented to Vejar. It purports to be this Castillo Lanzas decree. He is asked to certify a copy. He will not certify that the original is signed by Castillo Lanzas; he will not certify that it is an original document; but he *will* certify that the copy he makes is a copy from "*its* original," which was handed him by Barron, Forbes & Co., and returned to them by him. Whether that original be true or not, he will not certify. He returns them a certificate that it is the original *of the copy*. That is all. There is no statement there that it was signed by Castillo Lanzas. He knew nothing about *that*, and he would not certify it.

At page 556 is the next certificate by this Notary; given on the 3d of December, 1849. He was called upon with a copy of the instrument of *avio*, which had been passed in Mexico in December, 1846, and which contained a copy of the Castillo Lanzas decree, authenticated by the signature of three or four Mexican notaries, and the seal of the National College of Notaries. That instrument is now brought to him, and he is requested to certify; not to the Castillo Lanzas decree—that has not come up yet—but to a copy of this instrument of *avio*. He says:

> At the verbal request of Alexander Forbes, and for the appropriate uses, I give him the present, signing the same in Tepic, the third of December, one thousand eight hundred and

> forty-nine, having used common paper, there being no sealed paper of the fourth class in the office where it is issued, which I certify.
> JESUS VEJAR.

Now, why was that paper taken to Vejar to be certified? Why was not the copy from the City of Mexico sent up for a certificate? The answer is plain. On the 3d of December, 1849, California belonged to the United States. The original copy from the City of Mexico, certified by the notaries of Mexico, without an authentication of their signatures, would not be admitted in California. Therefore, Jesus Vejar certifies the previous copy given by the Mexican notaries, and then that copy is certified by the British Consul in Tepic. It was supposed that, with the certificate of the British Consul in Tepic, it would be admitted here in our Courts, or used for any purpose required as an authentication of the notarial copy from Mexico. A notarial copy, sent from Mexico, being intended to be used in *Mexico*, required no authentication; but here he was asked to make a copy to be sent to *California*. Making that copy, he saw the notarial certificate of four notaries of the National College of Mexico attached to a paper containing the Castillo Lanzas decree, "treating it with deference as genuine, respecting it, obeying it," as he says in his certificate of that day.

Then, on the 15th of March, 1850 (page 801), he was called upon to give a certificate in relation to another signature. On that day he was, in fact, asked to certify three different signatures. Now, I call your Honors' attention to the manner in which each of the three signatures was described and certified to by this Notary. I want your Honors to see the scrupulous care which he takes with each of the signatures. He certifies each, giving what he knows about the facts, and leaving the Court to determine from those facts whether his certificate is to be treated as sufficient proof, or not.

He is asked to certify to the signature of Jas. Alex. Forbes, who was in California. What certificate does he give?—

> I, Jesus Vejar, Notary Public, hereby certify and accredit, that the last preceding signature of Don James Alexander Forbes, is the signature of that gentleman which he is accus-

tomed to use, it being so known to me, when I knew him in his transit through this city on his way to Upper California, by various acts which he executed in the house of Barron, Forbes and Company. And at the request of those gentlemen, I sign and execute this certificate at Tepic, on the 15th day of March, 1850. JESUS VEJAR.

That is one thing he is asked to certify—the signature of James Alex. Forbes: "I certify it to be his signature; and I certify it because I *know* it, having seen him use that signature, when he passed through this city, in various acts. That is the way I know that signature." He is there asked to certify the copy of the *escritura*, or instrument of partnership.

On the same day he is asked to certify another instrument. Your Honors will find his certificate on page 3132. These papers were presented to him solely for him to certify *signatures*. This (page 3132) is again to the signature of Jas. A. Forbes.

Now, the Castillo Lanzas document is presented to him. We want him to certify this signature, too. What does he say? He is asked to certify the Castillo Lanzas signature to that document which had been sent to him before for a certificate, and which he *then* declined to certify as being Castillo Lanzas' signature. What does he say *now?*—(Page 68 of the record):

I, Jesus Vejar, a Notary Public, hereby certify and attest that the foregoing authentic instrument, signed by his Excellency the Minister of Foreign Relations, Government and Police, Castillo Lanzas, has been respected under that signature, and obeyed by the Mexican authorities that governed in Upper California in the year eighteen hundred and forty-six, according to insertions which the said authorities made of the said instrument in acts which they passed upon the subject of which they treat, and which I certify to have seen, and for this reason that signature in the said instrument should be esteemed as authentic, and signed in the handwriting of his Excellency the Minister; and as also by proceedings which have passed under my observation Sõr. Don Andres Castillero recognized it.

The certificate is not offered for the proof of any executive acts in Upper California; it is offered to prove a signature. The Notary says: "I say that it is the signature, and here is my reason: my reason is that I have seen it respected in insertions of that document in acts passed in which that document has been respected and treated with deference by Mexican authorities."

Now, may it please your Honors, if two meanings could be given to this certificate, would you select the one which would brand this man with falsehood, perjury, and official misconduct; or the one which the act naturally bears on its face? Observe, too, he certifies to this certificate for two reasons, the latter of which you may judge to be sufficient, or not, as you please. "These are my reasons," he says; "First, I have seen acts containing insertions of this document in which this signature has been respected and obeyed, as being a genuine signature, by the Mexican authorities; Secondly, by proceedings that have passed under my observation—Castillero recognized it." That may be a bad reason, or a good one. It is his reason. Take it for what it is worth. The grant purports to be made to Castillero. Vejar says he has two reasons for believing the signature to be a genuine signature; one is, that Castillero recognizes it to be a genuine signature; the other, that the Mexican authorities have inserted it in acts passed before them which "I have seen." We produced the acts in which he had seen it, and in which it was inserted.

Now, what is there against all this plain and logical sequence of facts? These words: "that governed in Upper California in the year 1846." Now, let us put ourselves in the Notary's place for a moment. He has given his certificate to the genuineness of an instrument which is to go out of the country; he certifies, therefore, that the signature has been respected by Mexican authorities; but it strikes him that, the fact that it has been respected by Mexican authorities gives it no authenticity in California, which is an American possession; it is therefore necessary to state that it was at the time that Mexican authorities were governing in Upper California, to wit, in the year 1846. For the purpose required by these parties — to send it into the United States,—it won't do to simply certify that it was respected by Mexican authorities; that does not help it in the United States; but it must be at a time when Mexican authorities governed in Upper California. I must state the date when it was so respected, the date when the Mexican authorities were governing in Upper California, to wit, the year 1846. The ideas passing through the Notary's mind become apparent to any individual who will read the certificate candidly.

It was suggested by his Honor the District Judge, that those words (*actos que autorizaron*) might refer to other officials besides notaries; and it is asked what reason had we for restricting "actos" to notarial instruments in this particular case?

To that I answer, first: That it is true that those words "*actos autorizados*" are Spanish law terms which do apply to other instruments—as his Honor observed—but that those words are particularly, and almost invariably, applied in the Spanish law to notarial instruments. In the Mexican Febrero, vol. 2, page 532, the author, speaking of the various kinds of public and private instruments, says: "There are various classes of public instruments that the laws of the Partidas recognize, such as documents authenticated by the seal of the Pope, King, Prince, Archbishop, Bishop and others; but among them special mention should be made of those authenticated by the signet of a Notary, who is the officer created by law for this purpose."

In the whole of these notarial certificates scattered through this volume, you find these words "*actos autorizados*" used by every Notary who attempts to certify a signature. And, although it is true, as his Honor the District Judge observed, that those words could be applied to other authorities, yet when we find about one hundred certificates in this volume, in all of which the words are applied to notarial acts, the presumption is that they are in this instance applied also to notarial acts, and nothing else. It is a Notary that is certifying; he is using notarial language; all through the record you find notarial instruments *certified in these words and in no other.*

Everywhere else the meaning is undisputed. Why is that meaning changed for this particular certificate? Why should it be so changed? And why should it be so changed for the purpose of establishing that the Notary certified a falsehood in regard to a matter of which he was not asked to certify at all? The certificate on its face states its purpose. He is not asked to certify facts in California; he is asked to certify a *signature;* that is all his certificate purports to be—an authentication of a signature.

Now, whether he gave good or bad reasons for his certificate, is to us a matter of indifference, for he states his reasons—such as they are—and your Honors can judge of their weight. All we asked of him to do, and all he could do, was to certify the signature to three or four papers—which certificates he made out as he thought proper. *This* signature he certifies to be James Alex. Forbes', because "I have seen him use the same in various acts;" "*that* I know for other reasons." I shall bring to your Honor's attention some other certificates where he uses these words "*por esta razon.*" "*This one,*" he says, "is true because I have seen it inserted in various acts." We produce the acts in which it was inserted, and those very acts prove the statement to be true that he had seen the document inserted in them, and treated as genuine by Mexican authoriities. Who made these insertions? Mexican authorities. The California authorities were designated as *local* authorities. All through these books of record, when California authorities are spoken of, they are called *local authorities.* That is not what this Notary has seen. He has seen the signature respected by Mexican authorities; that is, by authorities of the City of Mexico.

I think, may it please your Honors, that this amounts to absolute demonstration. We were all deceived in our opinion of the meaning of the paper; which I admit, upon its face, appeared to be that which the Court attributed to it, namely, that this Notary was certifying to something which had occurred in California, when he had not the remotest idea of certifying to anything in California, at all, and could not know in Tepic what occurred in that department.

Shall I give your Honors more of his certificates?

On the 18th of March, 1850, he was called to certify to some other papers. It is another certificate in relation to the signature of James Alexander Forbes; and given for the same reasons as before. James Alexander Forbes' ratification of the *avio* was presented to him. What is his certificate to this? (Page 549):

I certify and give this certificate, that the preceding signature of James Alexander Forbes, which is subscribed to the foregoing power of attorney granted by Don José Castro, is the same that he is accustomed to use as Vice Consul of Her Britannic Majesty in Upper California, under his seal of office as it appears; and in such character of Vice Consul such signature is recognized by foreign mercantile houses in this city in giving faith and credit to authentic instruments which he has issued—and for this reason I certify the signature.

That is the reason why he gives that certificate.

On page 2475, this Notary is called upon to certify the certificates of notaries of the City of Mexico, on this same day (18th of March, 1850). In so doing, he gives a different reason. He certifies their signatures, and gives his reason for it.

It appears to me, then, may it please your Honors, in the highest degree unjust to this Notary to give to his instrument the signification which was formerly given; a signification with which we have nothing to do. He was asked to certify Lanzas' signature, amongst others, and if he gives bad reasons for believing it to be his genuine signature, it is nothing to us.

Mr. Justice McAllister—Taking your construction to be correct, do you say that the certificates of a foreign Notary, made in a foreign country, should be taken as evidence by this Court?

Mr. Benjamin—Not at all. I simply wish to prove *good faith*, so far as the certificates are concerned.

Now, how is Jesus Vejar's certificate further assailed? By a very simple method; by saying he was a piece of *office furniture* of Barron, Forbes & Co. Well, so he is, just as my brother Randolph is a piece of office furniture of any of his clients, and as I am of mine. If it suits him to call me at present a piece of office furniture of Barron & Co.—

Mr. Randolph (interrupting).—By no means. I shall never do so, sir.

Mr. Benjamin—Why not? They are my clients. Barron, Forbes & Co. were clients of Vejar. Notaries have clients as well as lawyers. Each Notary has his clients. Those clients do all their business in his office. You might ridicule any set of certificates brought from any Notary, any where, as signed by a piece of office furniture, because all the business of the client is done in the same office. I will say, that so far as my professional business is concerned, I do all my client's business, or none. There would not be a particle more of propriety in the epithet being applied to any gentleman of the bar, because he was the legal counsel of his client, than in applying it to a Notary, because he was the Notary of a commercial house.

I now come, may it please your Honors, having reviewed some of those facts which are spoken of as inducing doubt in relation to the genuineness of these papers—a genuineness that is now established beyond all controversy—to inquire into the origin of this charge of fraud.

How came it to be made? Whence did it derive its origin? and who were its respectable progenitors?

A man by the name of James Alexander Forbes—who has been often mentioned in this case—became bankrupt. Not yet thoroughly bankrupt in character, though that was rather bad, he became utterly bankrupt in fortune. He came to these gentlemen, who are the claimants in this case, and asked them for money, and they would not give it. He asked them for a loan of $10,000. They had already lost money by his bankruptcy, and declined giving him any more just at the moment when he had become bankrupt. Animated by motives of revenge, and by a desire to swindle somebody out of some money, having failed in his efforts on Barron & Co., he bethought him that there was a body of men here who were busy in claiming this valuable property, pretending that it belonged to them under agricultural grants, who had the ear of certain Government officers, and who, if they could get rid of the New Almaden Mine owners, might perhaps defraud the Government out of it for their own benefit. How were these New Almaden Mine owners to be gotten out of the way? Up to that day, not a human soul had breathed a suspicion of the genuineness or validity of these papers which had been spread upon the records of the Courts of this country for years.

"I will go," says James Alexander Forbes, "and get hold of a shrewd Frenchman here by the name of Laurencel, and satisfy him by forging certain papers, and putting them in connection with certain other true papers, that there is something wrong in this title. I won't let him have anything until he pays me $10,000 cash down; and I will run no risks. The way I will avoid risk is this: I will stipulate that these forgeries of mine are not to be used except to effect a compromise; and if Laurencel can get a compromise by their use, then he shall give me $10,000 more. If he cannot effect a compromise, why, the papers are not to be used for any other purpose, and I run no risk. I will, at any rate, get my $10,000 in my pocket, and may be these gentlemen, the owners of the mine, will be frightened by this conspiracy into some compromise, and will give Laurencel some of their property—in which case I will get $10,000 more. If they do not, why Laurencel will be left to suffer, and I will have pocketed $10,000."

Forbes proceeds immediately to carry out this notable scheme —and he finds a willing auditor in Laurencel. Laurencel, in his testimony, admits this bargain; Laurencel, under stress of the orders of the Court, is forced to answer the question put to him relative to it. He declines answering it at first.

MR. RANDOLPH—Excuse me; you fall into an error. Laurencel testifies first, that he gave a large sum of money for the papers; and the amount of the money was the only thing which afterwards it required the order of the Court to induce him to divulge.

MR. BENJAMIN—Certainly. (Deposition of Laurencel, page 377.)

Ques. 18.—What amount did you pay?
Ans. 18.—I paid a large amount; I decline to say the amount.
(Page 378). *Ques.* 21.—What did you pay Mr. Forbes for those papers.
Ans. 22.—I have already declined to answer that question.

[The Court requires the witness to answer].

I paid Mr. Forbes twenty thousand dollars for the interest that I was acquiring in depositing these papers, and the engagement on his part to go to Mexico, when I should request him to do so, and procure for me the proof of the fraud committed in this case, which he assured me he could procure. I was also to pay, if necessary, his traveling expenses.

"Was that your bargain?" "Yes, it was." "Was it in writing?"

After some equivocation on that subject, which I do not care about dwelling on, Laurencel finally answers: "Yes, it was in writing." Where is it? On page 380, he answers that—"*I have destroyed my counterpart;* it was in duplicate; *I destroyed it by the advice of counsel;* I did not preserve a copy of either; *I thought it would be inconsistent with the object with which I destroyed the papers.*"

What moral leprosy was there in that paper which his counsel would not suffer even to appear in a Court of Justice? Was it that the infamy of the transaction had so penetrated into the very substance of the paper on which it was written as to taint the paper itself? That paper must never see the light!

He says now, that Forbes' promise was to procure him proof, proof which he said existed of the fraud. Procure proof! Was that all? They *say* that such were the contents of the paper burnt up!

What a field is left for the imagination, as to the infamy of this transaction, when the man who enters into it is told by his counsel, burn up your paper, sir! It is *infamous!* It must never be seen!

What was this bargain? Was it that James Alexander Forbes was to procure other witnesses who would join him in establishing his forgeries?

Was it that he was to go to the City of Mexico and endeavor to get witnesses from there to swear that these papers, containing our title, do not exist in the archives, were not the original papers, or were not placed there at the time that the dates purport?

What was this infamous bargain which polluted the very paper on which it was written? No man knows but the parties to this conspiracy; to others, it will remain a secret forever.

They have disclosed to the Court whatever they chose to disclose. They have destroyed the evidence which would disclose the rest. That, I suppose, is locked up in their own bosoms, to be carried into effect between them, on the principle that, as regards themselves, there is honor between thieves.

The next that we see of Mr. Laurencel, he is inducing Benito Diaz to come in and back the testimony of James Alexander Forbes. He shows him papers; induces him to examine them; has conversations with him—which poor Benito Diaz, who has a bad memory, says he cannot exactly recollect; and then comes into Court with him to back the testimony of James Alexander Forbes in carrying out the conspiracy between Laurencel and himself (Forbes).

What else do we know of Mr. Laurencel?

Having in his possession, and under his control, or rather having access to the records of the United States Consulate of Monterey, containing in their pages the proof of the departure of certain vessels—

Mr. Randolph (interrupting)—You refer now to a book which was at the time in my keeping? I told you the other day that that book was not within the access of Laurencel. For all that concerns that book, I alone am responsible.

Mr. Benjamin—If Mr. Randolph states that Mr. Laurencel did not see that book, of course I have nothing further to say.

Mr. Randolph—Mr. Laurencel, or any other gentleman who chose to see it, could see it. Further than that, I had charge of the book which was loaned me by Mr. Larkin; and I alone am responsible for its keeping.

Mr. Benjamin—I say nothing to the contrary. My brother Randolph does not know what I have reference to. I say that Laurencel had access to certain books containing certain facts.

Mr. Randolph—If you refer to the letters to the Department of State—they were there. If to the other letters—they were not there to the best of my knowledge and recollection.

Mr. Benjamin—Of course my brother cannot suppose I refer in the remotest degree to him. I am referring to Laurencel's acts.

Mr. Randolph—When referring to a book in my keeping, you are referring to me in a great measure.

Mr. Benjamin—I will drop that part of the subject, as Mr. Randolph seems sensitive about it.

Mr. Randolph—No! I request you to go on.

Mr. Benjamin—I was simply going to state this, that Laurencel had access to these records. It is a fair presumption that he there ascertained that certain vessels had left California at a particular date; yet he brings up evidence to sustain my brother Randolph in the fact that no vessel left. I do not for a moment suppose that my brother covered up the evidence. Of course he only got such evidence as Laurencel brought.

Mr. Randolph—The records to which you refer were brought in evidence. It is all in evidence. But not one single line or word is put in evidence, and you are speaking altogether in regard to a private document, without warrant from the record.

Mr. Benjamin—I proposed to abandon the subject. You said, go on! When I go on, you object. I will, therefore, leave all that concerns Laurencel and the departures of those vessels aside. I will leave aside the fact that he (Laurencel) produces witnesses in Court (whose memory is eulogized by Mr. Randolph) to prove, as they did most emphatically, that they remembered perfectly well all the vessels that left Upper California in the first half of the year 1846. Yet here is the proof in the newspapers and marine news of the day, of other vesses leaving at that time—facts which they, with a memory stated to be extraordinary and unimpeachable, had no recollection of when they were brought up by Laurencel.

What else does Laurencel do?

He sends James Alex. Forbes down into Lower California to corrupt General José Castro by an offer of a bribe of $10,000. I say Laurencel did this, because no man can suppose the United States Government did it. Forbes said to Castro, to be sure, that he came in behalf of the Government. But, in truth, Laurencel had bargained with him that he should go. Laurencel states that was his bargain.

(Page 2616.) The witness (Castro) called upon the stand, is asked in relation to a visit paid by James Alex. Forbes to him in Lower California. The first states the date of the visit, as April or May; and then before his testimony is complete he states that the data given by him previously is erroneous. It was in January or February, and not April or May. Now, what was this visit?

Q. 18. Just before you left Lower California on that occasion, had not James Alexander Forbes been there on a visit to you?

A. Yes, sir; he was there about the latter part of April, or the early part of May.

Q. 19. Please to state what was the object of Mr. Forbes' visit to you, as disclosed by himself, and what passed between you in your interviews; and under what circumstances Mr. James Alexander Forbes left Lower California.

A. At my residence (the Sausal de Camacho) I received a letter from James Alexander Forbes, dated at Don Juan Bandini's rancho, in which he stated that he had a matter of great importance to consult me about, and requested me to come at once to see him. I did so, and took my Secretary with me. When we arrived, after the usual salutations had passed, Mr. Forbes and myself walked out together from the house, and he then stated to me that he was authorized by a powerful company of speculators (empresarios) in San Francisco to furnish me with the necessary means, if I would consent to detach Lower California from Mexico, to make it independent, and that subsequently it should be annexed to the United States. I listened to this calmly, and told him to go on. He then said, there is another matter of importance to you. If you will give your testimony against the owners of the Almaden mine, the Government will pay you a considerable sum, more than ten thousand dollars. I answered, "With regard to what you first proposed, I am an officer of the Mexican Government, and will not be guilty of treason; and as to the other matter, I cannot be bought with money to do an infamous action; say nothing further to me on the subject." We then returned to Mr. Bandini's house.

I then went home, leaving Mr. Bandini an order, directed to Forbes, stating that my duty, and his own personal safety, required that he should immediately leave the country. A few days afterwards I heard from Mr. Bandini that Forbes had left the day after he received my order.

After asking some other questions, he answers to the twenty-second interrogatory thus:

A. I did not give him an opportunity to enter into further details. He was speaking about being dissatisfied with the house, etc., as I stated before, when I stopped him, saying that I did not wish to hear any further explanation about his affairs.

Q. 23. Did he mention the names of any members of this powerful company of speculators in San Francisco, who were desirous of detaching Lower California from the Mexican Republic, and of annexing it to the United States?

A. He gave no names.

Q. 24. Did he tell you by what authority he spoke for the Government, when he promised you ten thousand dollars and more, if you would give your testimony on its behalf, and against the owners of the mine?

A. He did not state how he was authorized to make the offer—he only said the Government would pay me.

Q. 25. Did he exhibit to you any written authority from the Government to treat with you about this matter?

A. No, sir.

Q. 26. Did he tell you who defrayed the expenses of his mission to Lower California?

A. He said that there was a fund here in San Francisco, out of which his expenses were paid.

In the cross-examination, he is first asked how he came to recollect and change the date of the visit from April or May to January or February. He says, in looking over his testimony it occurred to him. (Page 2621.)

Q. 40. About this date of your interview with James. Alexander Forbes in Lower California, what had happened in the two or three days which had elapsed, to enable you on yesterday to remember more accurately what the date was?

A. Because I thought the matter over, and came to that conclusion in my own mind; but I am not even now absolutely certain about the date.

Q. 41. Has not Forbes been to see you and told you that he could prove your statement was false, and that he was not in Lower California at all at the time that you have mentioned?

How did the special counsel of the Government know that Forbes had come here to have a conversation with General Castro—except through the omnipresent Laurencel?

Mr. Randolph—I will tell you. Forbes came into my office and told me so. I should have guessed *that.*

Mr. Benjamin—*I* should have guessed the contrary. If he came to your office, I have no doubt but Laurencel sent him there. Laurencel had previously been sent for by Forbes, as stated by the latter, to consult with him *as to the proper manner of sending a paper to the United States Attorney.* He was sent for, and had to go all the way to Santa Clara to consult about the proper manner of sending a paper to the District Attorney! *That* certainly must have required a *very* grave consultation! However that may be, as soon as Castro on the stand is forced to divulge this attempt to corrupt him by money, and to induce him to give testimony against the owners of the Almaden mine, Forbes is on the spot. (Page 2624.)

Q. 41. Has not Forbes been to see you, and told you that he could prove your statement was false, and that he was not in Lower California at all at the time that you had mentioned?
A. It is not true that Forbes ever told me that any statement of mine was false. I allow no one to tell me personally that I am a liar, and I have never received such an insult from any one in my life. Forbes came to me in a friendly manner, saying that he regretted I had revealed what had passed between us, that it was a secret, and so on, and endeavored to make excuses about it. I told him that being under oath I had to tell the truth.

Now, if Castro's version was not the truth, why was not Forbes brought up again? Why—the answer springs instinctively to the lips: the Government counsel were ashamed to bring him again into Court. This vile creature, with his lips steeped in lies and his soul blackened with perjury, had been paraded day after day in the Court room, until the very precincts of justice were filled with the stench of the corruption which dripped from his every pore. The Government did not dare to bring him in again. But if Forbes had not in fact been down to Lower California—and no other motive for his trip is suggested anywhere—it was open to proof by other persons than he that he had not been down. No such attempt was made.

Who sent Forbes down? Laurencel tells us that he had made a bargain with him that he should go; and Forbes admitted that he had made the bargain. The papers which stated the terms of the bargain are burned up—burned up by those who wrote them, as too infamous to be produced in Court.

There, then, your Honors have the names and the characters of the conspirators who are brought forward to rob the owners of their property in this mine because it is a rich mine. In the quaint language of old Gamboa, "suits do not arise about poor mines; but whenever a mine is rich there are plenty of suits."

Now we come to the famous letters in which this conspiracy "cropped out,"—I believe I use the appropriate Californian mining language. Before that the matrix had been in the bosom of the earth. Parties had been simply "prospecting," but finally they found the "cropping out" of this mine, and it is produced in Court; and what do we find?

A series of letters, produced by one whom the Government's counsel admits to be proven a forger. He ridicules us for impeaching the testimony and showing the perjuries in the deposition of this man—James Alex. Forbes,—"for, he says, "it never entered my brain that you would take that trouble. Of course he is a forger; I bring him in as a forger; I do not pretend to defend him."

Very well; there is one step. Then, a man known to be a forger,—whose testimony is not, the counsel says, relied on at all by the Government in anything that cannot be proven by somebody else,—that is the man who is in constant, confidential communication with the man who bought his testimony. The man who is to make money by that testimony is riding day by day with this known forger, who is not to be believed on oath, and whom the Government counsel does not pretend to defend in any way or shape. They go from rancho to rancho: they seek the old Spanish and Mexican settlers. They concoct, they combine, they conspire day by day, and hour by hour,—how can this mine be stolen? How can we rob this mine from the owners? I will tell you how you can steal the property, says James A. Forbes,—"There are some letters containing expressions which can be made to give resemblance to a charge of a conspiracy to forge titles; take them, use them; blackmail these parties into a compromise."

The letters are brought; they are exhibited to the claimants; "How much will you give?"

How much *did* John Parrott give? How much did William E. Barron give?

They told these people: "Take your forged documents, and go away with them; don't insult us with your base proposals."

Mr. Randolph—Did they ask Hall McAllister?

Mr. Benjamin—I speak to the record in speaking of those to whom the proposals were made, and by whom.

Why did not John Parrott buy up all these *proofs* about these forgeries? He is a shrewd man; he has the reputation of knowing where his interests lie. I believe people don't generally get much the better of him in bargains. Why did not John Parrott buy up these papers which were going to destroy his title? He handed them back to the parties: "Take them! Take them! Go away! No compromise about such matters here!"

Well, that won't do. John Parrott won't buy. But James Alex. Forbes has got the money ($10,000), the documents are deposited in the vaults of a bank here (Davidson's), under a contract that they shall not be brought out without his (Forbes') order; and he goes off whistling about the country, contented in the knowledge that he has defrauded Laurencel out of $10,000 without any risk run.

But Laurencel is not to be defrauded that way. He comes into this Court, and procures a subpena *duces tecum* to bring the papers into Court. He uses the Government as an instrument to break his bargain with Forbes. He makes a cat's-paw of the Government to break his private contract. So the Government does lend its aid to Laurencel, who undoubtedly must be worthy of its protection. Still, it does strike me as curious, that it is precisely Laurencel's counsel who is so vehement against my clients for being foreigners. I have sometimes thought it would be an interesting puzzle to find out how the Government of the United States got interested in foreigner

Laurencel against foreigner Barron. That, however, must be one of the secrets of State, not proper for us to know.

Mr. Randolph—That is not the case at all. My learned friend (Peachy) next me, for a year or two—I know not how long—was engaged in opposing the case known as the Fossat claim. He acted as the counsel of the United States in that particular instance, because of his employment by the New Almaden Company in another instance. His endeavors to procure testimony were untiring, and a vast amount of damage was done. In that situation the counsel for the Fossat claim followed the example, and did the same thing as the New Almaden Company.

Mr. Peachy—One word. My connection with the case has been alluded to, and I desire to say this: that I appeared for the Government to prove that this mine did not belong to Laurencel; that was all. I never did contend that this property belonged to the Government.

Mr. Benjamin—I was going to say, further,—if Mr. Peachy had not desired to make his personal explanation—that Mr. Randolph's explanation lacks one little particular.

Mr. Randolph—It was not an "explanation" but a statement of facts.

Mr. Benjamin—Well, facts. One fact is left out. Did the Government employ Mr. Peachy, or pay him, or was he employed by private clients to appear for them in that Government suit? What I am trying to ascertain is, what the secrets of State are that induce the Government of the United States to employ and pay counsel for the purpose of having Laurencel proved the owner of this property, instead of Barron; Laurencel being as much a foreigner as Barron is. If foreigners have no rights to justice in the Courts of the United States, how is Laurencel any better off than Barron? If, on the contrary, as has hitherto been believed by people in this country—and will be hereafter, unless your Honors decide otherwise (which I doubt)—that foreigners, by law, have a right to own property, then I cannot see what difference it makes whether Barron, Forbes & Co. are foreigners or not. However, in all respects I say Laurencel and Barron stand on precisely the same footing —both being born out of the United States.

I have said that this contract being completed remained a mystery between the two rogues who made it,—the papers which would show what it was being destroyed.

A failure to obtain witnesses from Mexico, as undoubtedly had been promised by Forbes to support his testimony, having occurred; the papers being in a bank vault; Forbes having his money in his pocket,—Laurencel uses the Government as a cat's-paw to enable him to break his bargain. Instead of a joint order of Forbes and Laurencel being taken to Davidson, the banker, to produce the papers that had been deposited in his vaults, the United States Marshal is procured, through the agency of Laurencel, to be sent to take the papers by violence and by stress of law, which Laurencel had bound himself to Forbes should not leave that depository without his (Forbes') consent.

They are brought into Court. I propose to examine them. I propose to show your Honors, in addition to what Mr. Peachy has said, that a large number of the documents produced from that case are forged; that nearly every letter purporting to be written by James Alex. Forbes, as produced by himself, is a forgery; and I do this with a full knowledge of the fact that in the answer in chancery William E. Barron swore that he believed them to be true. In spite of that belief at that time, I will show the forgery on the face. I will show it so that no man can doubt. It does so happen, that William E. Barron being called upon suddenly, and within a very brief delay, to file an answer in chancery, a large body of correspondence was brought before him, and he was asked whether it was genuine. He saw that one document was undoubtedly a forgery, and that document purported to be a letter of Alex. Forbes. The remainder of the documents, which James Alex. Forbes had forged and brought in as his own letters to the parties, were forged out of true letters, by picking out paragraphs here and there. Without an opportunity of comparing the originals in our own possession; without an opportunity of looking at the letters; hurried to file an answer in chancery—William E. Barron said, "I believe they are true." But when we come to examine the vast mass of documents produced in the cause, we find the very original letters, of the very dates, and in the handwriting of James Alex. Forbes,—from which he has forged and brought into Court what purport to be copies retained by him of the originals. I will follow him all through these letters. I will follow his track as the huntsman follows the game—and with the same unerring certainty.

Mr. Justice McAllister—On what page do the letters begin?

Mr. Benjamin—If your Honor please, these letters are scattered through four volumes, without order of date, sequence, or anything by which the Court can follow up my argument in relation to them, unless I furnish your Honors with a chronological list, which I will take pains to do, in order that your labor may be facilitated.

Before speaking of the letters produced in this case that were forged by James Alex. Forbes, I wish first to call the attention of the Court to a letter which is a true letter; having no reference, however, to this case, but brought in for the purpose of deceiving the Court, and since made use of by the counsel for the Government in a former argument. I think I can show that James Alex. Forbes put this paper into this bundle of letters for the purpose of deceiving Laurencel; that he has deceived the Government counsel and deceived the Court in so doing; that it was in relation to an entirely different subject, and had no reference to New Almaden at all.

Mr. Randolph—What letter is it you refer to?

Mr. Benjamin—The letter of the 19th January, 1848.

The letter is at page 386, and requires reference to but one other for any immediate purpose—which is at page 542. This is a part of this conspiracy of James Alex. Forbes to deceive into the belief that there was some fraud.

Now, I will show to your Honors in a moment or two, that after the discovery of this New Almaden mine, the whole neighborhood was aroused to the fact that there were veins of quicksilver in that range of the Sierra Azul, or Blue Ridge, as they term in Virginia a similar mountain range. The whole neighborhood was aroused to the fact that there was quicksilver in that range. It was supposed that other veins would be found; and the record teems with proof of denouncements by different parties, who thought they had discovered other similar mines. Amongst them were the mines of San Antonio and Guadalupe. In those two mines James Alex. Forbes had an interest. In those mines he was desirous that Alex. Forbes should also take an interest; and they had a correspondence upon the subject: and this letter (19th June, 1848) is a letter relating to those other mines, which, as I shall proceed to show to the Court, was brought into this case, having no earthly bearing upon it.

First, let me read the letter, premising to your Honors that only two or three months previous—as late as the 24th of November—Alex. Forbes had made a thorough examination of the New Almaden mine, (*Vide* letter of the 24th Nov., 1847). After having been first alarmed at the prospect that the mine was, as he supposed, a mere *manto*, or horizontal layer—a mere superficial deposit—he found the vein, and he proceeded to inform his associates of it in the letter to be found at page 386.

MINE, 24th Nov., 1847.

For Mr. J. A. FORBES
and
The PADRE REAL, } Santa Clara:

We have at last found the vein or "cinta" of ores which we were looking for, so that I have now the pleasure to inform you and the good Padre of our luck as I promised I should do; but I fear the mine will be reduced to this "cinta," and the great body of it will be "Tepetate Muerto."

But perhaps this cinta may be wider below than it is above. To see whether this is so or not has been the object of our labors, *since discovering the proper direction of the vein of the whole mine*, which discovery makes everything more plain.

This direction was before *entirely mistaken*, of which and other things we will have a great deal to talk about when we meet. When Mr. Walkinshaw arrives and takes a look at the mine, I think we shall take a turn to the Mission. I expect him to be at Bernal's Rancho this afternoon.

I may say now, that it is impossible we can go off the main vein of the mine, as it is entirely different from the walls (respaldos), they being of hard rock of quite different character, whereas the vein is quite soft and easily distinguished.

All we have to do is to look for the "cintas" which have got ores, which, in my opinion, will be reduced to one, *not very wide.*

A. Forbes.

(Endorsed) Alex. Forbes,
Mine of Almaden, Nov. 24, 1847. No. 4.

Here, Alexander Forbes has discovered the vein of the mine. It is thoroughly distinguished. The walls are clear and plain. The ore itself is equally plain and manifest. This he is now communicating. No doubt now amongst these mine owners in relation to the extent of the vein of the New Almaden mine. As to the quality of the ores, that has been known for years. There is no necessity for testing the ores of New Almaden. They were selling the quicksilver; they were reducing the ores in their furnaces, as far as their furnaces would permit it; they were furnishing quicksilver for the market; therefore, they had no necessity, nor was it a time for making tests of the quality of the cinnabar. That time had passed.

Now, look at this letter of Jan'y 19th. When I first read it I did not understand it all. The idea did not suggest itself to me that it did not refer to this mine at all; and I could not make head or tail of it until I saw the endorsements. Then, following up the track, which my friend Mr. Randolph left, I found out what it meant.

(Page 386).—My Dear Sir:—I am very much obliged to you for your very prompt attention to the business in hand, and return the expediente immediately.

I am very much surprised at the result of your assay, and shall try what I have?

Is that the ore of New Almaden? Is it probable that in January, 1848, these two parties have each taken specimens of that ore, and that James Alex. Forbes is testing one of the specimens in Santa Clara, and Alexander Forbes testing another specimen at New Almaden? Does that paragraph seem at the start to refer to New Almaden ore? No! It looks to something new, something strange; something that Alexander Forbes had no idea would occur. But he knew the richness of the New Almaden ores. The New Almaden ores, from the original assay, afforded an average yield of 35 to 40 per cent. Some of it was pure cinnabar, pure sulphurets of quicksilver. He could, therefore, be surprised at no assay of New Almaden ore. But he has been sent the results of an assay of some ore by James Alex. Forbes. He says, he is greatly surprised, and adds, "I will try what I have." Does that mean New Almaden ores?

(Page 386).—"It will of course be better to say nothing about it, particularly as I have already written to Monterey that there is no mine." Is that New Almaden? Is there no mine there? "Nor does there appear to be any quantity of this kind of stuff."

Now, what is it that this is written about? It is some mine, the ores of which surprise him intensely, and which he is immediately going to assay, to see if his specimen corresponds as to results with the other. New Almaden ores have gone up, in some instances, to pure cinnabar. No assay of *those* ores would surprise him. But this is something that does surprise him. Besides, that he has written to Monterey that there is "no mine." Now, the mine of New Almaden was known to the public officers, and to the whole world; and the quicksilver therefrom was being sold? Is that New Almaden, where there was "no mine?"

I looked on the back of this paper, and saw that it had been endorsed in pencil: "Suñol, 4½; Sainse, 4½; Pena, 4½; Narbaez, 4½; Padre, 4; Forbes 2." I added that up and found it made twenty-four; just the number of barras there are in a mine. Well, that is not New Almaden, because these are not the names of the owners of New Almaden. This is an entirely different set of men. Yet that is on this letter. Then this letter is about a mine; the assay of some of the ores of which are then—1848—thought surprising; and about which Alexander Forbes has written to Monterey that there was "no mine;" on the back of which letter there is written in pencil an endorsement, showing that the owners are not those of the New Almaden mine.

Now, James Alexander Forbes was asked about this. I want to omit this poor devil's testimony, and will simply state its substance. He was asked about this endorsement, which shows the letter is not a New Almaden letter at all. He says it *is* a New Almaden letter, and that this endorsement is put on the back of it—as he supposes, by mistake. (*Vide* page 489).

Now, what is the face of this paper? On its face it is unintelligible as regards New Almaden. But that is not all. Look at the letter of the 7th of February, 1848, page 542 :

SANTA CLARA, 7 Febr'y de 1848.

ALEXANDER FORBES, Esquire:

My Dear Sir: By the Mason I send you some specimens of the new vein, which was duly registered on Saturday, and poso opened ; I have not had time to make an assay. Your opinion respecting the abundance of ores of cinnabar in the vicinity of New Almaden is very correct. I have this morning caused another denuncio to be made of another veta! and on my return from it I have yet another to make.

Is that New Almaden? We all know that there never were such denouncements made about New Almaden; but we have in this record these denouncements made of other mines all round it. So you see, by positive archive testimony, that these passages of the letter of the 7th of February, cannot refer to New Almaden. They refer to denouncements and registrations of other and different mines made on a particular day which we have brought in and copied in the record.

Your Honors can see that this letter of the 7th of February, is but a continuation of the correspondence begun a few days before on the 19th of January. Here you see, that at this very time he was writing about other mines, and he has written to Monterey that there was "no mine." That has been perverted by the counsel for the Government into a statement that he had written "*to the authorities*" at Monterey. There is not a word in relation to "the authorities" in the letter; and if he had written to the authorities at Monterey, he would have told them what the authorities at Monterey already knew—that there was "no mine"; that is, in the place he was speaking of.

How did we find that out? Why, brother Randolph turned the attention of the witness (Halleck) to the correspondence of Governor Mason in this executive document (holding up a pamphlet), for another purpose; and he referred to a letter of Governor Mason relating to Walkinshaw's opinions about the right of a partnership to four or five pertenencias, under the Spanish law. Naturally I looked at that—as at everything he has brought forward in this case—for the purpose of informing myself, and it occurred to me that there was at this time a false denunciation made to Governor Mason, of something that was at that time "no mine." I refer your Honors to Governor Mason's letter to Alcalde White, under date of 17th April, 1848, at page 551, House Executive Documents, First Session Thirty-first Congress, 1849–'50—generally known as the California Message and Correspondence. In that letter he refers to his visit to this very neighborhood; speaks of his examining this very locality in relation to the business of the mines, and finding that there was no mine, and that there had been a fraudulent denunciation. And who are the parties? Who are the owners? The very persons whose names are on the back of this letter—or several of them. Just the names that James Alex. Forbes penciled on the back of this letter of January 19, are found in Governor Mason's communication of the 17th of April, 1848. I must read some of the passages of that communication to the Court. (Page 551, House Ex. Doc. 1849–'50.)

Sir:—I received your letter of the 2d inst., late in the afternoon of the 6th, together with the papers which accompanied it, concerning the quicksilver mines denounced in your office on the 17th of December and on the 5th of February last—the former by Cook, Belden, Abrego, Ricord, and others; the latter by Pedro Sainsevain and partners—two days previous to the reception of your letter, I received one dated on the 4th inst., signed by Messrs. Abrego and Larkin, though written by Mr. Ricord, as he informed me, in which it is stated that the mine denounced on the 17th December was denounced by Mr. Cook, and shortly thereafter transferred to their company, and that the one denounced on the 5th of February was denounced by José Suñol, Abrego and Larkin—"ask for an executive order for Suñol to desist from digging within their proper limits, and that the right of Suñol to be put in possession be deferred until the creation of certain Tribunals;" and state that the denouncement of Cook on the 17th of December, and that the possession obtained under it on the 2d of February, were prior to Suñol's denouncement, which was on the 5th of February; the other party, those interested in the denouncement of the 5th of February, claim to be the lawful and rightful owners of that mine, and demand possession of it under the 4th article, title 6, of the Mining Laws, and assert that the party claiming under the denouncement of the 17th of December have no right to possession, because neither their excavations nor measurements of possession were made in accordance with the requirements of the aforesaid fourth article of the Mining Laws.

I availed myself of the opportunity which a visit to your part of the country last week afforded me, to personally examine and minutely inspect and measure both of those mines, denounced on the 17th December, and the 5th February last; there were three excavations at the mine pointed out to me as the one denounced on the 17th of December, all three within a few paces of each other. In one of the excavations, over which was erected a windlass, a man named Cash was at work; and near the two excavations lowest down the hill, stood a small cabin and Mr. Taylor's tent; this was on the 11th inst.; the deepest of these three excavations, measuring in the most favorable manner from the upper side of the hill, did not exceed fifteen feet, though one of the interested parties states that one of the excavations was of the depth required by the mining laws when possession was given, on the 2d of February, but that it since "caved in." I examined that spot which is said to have "caved in," with great care; it had the appearance of having been purposely filled up; it was dug in rock, not in earth; and in my mind it was as much impossible for that rock to have "caved in," as it would be for an auger-hole to "cave in" that had been bored in a large solid block of timber.

So your Honors see that there were places around this mine that were denounced as mines that were no mines. People in those days were getting specimens of good ores, and going around and representing them as found in neighboring mines, and trying to deceive the unwary into purchasing, or taking an interest with them in the pretended mines. Amongst them, it seems, there was some mine of which Alex. Forbes had written to Monterey that there was "no mine;" that he did not believe any existed there. He was afterwards surprised at the assay made by James Alex. Forbes, and said he would try what he had, but did not believe in the thing at all. That is the letter of the 19th January, 1847.

There, then, we find on the 17th of December, that a body of men had been engaged in digging a hole in the rock, and filling it up, pretending it was their *pozo*, and that it had caved in, when, as Governor Mason said, "it could not cave in any more than could an auger-hole in a block of timber."

But what, in the name of sense, has that got to do with New Almaden? To whom was it that Alex. Forbes was writing, stating that there was no mine? To James Alex. Forbes and Padre Real—to whom he had written six or eight weeks before, that he had found the "*cinta*," that the vein was rich. James A. Forbes is asked "Why, what in the name of sense is the meaning of this letter (19th of January) written to you, if about the New Almaden mine?" "Why the reason Alex. Forbes wrote that is this: He did not want people to know the richness of the mine; he wanted to buy out shares." "But who had any to sell?" "Padre Real and myself." Well then, he was writing (on the 24th of November) to the very men he wanted to deceive, the true state of the case. Only a few weeks before sending this letter of the 19th January, he had written to them of the richness of New Almaden, the certainty that he had found the vein, that the ores were all that could be desired; and sends a special messenger with the pleasing intelligence. Yet James Alex. Forbes says, the purpose of this letter written six weeks later, was to deceive him by telling him that there was no mine at New Almaden, in order that the writer (Alex. Forbes) might purchase out his (James A. Forbes') interest cheap! What could possibly make the Court believe such a ridiculous story as that? Here is the paper, endorsed on the back with all the names of the partners in a different and distinct mine, clearly having no connection with New Almaden. By reference to the correspondence in the record, I have clearly shown that these parties did have correspondence in relation to other mines.

Your Honors will find, at page 541, that there had been previous correspondence of these parties in reference to other mines:

SANTA CLARA, 14th July, 1847.

I was presented yesterday with a splendid specimen of quicksilver ore, from a spot within or near the limits of the two

> leagues conceded to Castillero and Socios, but situated upon the land claimed by the American, Cook, of whom you doubtless have been informed. The person who brought the specimen to me, was sent by one of the discoverers, and informed me that in May, 1846, this new vein was discovered and denounced before the authorities of San José.

So of some other veins he speaks of.

And, finally, we have a letter which has recently been brought into the record, which the Court will find at page 3050.

In January, 1849, James Alex. Forbes writes to Alex. Forbes:

> I have received proposals from the house of Jecker, Torre & Co. for purchasing "barras" in the mine of Almaden. I have declined entering in any negotiation of this nature, but I have made proposals for them to take the habilitacion of the mine of Guadalupe, which is still in the state in which you saw it. Herewith I accompany a copy of my letter to D. Ysidro de la Torre upon that subject, for your government, and if he should not feel disposed to take the habilitacion, it would be more agreeable to me for you to include this mine in the negotiation of Almaden, upon terms which may be advantageous to both parties. I may add, that it is possible to obtain the major part of the shares in the mine of Guadalupe by judicious management.

Having shown, may it please your Honors, that this letter cannot, by its subject matter, in any manner apply to the New Almaden mine—that it is without sense or bearing on that mine, but has relation to other mines concerning which Alex. Forbes was corresponding at that time with James Alex. Forbes—I say that he (James A. Forbes) in bringing that letter into Court, commenced the series of frauds by which he attempted to impose upon the Court, and induced it to deprive, for a time, these parties of the enjoyment of their property.

At the very time—I think on the same day—that letter of January 19th was written, in which he (Alex. Forbes) speaks of his belief that there was no mine, referring to this other mine, he presents a petition to the Alcalde, setting forth that the mine of Almaden is a fine mine in beautiful order, and wants the Alcalde to go there with the "*peritos*" (mining experts) required by the law, enter the mine, inspect it, and make a record of its good condition. Now, those two things could not have occurred on the same day, in relation to the same mine. That thing asked of the Alcalde was done at once, the record of it made and put in the public office. The whole matter of this letter of January 19th shows clearly that its production here by James A. Forbes was the first of his series of forgeries. I call it "forgeries," for it is as much forgery to bring in a true document and endeavor to palm it off on the Court with a false meaning, as it would be actually to forge the paper.

I come next to the forged letter of the 28th of March, 1848. In relation to this letter I would say at once, that it ought not to be necessary to make any remark, for I understand Mr. Randolph to admit it to be forged.

Mr. Randolph—No, that is a mistake.

Mr. Benjamin—You said in the opening of your argument, that all the papers in the City of Mexico had been fabricated there after the 2d day of February, 1848. I noted that at once, because I immediately thought it an admission that this letter was a forgery. The existence of the two facts—that all the papers in the City of Mexico had been fabricated subsequent to the 2d February, 1848, and that this letter of March 28th is a genuine document—is totally impossible; because this letter, written up here in California, purports to be a letter of Alex. Forbes to James Alex. Forbes in relation to his knowledge of the forgery of these papers, in the City of Mexico, by Castillero.

Mr. Randolph—If you are familiar at all—and you must be now—with the course of my argument in this matter, you are aware that I maintain that a document brought up by Robert Walkinshaw in the spring of 1847, was a forgery. Hence, if forged in California, or in Mexico,—where I infer it to have been forged—it was forged prior to the 2d of February, 1848.

Mr. Benjamin—I wrote down—Mr. Peachy wrote down—

Mr. Johnson wrote down—in fact we all noted at the time what I have stated. Inasmuch as the Government counsel was to give me an opportunity to reply, I had a right to know what his theory was.

Mr. Randolph—I think at the time Mr. Benjamin was taken ill, when I, perhaps, had grown too wearisome to be longer endured, I was discussing that paper of the 28th of March.

Mr. Benjamin—I do not deny that Mr. Randolph may have said the contrary of what I allege, in another part of his argument. I cannot pretend to follow his argument, for he makes one assertion at one time, and at another, another. But, when opening his argument—of which I took careful note for the purpose of reply—he put this proposition before the Court: that none of these Mexican papers were in existence prior to February, 1848. I wrote that down,—all of us noted it.

Mr. Randolph—I desire the gentleman to precisely understand what he is to reply to. I say that all the papers now in evidence, including the Castillo Lanzas document as now produced, in my opinion were forged after the date (2d Feb., 1848) to which you refer; and further, that the paper referred to in the letter of May 5th, 1847, is not the paper now produced and called the Castillo Lanzas document; but that that paper was forged *before* the 4th of May, 1847,—and that there have been here two Castillo Lanzas documents, entirely dissimilar. That is my case from the year 1858 to the present time. The Court understands it.

Mr. Benjamin—As I have to reply, I want to understand it myself. You say Robert Walkinshaw brought up a forged paper in 1847. I understand you to allege that another set of papers were forged after February, 1848. The act of possession of the mine—that was forged, when?

Mr. Randolph—That may be taken to have been forged in the month of January, 1848; possibly a little before—in 1847.

Mr. Benjamin—I will endeavor to remember these dates.

Mr. Randolph—When more familiar with the case you will not fall into error.

Mr. Benjamin—My brother forgets in one part of his argument what he said in another part, I think. I may be mistaken in this instance, perhaps. I said I supposed my brother, in the point made in his opening, had admitted this letter of the 28th March to be a forgery. He says he does not; that he said some documents sent up here were forged in 1847: and that the *other* documents which we produce were forged after February, 1848. But this letter of March 28, 1848, says, or makes Alex. Forbes say—which is the most absurd of all possible suppositions—that he wants to save himself from the loss that would ensue, should it in any manner leak out that in fact the documents procured by Castillero in Mexico, as his title to the mine and lands, were *all* obtained long after the occupation of California by the Americans. They were *all* obtained, Alex. Forbes says in this letter, long after the occupation of California by the Americans; and Alex. Forbes knows this in Monterey on the 28th of March, 1848.

Let us take that as a start in the matter of this forged letter. Now let us take up this forged letter, and see the forgery step by step as it goes along. It is really amusing; and may serve to beguile the Court for half an hour, while we go along. But, before we take up the correspondence of the 28th March, it may be well to begin with two or three letters that just preceded it. Your Honors will find the first of those letters at page 954, the answer to it at page 956, and the reply to the answer at page 955.

That is the *true* correspondence, and as soon as we have gotten through with it, we will see how it tallies with the forged.

The letter at page 954 is the rough draft, in the handwriting of Alex. Forbes, left in Tepic when he went to England, being then from 72 to 75 years of age.

The forged letter was produced here on the 15th of February, 1858. The true letters were produced, in order to show the forgery, on the 31st of July, 1858; so that but sixteen days elapsed after the forgery had been produced in Court before we produced the true letters. Those true letters are admitted by the witness (James A. Forbes), in his cross examination, to be in the handwriting of Alex. Forbes, but he attempts to deny their receipt. I will show that they *were* received.

Now let us, with that light before us, observe how utterly impossible it was for these letters to be made up, by us, within sixteen days from the 15th of July—for old Alex. Forbes was in London, and had left the country for many years—yet these were his own rough blotters of his letters, and were produced immediately after the production of the forgery.

Now let us see what these letters say. The first, which I am about to read, the Court will find is answered by James Alex. Forbes two days afterwards; and that the expressions in the one are copied and answered in the other.

James Alex. Forbes had gone down to Monterey; there had had a quarrel with Alex. Forbes, and had gone home to the mine. On the 20th of March, Alex. Forbes writes him as follows (page 954):

[NOTE.—Those portions of this letter printed in italics, and inclosed in brackets, show the words and sentences erased in the original]

MONTEREY, March 20th, 1848.

My dear Sir:—I have made an arrangement respecting the Admittance, by which she is to go down to the coast of Mexico at the same time [*with*] as the William, which arrangement amounts to a sale if certain contingencies do not [*occur*] take place. I therefore will not leave [*this*] Monterey till the 27th of [*the*] this present month. I mention this that you may know the latest day on which I can hear from you, and I request the bearer to be sent from the mine, to enable you to fulfill your promise of informing me if the Robles, or you as their attorney, [*would*] accept of my offer of $6,000 for their two shares.

This letter is a rough draft, and we have printed in italics what was stricken out of it,—the erasures. At the commencement of the sentence immediately following what I have just read, the word "as" is stricken out, and the letter goes on as follows:

[*As*] I repeat what I said to you here, that it will give me much pain to leave this country with any bad feeling existing between us; and however much disappointed I may be in the arrangement which I hoped to make, I have no other wish than to do by you what I think is right and friendly. I, at all events, will expect to hear from you by the bearer [*or by any other conveyance which you think will be more speedy. I must feel most severely the disappointment of not hearing from you before I leave the country; and no good can result from a resort to any legal or harsh measures, on either side, between us who of all others ought to go in concert.*

I now beg that you will fulfill your promise in writing me so as to reach this before I leave, and I have still a hope that you will make such arrangements as will meet both our views and tend to all our] who will wait your orders, unless you choose to send your letters by some other hand.

Now this letter was received—when? On the 22d of March, In the letter acknowledging the receipt the statement is, "I have this moment received your letter of the 19th instant." Whether the letter copied from the rough draft was dated the 19th, by mistake, by the clerk who copied it, or whether Jas. Alex. Forbes made a mistake in calling the letter the letter of the 19th, instead of the 20th, is of no consequence, because the letter cannot be mistaken. James A. Forbes' answer copies the very language of this rough draft:

March 22d, 1848.

My Dear Sir:—I have this moment received your letter of the 19th inst., and answer it immediately by your messenger.

The previous letter had stated that he (Alex. Forbes) had sent a messenger and wanted a reply by that messenger:

I had already closed a package for you, including a letter containing my answer to your last proposition, and in relation to the whole of the shares in the mine of New Almaden, held in the name of Robles. I beg to refer you to that letter.

I desire you to accept my thanks for the expression of your regret on leaving California with any bad feelings existing between us.

There, the expression in the rough draft of the 20th—"It will give me much pain to leave this country with any bad feeling existing between us,"—is copied in the answer.

Mr. Randolph—That, no doubt, is the answer.

Mr. Benjamin—You think there is no doubt of that? Let us, then, take that fact as conceded. What, then, does this letter contain? It contains the answer to the propositions of the letter of the 20th. This answer is replied to on the 25th. Let us see if the letter of the 25th is really an answer to the letter of the 22d. If it is, it will refer to expressions contained in the letter of the 22d.

In the letter of the 22d, James A. Forbes says:

> (Page 956.) I desire you to accept my thanks for the expressions of your regret in leaving California with any bad feelings existing between us, and also for your friendly and equitable wishes towards me. None of the first exist in my breast, and I pray God that all success may attend you. There is no need of praise or merit attached by me to my actions or operations in this affair of the mine of New Almaden; nor shall I allege any services rendered to you; but I shall spurn at those base sycophants, who being no real friends of yours, but wishing to creep into your favor, have endeavored to poison your mind with regard to one who never entertained a thought sinister to your interest; and who, notwithstanding the cold, repulsive reception occasioned by your preoccupied mind, did not hesitate to manifest a sincere desire to serve you. But in what manner have those feelings on my part been appreciated? You declare that I have arrayed myself in defiance against you, and that you will take measures to counteract all that I can do! This has caused in me a poignant wound to my feelings, knowing that it may be augmented by your incorrect view of my intentions in relation to the affairs of the mine. I am quite sure, however, that the right of the Robles, which I represent, is most incontestable and tenable in any tribunal of the civilized world; consequently, it never has occurred to me that any litigation could take place, except by an attempt to impair that right.
>
> It is difficult for me to believe that you, or any other person of sound, moral, unbiased judgment, will say that I have done wrong in the trust reposed in me by the Robles. But I will trespass no longer upon your time. I went to Monterey with a sincere desire to effect an arrangement with you; but you formed a misconception of my principles and sentiments. I have made a last proposition to you with the intention of retiring from any further intervention in the affairs of the mine of New Almaden. It remains with you to accept or reject

that proposition, and also to remain assured of the respect with which,

I am, my dear sir,
Your most obt. servt,
JAMES ALEX. FORBES.

Here is the answer of the 25th:

MONTEREY, 25th of March, 1848.
JAMES A. FORBES, Esq., Santa Clara.

My Dear Sir:—I have received your letter of the 22d inst., and would have answered it immediately, but the man who brought it has been ill of a boil on his leg, which is the cause of the delay in writing you.

I shall not trouble you with any remarks respecting what has passed between us on the subject of the sale of your and the Robles' shares of the mine, further than to say that, I firmly believe your proceedings in the whole affair have been according to what you thought right.

That is the answer to this: "It is difficult for me to believe that you or any other person of sound, moral, unbiased judgment will say that I have done wrong in the trust reposed in me by the Robles."

The letter of the 25th goes on:

(Page 955.) But unfortunately I find the difference in opinion still as to the value of the shares exists; but in order to make another endeavor to effect an arrangement, I have named Mr. Walkinshaw and D. Manuel Diaz, who will wait upon you as soon as possible, and who take powers from me to conclude an agreement. I would not have named D. Manuel Diaz if he had been one of those whom you suppose had attempted to prejudice me against you.

In reference to that portion of the letter of the 22d, where James A. Forbes spoke of false friends, who had endeavored to prejudice Alex. Forbes' mind:—"On the contrary, he has always spoken of you as a friend, and as such I name him, thinking it will be agreeable to you."

"I am most sensible of your [*great attention*] exertions to serve me,"—copies the expression of the letter of the 22d, where James A. Forbes speaks of endeavoring to serve him—"and of the great trouble you took to forward in every way in your power the interests of [*the mine*] that concern, and [*I can assure*] you may rest assured that whatever way the business now depending between us is settled, and whatever proceedings may ensue, I do not leave California with any other sentiment towards you personally than that of friendship and respect."

There is the corrrespondence; and what is it?

First. A proposition to buy the shares of the Robles, and the price named.

Second. A reply, refusing the proposition.

Third. An answer to the reply, stating that as the difference of opinion still exists, the writer (Alex. Forbes) has sent Walkinshaw and Diaz to treat for the purchase.

When does that correspondence take place? On the 20th, 22d and 25th of March, 1848. These letters are produced here by us.

Now, for the forged one. The forged one is dated on the 28th of March, 1848; and the first line begins with an apology for never having written on the subject! (Page 864.)

> My Dear Sir—I have to apologize for not writing you before this, as I promised I would, respecting the purchase of your shares in the mine of New Almaden.

Is there another word necessary to be said? Is it necessary for me to go on? Three days after the 25th! Six days after the 22d! Eight days after the 20th! The correspondence of the 20th and 22d, admitted to be that which took place! That correspondence was not in Court when this forgery was brought in, but it is now produced! The forgery copies portions of the true letters; is made up of portions of two or three letters, with an interpolated phrase about antedated titles which does not exist at all in the genuine correspondence, and the forgery starts out, being dated the 28th of March, with an apology for not having written before, as promised, in relation to the purchase of the shares!

What shall I say in addition to this striking fact? Can any human being believe this letter possible, after the previous ones? How is this letter, the forgery of the 28th of March, made up?

It states, (page 866): I have to apologize for not writing you before this, as I promised I would, respecting the purchase of your shares in the mine of New Almaden; but really, as your opinion of their value is so widely different from mine, I considered it almost hopeless to make you any further proposals.

I do not however leave this, without making the necessary arrangements to effect that object, and have authorized Mr. Walkinshaw and Manl. Diaz to wait on you with my final offer for the purchase of those shares.

Two days before, he had written the same thing, viz. (955): "I have named Mr. Walkinshaw and D. Manuel Diaz, who will wait upon you as soon as possible, and who [*will have*] take powers from me to conclude an agreement." The clause about D. Manuel Diaz not being one of the men who had attempted to poison Alex. Forbes' mind is left out, and instead of that sentence, a forged sentence about antedated titles is put in.

Here is that forged sentence: (Page 864): Were I not already so deeply interested in this negociation, I would never think of investing another dollar in it, but this interest renders it necessary for me to have the control of all the shares." * * * Why? in order that I may dispose of the whole, whenever an opportunity may offer, and save myself from the heavy loss that would ensue, should it unluckily leak out, that in fact the documents procured by Castillero in Mexico, as his title to the mine and lands, were all obtained long after the occupation of California by the Americans.

The forgery is so clumsy that it reveals itself at every step. The party who made the forgery did not know that we had the answer to the letter from which the forgery was principally made up. We have the answer to that *true* letter, answering everything that was contained in it, but saying not a word about this antedating.

Jas. Alex. Forbes would of course be startled by being told in that letter, if any such had really been written, that all the titles are forged and antedated! Some of the barras belonged to him. Yet, he holds on to them for years afterwards—until he can sell them for $54,000. He is not disturbed about this antedating. I said we had the answer to this letter—or rather to the true one of the 25th, from which this was made up. What is it? (Page 957.)

SANTA CLARA, 28th June, 1848.

ALEXANDER FORBES, Esq.

My Dear Sir:—Soon after your departure from Monterey, Mr. Walkinshaw and Don Manuel Diaz made proposals to me in your name, for the purchase of the four "barras" or shares in the mine of New Almaden de Sta. Clara, of which I am the agent on the part of the Messrs. Robles. The offer made by your agents for those shares not being equivalent to their present or future value, I have declined entering into any negotiation for their disposal.

Why, how is this? Where is the "future value"? If it should unfortunately leak out that all these titles had been forged, where is the "future value" then? He is informed that all these titles *have* been forged! What has he to say to that? Not a syllable in this whole letter about it! Nothing but an answer to the letter of the 25th of March can be found in this letter of the 28th of June. There is no answer to the letter of the 28th of March there. No important part of the letter of the 28th of March is answered in the letter of the 28th of June.

MR. RANDOLPH—It was no news to Jas. A. Forbes.

MR. BENJAMIN—My brother says it was no news to Jas. Alex. Forbes. Is that so?

MR. RANDOLPH—Undoubtedly.

MR. BENJAMIN—Then why was it written to him as news. Why then was he informed of it so correctly in this letter? What is the object? Do men put down facts of this kind which may leak out and have the effect of destroying their title in letters to persons who know it already, and to whom, therefore, a slight allusion would be sufficient. On the contrary, this seems to be the communication of news. Either he (J. A. Forbes) knew it before—and then it was totally unnecessary to commit it to writing, and pass it through the mails—or he did not know it, and it was news to him; if so, why does not he answer it? Important as that news would have been to him, he did not even refer to it. No other answer to the letter of the 28th of March than the letter of the 28th of June is produced.

Go further into this letter of the 28th of June, and what does it contain? It contains bitter revilings. It contains violent personal reproaches about everything else—not a syllable about the news communicated by the letter of the 28th of March. It shows the existence of an embittered feeling between these parties which was going to bring Jas. Alex. Forbes into Court against Alex. Forbes. It shows also that he (J. A. Forbes) did not hesitate to write the grossest lies to those he corresponded with; for observe:

"I have declined entering into any negotiation for their disposal."

That is written by him on the 28th of June. The counsel for the Government produced here in evidence his sale to Walkinshaw of those very barras in the previous April. In other words, the first piece of treachery committed by Walkinshaw towards Alex. Forbes, was going to Jas. Alex. Forbes, as the agent of Alex. Forbes, to purchase certain shares for him, and buying them for himself instead, and after having bought them for himself and paid for them, Jas. Alex. Forbes, who has already sold those two shares to Walkinshaw, and who has himself bought the other two shares of the Robles, writes to Alex. Forbes: "I have declined entering into any negotiation for their disposal!"

The whole quarrel between Alex. Forbes and Jas. Alex. Forbes, was in relation to the Robles' shares. Litigation is threatened. Alex. Forbes is told to send up some man to represent him in California—he is going to be sued. All in this letter of the 28th of June, is a plain, clear answer to the letter of the 25th of March. Not the slightest allusion is made to the antedating spoken of in the forged letter of the 28th, or to the facts contained in the forgery.

This forgery is brought into Court, pieced up with expressions from the true correspondence. It is made up by James A. Forbes, for his friend Laurencel, after they had broken down in their first attempt, and all their inventions had been scattered to the winds by the production of the original correspondence up to that date. After James Alex. Forbes had sworn in Court everything that could be required of him in relation to his first set of documents—had sworn that he knew nothing about these titles to the mine, and that he had never seen them, up to a particular date—brother Peachy pulled out of his pocket letters of a prior date signed by himself (James A. Forbes), that proved every word he uttered to be a lie.

What is to be done now? He had sworn that he had not seen certain documents up to 1848.

What is the document he speaks of in his letter of 1847? When asked, he equivocates, denies, tergiversates—won't answer. He is drawn back to it again and again, and finally he answers: "Well, it is the title. I saw them. I saw the copies he had brought up with him. I saw them in 1847."

He had previously sworn over and over again that he had never seen them at all.

He is driven out of Court in disgrace. The conspirators have lost their money. Laurencel had lost his first ten thousand—given for the papers to be used for blackmailing; he had lost his second ten thousand dollars, paid Forbes to give his testimony. Forbes *had* testified, and his testimony was routed. How much he was now paid for the forged letter I do not know. We may well surmise that these little services among these men were not rendered for nothing. Although there is said to be honor amongst thieves, James Alex. Forbes was too cautious to rely on promises for services he was rendering, and without doubt required cash in hand—but how much he received for this forged letter we do not know.

Forbes' testimony, when at an end, required bolstering up. My brother Randolph says forgery is natural to this man. The Government knows—Laurencel knows—who will forge papers, and at once they go to him. He is a man from whom any forged papers can be produced. He brings out this forged paper from the mine of true correspondence he has, from which any quantity, any description of forging required can be manufactured by him.

This is the only letter in this entire correspondence in which the remotest hint or suggestion of antedating is found. James Alex. Forbes again and again writes, urging these parties to forge titles. Again and again he says to them: "You ought to have forged such and such papers. We want other titles than those we have here got. The titles we have got are an order to the Governnor of California to put us in possession. That never was done. That is not a good title. We want a title so manufactured that it shall be a complete title to us without an order to place us in possession. We want a complete title at once. We have got a registry and a possession, given by an Alcalde. That is not a good title. We want a ratification by the Government in Mexico. We want that forged. Now you must have all those papers forged, and send them up to me."

That is the constant burden of James Alex. Forbes' letter to different parties, at different times.

He then says: "Walkinshaw has got our true letters. Walkinshaw has got our true titles. Walkinshaw is a villain, and is trying to cheat us out of the mine. I am afraid he will burn up the papers. I am afraid of every possible machination that villain can devise, by which to rob us of the property."

He (Forbes) never once hints, however, that the papers were forged or antedated. It is never again referred to in the entire record. The fact—spoken of in the letter of March 28, 1848, —that these things *had* been done, is never again referred to.

Again; why is not the original letter produced? James Alex. Forbes was asked: "Sir, you came here before. You sold papers for money. You sold papers for the purpose of blackmailing these parties, as you say. Your blackmailing project having failed, you afterwards got money to come and testify. You never came here—as you admit—until you got $10,000 for entering this Court and testifying. Now, sir, why did you not bring this letter with you? Why is it we have never heard of the original?"

He tells six different lies on that subject. I have marked them down. But the subject is too disgusting to follow out.

First, he says he lost it; next in sequence, he says it did not tally in date with the other letters he had sold; next, he says he kept it back on purpose, because he knew Mr. Peachy had gone to Washington to get some law passed, under which he supposed some new testimony would be brought in from Mexico, and that letter was to vindicate him; next, he says we were not hard on him in the cross-examination—"I would have brought it in if you had gone hard on me; when you were hard on me, I brought it in."

Time and time again he tells this story as the reason why the original was not brought in at first.

Again: can your Honors suggest—I cannot—what would make a man sit down at home and make a copy of a letter he has got in his drawer or desk? I never did such a thing in my life, and cannot see any reason for doing it. If you had a letter from a man, would you amuse yourself, sitting down and copying it, and then keep the original and the copy in your desk? What for? What did this man make a copy for unless he was getting ready to have the original stolen? He takes care to provide a copy, in order that he may have the original stolen, and bring in the copy.

And what is the story about the stealing of this original? Why, it would be a miserable thing to put into a comedy! People would hiss the play, and drive the actors off the stage, disgusted with the silliness of such an invention. It does no credit to Laurencel and Forbes.

Brother Billings, you and Barron went to the hotel and stole the paper out of James Alex. Forbes' carpet bag! You then said you did not know anything about the letter, and I will never associate with you again. This thing is proven on you, and James Alex. Forbes almost swears it.

Mr. Randolph—For the reputation of the profession, I must ask what is there in the evidence to show that Mr. Billings had anything to do with this theft?

Mr. Benjamin—If you will look at Laurencel's friend Birnie's testimony, you will see his name brought in for no other purpose that I can perceive, but to hint that Barron and Billings stole the original letter.

Mr. Randolph—I have nothing to say as regards Barron.

Mr. Benjamin—It is true Mr. Billings was at that time in Vermont; but that is nothing. It was just as easy for him to steal letters here, when in Vermont, as if here! It is true the doors were all locked, the windows closed tight, and the carpet bag fastened. But what difference does that make? You [tapping Billings on the shoulder,] had false keys for all. It is true that Forbes had carried this letter all day upon his person, and just left it in his carpet bag for a convenient half hour—so that could be stolen, and the copy he had prepared, produced. But that does not make the thing improbable! You, brother Billings, must have known he intended to leave it in the carpet bag during that half hour, and you were all ready to go in and take it from thence. I am astonished at you!

Brother Billings, you went to Mexico, too. You found a big book there. You forged two pages in it. Not only that; you found on the paper "L. G. 15, fo. 140," and some other hieroglyphics, and got the clerk to swear that that meant the General Book, page 140, etc. You brought up the clerk to swear that that was the book of the Ministry of Justice, containing part of the original archives of Mexico. Now that is very astonishing again. Nobody did it but yourself. Nobody found it until you got there. You found it—and it is very easy for a man to find everything where he puts it, and I believe you put it there first. So of the carpet bag, the locked room, and the comedy—I believe you had a hand in it all!

James Alex. Forbes having taken a copy of the original, with an eye to its being stolen, and having put the original in his carpet bag for half an hour, so that it could be stolen, now brings the prepared copy into Court—and necessarily, as it is HIS testimony, it must be believed. Your Honors could not, for a moment, deny your credit to a copy, produced by James Alexander Forbes, himself, to an original he pledges his *honor* he once had! Once his *honor* pledged, the Court *must* be satisfied.

There is another witness for whom Brother Randolph has more respect than he has for Forbes. I think he does not admit that Birnie perjures himself for the mere pleasure of it, nor that he is a forger. Therefore, that not being admitted, we had to prove it. To prove it we produce only nineteen witnesses.

Mr. Randolph—On the other side we produce sixteen.

Mr. Benjamin—We are three ahead of you. We have nineteen witnesses to prove that this man is a common and notorious liar and perjurer. We have all the notables of the place where he lives, who swear they would not believe him on oath.

Mr. Randolph—We have more notables to prove the contrary.

Mr. Benjamin—Then, of course, your notables do not know him. And I say if you had ten thousand witnesses to prove a man credible, and had ten who would swear they would not believe him on oath, the presumption would be that your ten thousand did not know him, and that my ten did.

Who is the first witness, and what does he say about it? The first is Colonel Coffee. What does he know about Birnie? I will state to the Court that every one of these witnesses brought to impeach Birnie, were asked the legal question only, viz., "What is his general character for truth and veracity? Would you believe him on oath?" Every one says he would not believe him on oath, and that his character for truth and veracity is very bad.

But the principal points of his character came out on the cross-examination by the Government counsel.

Mr. Randolph—I was absent at the time. Had I been present I might not have asked the questions.

Mr. Benjamin—I don't think you would. You know too much for that.

Now what does this Colonel Coffee say about Birnie? He says that he deceived him in a business transaction:

> A man that would deceive me in a business transaction, I would not believe on his oath, and beside that, I have heard his reputation very frequently attacked in conversation.

The next witness is Warmcastle, County Judge, and member of the Legislature.

Ans.—From his reputation in the community, and my acquaintance with that reputation, I could not believe him, unless I was satisfied that he had no motive for misrepresentation.

Ques. 9.—Does not this rule apply to every person, and please state why particularly to Mr. Birnie?

Ans.—No, sir; there are many persons in my community, whom I would believe on oath, when it would be for their interest to testify falsely, but Mr. Birnie is not one of that class of men, from my knowledge of his reputation; my impression is derived from my acquaintance with Mr. Birnie, through public rumor, for a number of years.

Next, we have David Boss, who is a farmer. What does he say?

Ans.—When I find that a man, whose word is not good, whose note is not good, I would not believe him on oath. I regard Mr. Birnie as a dangerous man, who would take all sorts of advantages. I would not trust him out of my sight. He is a worthless man, who lives on the labor of other people. For my part I have made money by hard work.

His brother-in-law, William Welch, told me that he stole his name, and put it down on a piece of paper, without his (Welch's) leave. I understood him to say that Birnie had forged his name, and I believed that Welch told the truth about it at the time.

That is the cross-examination to sustain Birnie.

Nathaniel Jones is the Sheriff of the county. He is cross-examined.

State some acts of Mr. Birnie's which has caused the bad reputation which you speak of among the community in which you knew him.

A. It is not from any single act of his, but it is from his want of occupation, and the universal belief among people that he swears falsely, and procures false evidence in land cases. He is utterly worthless, and he is a loafer. If I were to start out to find a man who thought well of his character, I should not know where to go to find him?

That is the cross-examination which is to sustain Birnie, by testifying and sifting the evidence.

Again he is cross-questioned.

What land cases do you refer to?

A. Anywhere he could get a fee for swearing falsely, and procuring false evidence.

Now, we come to B. R. Holliday. What does *he* know about him, and what does *he* think of him?

After speaking of his reputation, and being asked if it did not arise from some lawsuits, the witness said:

A. Perhaps they did in part—not all. Shortly after his marriage, his pecuniary credit became bad, and in the community he got such a reputation that anything that was stated as coming from Birnie would not be believed.

It was enough that it came from Birnie.

The next gentleman, Nicholas Hunsaker, who was the Sheriff, was asked if there was anything outside of the lawsuits in which Birnie had been engaged, in which his character was bad?

A. Outside of lawsuits it was said he employed a man to steal barley, which was in the custody of the Sheriff; this is the only act outside of litigation that I remember; with regard to those lawsuits, I have heard a great many people state that they would not believe him under oath.

The next witness, Smith, on his cross-examination, being asked, says:

A. I have no particular feeling against the man; I would believe him on oath if I could, but I couldn't do it.

So it goes on. I will not detain your Honors by reading the rest of this testimony, with the exception of the evidence of one more witness, Mr. Elam Brown.

He says, when asked when Birnie's reputation commenced to be bad:

A. I had known him two or three years before anything occurred to cause me to lose confidence in him. His reputation became bad by degrees; he was charged with doing one bad thing here, and one bad thing there, until finally people began to say that they would not believe him under oath. This is what I have heard, not what I know of my own knowledge.

I am on no unfriendly relations; nothing has occurred between us. I am sorry to be here to-day testifying against him.

I consider him a dangerous man, and I believe him deficient in those principles of honesty which would make him a reliable witness.

I would observe to your Honors, in relation to the testimony taken upon Birnie's character, that that taken by us was from witnesses from Contra Costa, where he had been living five years.

Now, may it please the Court, what becomes of the forged letter and all the superstructure built upon it? These are the witnesses you have got to prove the existence of the original. You have paraded before you by the United States, James Alex. Forbes and Robert Birnie; to prove that he made a copy at home, before he brought it here, you have James Alex. Forbes; to prove that he made a copy also, you have Robert Birnie; they provided two copies in advance—one for Birnie and one for Forbes—before the letter was in a condition to be stolen. That the letter was put in a condition to be stolen, you have no evidence but that of James Alex. Forbes. Nobody saw him put it in the carpet-bag but himself. You have no proof but his own, which, I need not say, the counsel for the Government admits is utterly unreliable. In relation to the theft you have no evidence but his. When he left his room to get a cup of tea, he put the letter which he had always previously kept on his person, in his carpet-bag. Somebody got into the room and took it from the carpet-bag without breaking any of the locks of the apartment, or that of the carpet-bag. That is the story that is brought forward to bolster up a forgery patent on its face. On that your Honors are asked to believe that there is forgery, fraud and fabrication in this case. But I leave that letter.

Observe, if your Honors please, that I wish to deal candidly with the Court. I do not say there were no propositions to forge. I do not mean to say that all the parties who had an interest in this title, repulsed those propositions to forge with the indignation with which they should have been repulsed. I do not expect to gain any case by attempting to hood-wink the Judges as if they were children. That subject I will come to presently, I am now engaged in endeavoring to show that the original conspiracy against our title was based on the forgery of nearly all the papers.

I will now come to the next forgery. Your Honors will now refer to the forged letter of the 28th of October, 1849, at page 392. The true letter of the same date is at page 844. Do your Honors want any further proof of forgery than this?

S. F. Oct. 28, '49.

William Forbes, Esq., Tepic.

My Dear Sir:—I have been detained here until the present moment, occupied in carrying out the arrangements explained to B., F. & Co. in my letter to them of yesterday's date.

Here is the forged letter:

S. F., Oct. 28, '49.

William Forbes, Esq., Tepic.

My Dear Sir:—I have been detained at this place until the present moment, occupied in completing the arrangements explained to B., F. & Co., under the date of yesterday.

Is anything further necessary? Two letters of the same date, to the same man, beginning with the same sentence, both marked private! Now I say that letter was forged when he had the original. Do your Honors want the explanation? He had forged a memorandum, which he had said he left in Tepic the previous May, and he wanted to show that that memorandum had actually existed there. In order to bolster up the forged memorandum, he had to forge a letter that would refer to the memorandum; and as the true letter did not refer to the memorandum, he took the first sentence of it and forged the remainder for the purpose of referring to that document.

Mr. Randolph—Which letter do you like best?

Mr. Benjamin—I like neither best. I want the Court to look at the true one. The true one is as bad as the false. It was not necessary to forge the false letter for any other purpose than that which I shall afterwards show. These words "forgery" and "perjury," are hard words, and they come back to roost sometimes.

Mr. Randolph— * * * New Almaden.

Mr. Benjamin—I have no doubt of it. How about your friend Laurencel? These things come back to roost. We will see as the case goes on. Here, then, is the true letter of the 28th October, 1849; and here is the forgery of the same date to the same man, also marked "Private," and beginning with the same words. The one brought in by us after the other had been produced by James A. Forbes, as being a copy of his letter which he had presented, is the true, original letter. Now, in the true letter, there is just as much adverse to the case of the claimants as in the false one; because the true letter calls attention to the forgeries he wanted committed, as well as the false. But in the true letter, the statement in regard to the forgeries is this:

(Page 846.) "I now desire to call your attention to the following important matter."

Now, then. He is now initiating a proposition for forgery. (Page 846.) "In order to secure the possession of the land, you must forge and antedate titles."

But when he first came into Court, it was necessary to carry the date further back. So he forged a memorandum, which he said he had left in Tepic; and then forged the letter of this date (28th October, '49). Instead of the statement in the true letter, "I now desire to call your attention to the following important matter," he inserts in the forgery, "I must *again* call your attention to the subject of the documents comprised in the memorandum left in Tepic."

And now, let me call your Honors' attention to a remarkable circumstance throughout the whole thing, to enable you to perceive the true state of that correspondence as originally brought before you: That in not a solitary letter throughout, is that memorandum spoken of, except in letters brought in by James Alex. Forbes, as being copies preserved by him of letters written by him to the parties. There is no answer, no allusion in our correspondence to any such memorandum. It never appears in the whole correspondence, except in letters which James Alex. Forbes brings in and swears to be copies of letters which he wrote.

This is the first one of the copies of the letters he swears he wrote. It is a forgery. Two letters, of the same date, with the same beginning, and to the same man! In one of the two —that brought in by the claimants—Forbes is initiating the subject. In the true letter he says, "I now call your attention;" in the false, "I must *again* call your attention"—changing the word "now" to "again," and putting the initiative back to the date of the Tepic memorandum, which no man had ever heard of until it was brought in in this case. It is awful, awful, to have all this mass of forgery brought in here and put in evidence by the Government of the United States against a claimant.

MR. JUSTICE HOFFMAN—What do you suppose is the object in the production of this letter by James Alex. Forbes?

MR. BENJAMIN—His theory was, that there was a certain date for ante-dating. When first brought in, he had a theory to maintain. He could not show all his letters to Laurencel, because, if he did, he would show him the fact of the existence of our title. He had to pick out certain of our letters, take his answers and pick out passages, and present them to Laurencel as proof of antedating and forgery. He remained at home, gathered his correspondence together, excluded everything referring to the existence of the titles. Whenever his own letters referred to anything favorable to the titles, he cut the passage out. Pretending that the copies he made were true copies of the originals, he sold them to Laurencel—but not to bring into the Court. It was never intended by James Alex. Forbes that those copies should be brought into Court.

MR. JUSTICE HOFFMAN—The suggestions of the Tepic memorandum appear in this letter never to have been acted on. The whole letter is a reproach on that account.

MR. BENJAMIN—What motive influenced his conduct with Laurencel it has been impossible for me to devise. But certain it is, that in this correspondence it is not one or two, but half a dozen letters, that he has forged in this way.

What his purpose was God only knows. He never meant the letters to be examined; never supposed they would be examined in Court. Again and again he urges in his cross-examination, that he never intended them to be produced here.

I am going to take up the true effect of the correspondence, and will show your Honors what I suppose the true theory to be, not denying any inference that may be drawn, but treating the Court with entire candor as regards the subject.

On page 393, you have the letter of the 30th of October, 1849. It is from James Alex. Forbes to Alex. Forbes, the sole purpose of it being to again speak of his having explained all this matter at Tepic. Nothing in relation to Tepic is in the original correspondence anywhere. But James Alex. Forbes left his tracks on the face of this letter. He forged it from his letter to William Forbes, of the 28th of October. After forging it and making it up as addressed to Alex. Forbes, he put on the back the date of the true letter (which he copied from the true letter,) while indorsing it with a wrong date, thus showing the origin of the forgery. Here on the back is the date (28th October) of the letter to William Forbes, containing, substantially, what James A. Forbes put in the forged letter addressed to Alex Forbes, and the letter to William Forbes is dated October 28th; that to Alexander Forbes —which is made up from the former—October 30, and when James A. Forbes came to indorse his forgery with the proper date, to bring into Court, he indorsed it October 28, copying from the letter of that date. There is the track of guilt forgers leave behind them. The true letter is addressed to William Forbes, under date of October 28. Out of that is concocted a false letter to Alex. Forbes, on which the date—October 30—is put. But when the forger goes to indorse the date on the back, that it may be brought into Court, he forgot he had made a change of the date, and writes on it that of the original, of which it is a copy. The true letter is at page 844.

You observe that every letter that I have shown you to be forged, is a letter which he brings in purporting to be a copy made by him of his correspondence.

Here comes another. Page 403; letter of Feb'y 26, 1850. Now, how was this letter produced in the original papers? Look at it! See how it deceives! The letter is brought in as

O. H. No. 9. It is followed by O. H. No. 10, O. H. No. 11, and O. H. No. 13,—all of which seem to have reference to its contents. Now it never was received, if ever written. But it never was written.

Mr. Randolph—How do you know that it was never received, if ever written?

Mr. Benjamin—The letter of the 7th of April announces the receipt of letters. As late as that date nothing had been received from Jas. A. Forbes, posterior to the 19th of Feb'y. Page 405: "I wrote to you by the California, dated the 23d of Feb'y, and since then, have received by the "Oregon," yours of the 19th of that month." Where is the letter of the 26th?

Mr. Randolph—He had not received it yet.

Mr. Benjamin—Why had not a letter leaving California on the 26th of Feb'y reached Tepic by the 7th of April? Whether it ever was received or not, by the face of this correspondence, no man can tell. But it is introduced into this correspondence to make it appear that this is the letter to which the letters O. H. No. 10, O. H. No. 11, and O. H. No. 13 were answers. Upon examining those letters, we find that at the date of their writing this letter had never been received. Yet, it is arranged by Jas. A. Forbes in this manner, and presented to Laurencel for purchase. Time was not to be afforded for examining all of this purchase. Time was not to be given Laurencel to ascertain how this correspondence fits in. He is not allowed to do anything beyond making an inspection of the papers, until his money is paid. He is not to use them except to black-mail. And when at last brought into Court, this man Forbes, with $20,000 in his pocket, is put on the stand. Then, all these papers coming from this source are produced by the Government of the United States to break down our title.

Mr. Randolph—Forbes is one of the claimants in the record.

Mr. Benjamin—No! no! You have proven that he sold out his interest, and then bought him to come in and give evidence against his partners—such evidence as we have seen in this case.

Now, may it please your Honors, from all this elimination of everything that is forged in these papers, I come to state to the Court what my true theory in relation to these letters is, and to place it before your Honors for your appreciation: These parties owned a valuable property in California. They owned it by titles derived during the existence of the Mexican Government. They had spent a fortune upon it. It is in proof in this cause, offered by the United States, at page 215 of this record, that these parties had spent upon this property, up to May, 1852, $978,114, and had gotten back $553,000, and no more.

Mr. Randolph—Where do you find that?

Mr. Benjamin—In the sworn answer in chancery introduced by you in this case. In these amounts are not included any allowance for interest on capital expended by the defendants. They were then $440,000 or $450,000 out of pocket. They had spent close upon a million of dollars upon a barren peak in the mountains.

Their liberal expenditures have turned out to have been judicious. If the mine had been poor, according to good old Gamboa, it would not have been (*muy codiciada*) very much coveted. Turning out to be rich, a host of harpies gathered around. These obscene birds of prey were befouling everything they touched. First came a body of people and said the mine was on the Berreyesa Rancho, because it had been so described in the original papers; Berreyesa having made a fraudulent alteration, and in that way defrauded Castillero into declaring it was on his land.

Next comes a body represented by my friend, the special counsel of the Government. Laurencel and his associates have been depicted with the feeble powers that I possess, and I have stated to the Court as plainly and as impartially as possible what their true character is.

The New Almaden Co. had sent up their titles through an agent—an agent they had taken up and invested with their confidence—Robert Walkinshaw. He was their agent, and had all their documents of title. He, also, turned on them, with an attempt to defraud them out of shares of the mine, to get a larger portion for himself. He formed a combination with others to denounce the mine as having been abandoned, to represent the original title as bad, and to share the property with others, thereby getting a larger share for himself. In that he was playing a certain game. If he succeeded, he got a bigger share; if he failed, he still retained what he had. He had nothing to risk, something to gain. In those days, with people combining all around them to defraud them out of their property, Jas. Alex. Forbes—who had written to them of Walkinshaw's intentions—commenced afresh, in 1849, the suggestions made in 1847. When the suggestions were made in 1847, he was not their agent. They were not responsible for what he chose to write, but treated his propositions with entire disdain. This is best proven by his own letters, since brought into the record, to which I now refer your Honors, dated Jan'y 13th, 1849. (Page 3050.) In this letter to Alex. Forbes, he says to him:

> I have much to say to you upon other points, but I cannot write too much upon the subject to which I have alluded, contained in my letter above mentioned, and which I fear has escaped your memory.

What is the letter above mentioned? Observe that, when that letter was written, the mine of these parties was in the possession of Walkinshaw; yet, Jas. A. Forbes, writing this letter to persons who were part owners of the mine, got no answer to his proposition. He had their interests in his charge, yet they did not answer it. No answer is produced, or pretended to have been sent. On the contrary, in Jan'y, 1849, he (J. A. Forbes) writes that he fears that letter has escaped the memory of Alex. Forbes. Nothing has ever come of it.

Here you have in Jan'y, 1849, this: that his letter of May, 1847, had been forgotten. Nobody had ever paid any attention to his counsels. But, towards the fall of 1849, (and here I come to a point suggested by your Honors when you asked me what the difference was, whether it occurred in May or Nov'r) for the first time the propositions are made to Barron, Forbes & Co., who, in the interval, have taken possession of this mine, in behalf of the avio formed in Mexico for supplying it. At page 390, you find the first connection of Barron, Forbes & Co. with this mine.

TEPIC, 11th April, 1849.

JAS. ALEX. FORBES, Esq., San Francisco.

Dear Sir:—We beg leave to refer you to Mr. Alex. Forbes' letter of the 9th inst., respecting the arrangement of the affairs of the Mine of New Almaden, and beg to recommend that negotiation to your best care and management until we can forward the necessary instructions for your government. You may now rely on this Mine being worked to the utmost of its capabilities of production and sale of quicksilver on the arrival of the apparatus, and we hope to make up for the delay which circumstances have hitherto prevented this important concern from being productive. We shall soon have the pleasure of sending you a list of the company of which the "Habilitadores" are composed. The House of Jecker, Torre & Co. of Mexico and Mazatlan, and our own, are chiefly interested, and as Don Ysidoro de la Torre has gone to Europe, he will concert with Mr. Barron everything which can tend to the successful development of this enterprise.

Now, fix your Honors' attention on this. The first proposition in May, 1847, never answered and nothing done, complained of in January, 1849, as forgotten. In April, 1849, for the first time, Barron, Forbes & Co. take an interest in this matter. They enter into it as *aviadores*; they furnish funds. They join with them Jecker, Torre & Co. of the City of Mexico, and the common funds furnished by these parties are to be used for putting this mine into active and successful working operation. Up to that time the funds had been insufficient. Probably there was doubt among the owners as to the amount of funds they were willing to expend. But now a new and vigorous impetus is to be given the enterprise. Alex. Forbes, long at the head of the business, then on the point of retiring and going to England, gives up his charge to the new company, and they begin to operate for the supplies of the mine, necessarily under the influence of this old gentleman who had probably reached his three score years and ten nearly.

That is the condition of things in April, 1849. Now, James Alex. Forbes goes down to Tepic, and succeeds in getting the house to make him the agent of the mine. What he told them about Walkinshaw, what means he used for that purpose (securing the agency), none know better than himself. *We* know not. He comes back, turns Walkinshaw out of the mine and takes possession; then comes warfare; then Walkinshaw and James Alex. Forbes have a long and bitter litigation; then James A. Forbes begins to dread the destruction of the titles; then he writes again and again to his principals, "This man Walkinshaw is a villain; I do not know what I shall do; he is going to steal away the original registries from the Alcalde's office; he is going to destroy the documents of title which you gave him to bring up here, and which he refused to give me; he is buying up the rights of the neighboring proprietors that he may bring suits; he has denounced your mine as abandoned, and claims that he has a right to take it under the mining ordinances; there is no species of villainy which you may not expect of this man; I am struggling against him; I am desirous of defeating him; I have your interests at heart, but I do not know how I shall succeed; in my judgment and opinion, your titles are informal; I told you so years ago, yet you won't send me other documents that I wanted fabricated."

"On the other hand, I am acquainted with the machinations of the neighboring proprietors, who say that their titles extend over this mine; I want help; that help consists in your obtaining for me fraudulent, fabricated and antedated papers, which must bear the date of the Castillo Lanzas decree. That is what I want, and what you must send."

That is what he writes, for the first time in any original letter produced to Barron, Forbes & Co., or William Forbes, in the fall of 1849.

Now, under these circumstances, what are the answers? This property is in a foreign country, far from those men, in the hands of agents whom they distrust—one of whom has turned his back upon them, and is endeavoring to swindle them out of their property; the other of whom is writing them propositions for forgery. Perhaps you will say, and perhaps a man of rigid morality would declare as his judgment, that they ought instantly to have repelled the propositions with contempt and scorn, and driven him (James A. Forbes) out of the mine. But where would their property have been then? Then it would have been necessary for some one else to go and take charge of it in his place. They were not ready for that. The partners were abroad. The proposition amongst them is, "Let us temporize; let us wait a month or two, until one of our partners comes home, that we may send him to take charge and put an end to the scene of fraud and corruption going on up there." To that end Alex. Forbes conducted the correspondence in his own name, but of course for Barron, Forbes & Co., in his letter, and appears to accept the proposition.

Perhaps I am going too far in saying that it is apparent on the face of the papers, that if he could have done so safely he would have been willing to join James Alex. in the forgeries. But recollect another man existed in the firm—the man who controlled the house, and who was on the eve of his arrival in Tepic.

On the 3d of February, Eustace Barron returned from Europe. Your Honors will find the announcement in the letter from Tepic of the 3d of February, 1850, at page 400.

Eustace Barron has arrived in Tepic on the 3d of February. What is the result of his arrival? Within thirty days this man James Alex. Forbes is turned out of the mine; Ysidoro de la Torre is sent up here to take possession of it, and when James Alex. Forbes is turned out it is put in the possession of Captain Halleck in behalf of the owners.

I have already read to your Honors the letters of the previous spring, in which the statement is made that De la Torre will confer with Eustace Barron, who is in Europe; that is in April, 1849. Castillero was in Lower California; De la Torre had gone to Europe; the owners were scattered; their interests were in the hands of strangers who were endeavoring to swindle and defraud them.

Eustace Barron returns on the 3d of February, as shown in this letter. Castillero has just arrived, and the parties meet. What does Eustace Barron find? Walkinshaw endeavoring to swindle the partners; James Alex. Forbes proposing forgeries; the vast interests belonging to his house apparently in the hands of thieves and swindlers. That is the condition of things on the 3d of February.

Now, here is the letter of the 2d of March, page 404. Eustace Barron had not then been in Tepic a month:

TEPIC, 2d March, 1850.

JAMES A. FORBES, Esq., New Almaden:

Dear Sir:—We duly received your letters up to the 29th of January per steamer Panama, which have had our best attention, and as our friend, Dn Ysidoro de la Torre of Mazatlan has been appointed, and has consented to proceed by this steamer to California, with full powers to act in behalf of all concerned, it is needless to enter into any particulars respecting the various matters contained in your letters, as you will be enabled personally to communicate your views to him; and to arrange every thing in the best manner possible. Mr. de la Torre came to Tepic to meet Mr. Barron and the others concerned in this negotiation, and it was deemed necessary that some of the partners in the "Habilitacion" should proceed to New Almaden in order to consult personally with you, and to arrange respecting the future operations of this enterprise, and Mr. de la Torre has been prevailed upon, at much inconvenience to himself, to undertake the present charge.

We are sure that no one could be named more agreeable to you, than Mr. de la Torre, and have no doubt but that his presence will be most useful in sanctioning and arranging a plan of future operations, and of assisting in adjusting any difficulties which now exist, particularly as he has the full authority of the association to act, as to him shall appear necessary. Mr. de la Torre takes up with him Dr. Tobin in the hopes that he will resume his labors, and act in conformity with his duty.

Mr. Barron and Don Andres Castillero are about to proceed to the City of Mexico, and will attend to what you have recommended.

That recommendation was, as stated in the previous letter, to get a "copy of the ratification which Castillero says exists in the archives," unknown previously to the associates.

Now, at page 328, you have the deposition of Captain Halleck. In March or April, 1850, Capt. Halleck takes the charge of this mine. De la Torre does not temporize for a moment after he gets here. James Alex. Forbes is at once turned out, and Capt. Halleck put in in his place.

Mr. Justice Hoffman—Just read the letter of the 29th of January, 1850, from James Alex. Forbes to Alexander Forbes.

Mr. Benjamin—Page 399:

I have received the copy of the contract of Habilitacion, and as you request me to address myself to B., F. *&* Co. on the affairs of the mine, I have now written to them upon this particular subject to which I request your earnest attention, not as regards the habilitacion, but another document which you know of.

Now, what is the answer to that letter? What are "the documents"? In the very next letter, dated February 6th, 1850, Barron, Forbes & Co. write to James Alex. Forbes, (page 543):

Dear Sir:—In reply to your private letter of the 20th December, respecting the two sitios of land, we have to say that we had hoped the document lately sent for this grant to Mr. Castillero would have been sufficient, but as you seem to be doubtful on this point, we have spoken to him, he being now here, and his opinion is that if this grant is not tenable it will be better to go upon the three thousand varas of the Alcalde, granted at the time of giving possession of the mine, and approved of by the Mexican Government, which approval will be taken from the Mexican archives and sent on to you. Although by the ordenanzas of Mineria, the Alcalde or Judge may not have had strictly a right to grant these three thousand varas, yet being approved by the Mexican Government, would make this valid as a *grant.* We hope, however, you will find the Berreyesas' lands not to include the hacienda, and consequently either the grant of the two sitios or the three thousand varas would be a sufficient title. Mr. Alexander Forbes will, however, write you more particularly on this subject.

In Alex. Forbes' letter of the 3d of February, he says, (Page 400):

Castillero has returned and is also here, so am I and William Forbes. This leaves out only the four California barras, and I think I may venture to act for you, if necessary, as you verbally told me I might. * * * * I have every reason to believe that the document you mention will be *found* in the City of Mexico.

I beg that the Court will notice that that man, James Alex. Forbes, forged a mark of italics under the word "found," thus altering the meaning of the letter—as is shown by the press copy of the original introduced by us.—See Transcript, 475:

> And as Mr. Castillero will return there they will no doubt be procured, but we are at some loss to know what is exactly wanted, and I beg you will, by next steamer, give a sketch of the document you allude to, particularly a description of the limits of the grant. I think you must not have received the information sent you of the existence of the grant of the two sitios directly to Castillero, and registered in Monterey, nor am I sure if this will mend the matter.

He then speaks of attacking the Berreyesas' title as not valid.

Finally, he says (Page 402):

> We think at present that it may be the best plan to get an authenticated copy of the approval of the Mexican Government of the grant of three thousand varas, given by the Alcalde, on giving possession of the mine. As a doubt may be started as to whether the Alcalde, acting as the "*Juez de Mineria*," had a right to make this grant, yet, if approved of by the Government of Mexico before the possession of the country by the Americans, there could be no doubt upon the subject. This takes in our hacienda, and unless opposed by the Berreyesas, would, I should think, settle the question. Castillero says such approval was given, and that on his arrival in Mexico he will procure a judicial copy of it; this is the plan we shall adopt if we hear nothing from you to alter this resolution.

This is the state of the correspondence in February. On the 2d of March this man Forbes is turned out of the mine. Capt. Halleck is put in possession when the owners resume their property, and then Eustace Barron goes to Mexico. I now intend to follow him to Mexico, and see what he did there. It is in the record.

Look at pages 59, 1794 and 1797, if you wish to see what Eustace Barron did in Mexico, when he went there in 1850.

MR. JUSTICE HOFFMAN—In the letter of March 2d, 1850, addressed by Barron, Forbes & Co. to Alex. Forbes, they say

Eustace Barron is about to proceed to the City of Mexico, to attend to what he (Forbes) had recommended. Is that part of the temporizing policy?

Mr. Benjamin—That was a part of their policy to keep James Alex. Forbes quiet until De la Torre could get up here and turn him out of the mine. Having previously stated what they were going to do, that is, to procure certified copies of the proceedings in Mexico in May, 1846, alluded to by Castillero; and they carried this out by what they actually did do, as I shall show the Court. They actually took steps in Mexico, and the first step taken the Court will find at page 59.

Forbes recommended a ratification and confirmation of the mining possession by the Supreme Government. The other recommendation was to procure a grant of the land.

Now, what did Eustace Barron do in Mexico, on the 30th of June, 1850? He procured the following certificate (Page 59):

> I, the undersigned, Minister of Internal and External Relations, certify that, although in the communication which the Junta for the Encouragement and Administration of Mining directed on the 5th of May, 1846, to his Excellency the Minister of Justice, relative to the mine of cinnabar discovered in California by Don Andres Castillero, it was written that it was situated in Lower California, and the same is said in the answer from the Ministry, dated the 9th of the said month, of which documents copies were given on the 23d of April last, to Señor Eustaquio Barron. This is a mistake, for said mine and the lands granted to Castillero are in the territory of Upper California, which grant the Supreme Government afterwards approved and declared legitimate.
>
> And I give this certificate for the purposes which it may serve, at the request of the said Señor Barron, in Mexico, on the 30th of June, 1850.
>
> (Signed) Lacunza.

Mr. Randolph—Where is the evidence in the record on that subject? Has there been a witness called to testify to this?

Mr. Benjamin—That is one of the documents offered in the Land Commission.

Mr. Randolph—Not proved there.

Mr. Benjamin—The certificate of Lafragua proves that exhibit in the Land Commission. I am going on to argue on it, if it is a forgery.

Now, your Honors have in your possession what Eustace Barron goes to do in the City of Mexico. Suppose he wanted to forge a grant. According to the gentleman (Randolph) is it not easier to forge these papers than to get a certificate from the Minister that these contain clerical errors? for Castillero to get a correct description copied, than to apply to the Minister of Relations to correct clerical errors? He has no difficulty in getting that certificate. That is fair, honest and upright.

Where are the clerical errors? If your Honors will look at page 1794, you will find that in the communication of the Junta of the 5th May, 1846, to the Minister of Justice, it is stated that the specimens of cinnabar came from the Mission of Santa Clara, in *Lower* California. On page 1797 you will find the same error.

Eustace Barron has gone to Mexico, to get the documents to send up here in proof of the title. What does he send up? A certificate that the errors are clerical errors; that the true place where the mine is situate, is *Upper* and not *Lower* California, as stated in the papers.

Mr. Randolph—When you first dwelt on the certificate of Lacunza, I asked you to point to anything that proves such a thing in evidence.

Mr. Benjamin—I can't. I will state that it is; you prove the contrary, if you can. It was filed before the Land Commission at the time.

The application is made to Lacunza, Minister of Relations, to correct the errors; that is done by Eustace Barron. Is anything else done? Look at the letters here. Eustace Barron is stated in the letters to be busy in the public offices of the City of Mexico, searching. Searching for what? For proof that the Berreyesa title is not good, that according to the archives neither Micheltorrena nor Alvarado had the right to make the grant; and to seek up evidence of that fact to send up to beat off the disputes about the boundaries. That is what Eustace Barron is about. He is getting proof from the archives to beat off the neighbors who are going to swindle him and his partners out of the mine by extending their limits. He is correcting clerical errors.

These things show conclusively that what he did in Mexico was honest and correct—and it is before the Court.

Mr. Randolph, the other day, called the attention of the Court to a document "the most extraordinary," he says, "ever produced before a Court within his knowledge." Upon it he called the Court to stamp its reprobation, because the party subscribing it had presumed to say that the doubts of the Court in relation to the authenticity of these papers were offensive. That *is* an extraordinary document, and the most precious used in the case. It overthrows your whole case, little as you seem to think it. It proves—notwithstanding all you say of the power, the influence, the wealth of this house, and of its chief—that with the aid of the American Minister and the British Minister, Eustace Barron was unable to obtain from the Mexican Government the poor privilege of putting the great seal of State on his papers. They told him: "No, sir! our laws are against it. We will not do it." You (Randolph) say we could get them all to make up such papers as we pleased; put *espediente* after *espediente* in their archives; buy up nine different witnesses. All of those witnesses, it is said, are perjured. Castillo Lanzas is a perjurer; these documents do not exist in the original; were never issued. All this you say. We have procured the forgery of all this by means of our power in Mexico! And yet, all this vaunted power you ascribe to us could not procure the poor privilege of having the seal of State appended to these papers, because refused by law. Castillo Lanzas is the man who refused it, a year before he came up here. Instructed by the President, he told Mr. Barron, "We cannot violate the laws for you. I am instructed to tell you that, by the laws of the Mexican Republic, the great seal cannot be used for certifying such papers, and we will not go outside of those laws for your interests. The President instructs me to tell you that if the American Government will not respect that document, authenticated as we authenticate all such documents, it is not our fault. As regards the matter of national interference, that is a matter we will attend to at the proper time. As regards this seal, which you pray for, it cannot be granted."

They could not get it. All the British and American Ministers' influence could not get it. It cost nearly $200,000 to bring up witnesses—all of which might have been saved by that little seal. Our Government would not admit evidence taken there without it. All the money in Mexico could not get it. If disposed to bribe or forge, what was easier than to hand $50,000 or $100,000 to Castillo Lanzas, to put that seal on this paper. If he is a man who could be bribed to come up here and give false testimony, is it not much easier to bribe him to put the seal on our papers? All the power in Mexico could not do that, yet, your Honors are asked to believe that we could put a bundle of forgeries in the archives in Mexico, and then bring up all the Ministers to swear to it. All that we could do in Mexico, while all the power and influence of the British and American Ministers and of our house could not get those officials to swerve one hair from the letter of the law in relation to their archives. Those archives, it is said, we cannot offer in evidence, because the Government, which is claiming our land, and which ought to ask them itself, will not do so—therefore, it has a right to take our land!

This is all I have to say, may it please your Honors, in defense of Eustace Barron. After the existence of these facts came to his knowledge, he turned James Alex. Forbes out, put the mine in possession of another person, went to the City of Mexico, busied himself in getting such certificates as the laws of the country would allow, endeavored to get proper authentications, and was refused, and finally was driven by the persecutions of the Government to spend $200,000 to defend his character; the faith of the nation, bound by the Treaty, being violated by the acts of the Government.

This is what Eustace Barron did. This is ALL that he did. And it is a labor of love for me to say so; because I knew him personally; because I became indebted to him in the City of Mexico for acts of kindness I will ever remember; because I loved his son Eustace, as noble-hearted a gentleman as I ever knew; because the other members of the family are my friends and acquaintances whom I also respect and honor. It is a labor of love for me to defend that family, because I believe them to be men of as high and pure character as any gentlemen on this floor. I believe it, and believing it, say it openly. Eustace Barron, senior, was a man of austere manners, upright, respected by everybody who knew him, with extended influence by reason of his character for probity and honesty, against whom no human being ever heard a single word of reproach or calumny. Yet, Eustace Barron had his dying moments embittered by the statements spread broadcast throughout the country; and it was at his request that his friend Negrete came up here to give testimony to the truth of the documents brought forward, without fee or reward; testimony unimpeached and uncontradicted, and which the whole power of the Government has been defied repeatedly to deny or disprove. It *cannot* be impeached or contradicted.

Protected against the slanderous charges of the Government by such a character and by such testimony, even the lightning of Edmund Randolph's invective plays innocuous around the name of Eustace Barron.

THIRD DAY.

MR. BENJAMIN—In the course of my argument on the facts of this case, I omitted one reference to a communication not hitherto adverted to in the case, to which I now desire to address the attention of the Court for a moment only before I proceed to discuss the questions of law. In Executive Document, No. 17, (House, 1st session, 31st Congress, 1849–50) previously referred to, is a communication from Col. Mason, then Governor of California, addressed to the Adjutant General at Washington, giving a report in relation to California mines, and a history of a visit made by him to this particular mine in the spring of the year 1848. As a part of the history of the country in relation to this mine, I desire to read a passage or two to the Court. (Page 534):

"Before leaving the subject of mines, I will mention that on my return from the Sacramento I touched at New Almaden—the quicksilver mine of Mr. Alexander Forbes, Consul of Her Britannic Majesty at Tepic. This mine is in a spur of mountains, 1,000 feet above the level of the Bay of San Francisco, and is distant in a southern direction from the Pueblo San José about twelve miles. The ore (cinnabar) occurs in a large vein dipping at a strong angle to the horizon. Mexican miners are employed in working it, by driving shafts and galleries about six feet by seven, following the vein.

The fragments of rock and ore are removed on the backs of Indians, in raw-hide sacks. The ore is then hauled in an ox-wagon from the mouth of the mine down to a valley well supplied with wood and water, in which the furnaces are situated. These furnaces are of the simplest construction, exactly like a common bake-oven, in the crown of which is inserted a whaler's frying kettle; another inverted kettle forms the lid. From a hole in the lid a small brick channel leads to an apartment or chamber, in the bottom of which is inserted a small iron kettle. This chamber has a chimney.

In the morning of each day the kettles are filled with mineral (broken in small pieces) mixed with lime; fire is then applied, and kept up all day. The mercury, volatilized, passes into the chamber, is condensed on the sides and bottom of the chamber, and flows into the pot prepared for it. No water is used to condense the mercury.

During a visit I made last Spring, four such ovens were in operation, and yielded in the two days I was there, 656 pounds of quicksilver, worth at Mazatlan $1.80 per pound. Mr. Walkinshaw, the gentleman now in charge of this mine, tells me that the vein is improving, and that he can afford to keep his people employed, even in these extraordinary times. This mine is very valuable of itself, and becomes the more so, as mercury is extensively used in obtaining gold. It is not at present used in California for that purpose, but will be at some future time. When I was at this mine last Spring, other parties were engaged in searching for veins; but none have been discovered that are worth following up, although the earth in that whole range of hills is highly discolored, indicating the presence of this ore. I send several beautiful specimens properly labeled. The amount of quicksilver in Mr. Forbes' vats on the 15th of July, was about 25,000 pounds."

At the close of my argument yesterday, my brother Randolph asked me on what authority I read the certificate of Lacunza, annexed to one of these espedientes. He will find it as part of Exhibit A, produced by Lafragua, offered in evidence in the Land Commission, and received without objection by the United States. I have now, may it please your Honors, closed my argument on the facts of this case. Imperfect and incomplete as it is, I trust sufficient has been shown to satisfy the Court to the fullest extent of the genuineness and truth of the papers brought before it as the titles of these claimants. Of the vast mass of testimony contained in these four or five octavo volumes, comprising 4,000 or 5,000 pages, necessarily a good deal must be omitted in the resumé of counsel.

But we rely on the diligent care of your Honors, on your candid consideration of the evidence, both on the part of the claimants and on that of the United States, and on your conclusion, drawn from all these facts produced, that there is not one shadow of doubt remaining in relation to the truth of the titles presented before you. We rely on your conclusion therefrom, that the very documents and letters offered by the Government of the United States, for the purpose of establishing that at one time some antedated and fraudulent papers were contemplated by some of the parties to these transactions, referred to the documents, now offered by us in evidence, as being true and genuine—describing them with an exactness which makes their identity absolutely certain—and proposed the forgery of the papers containing features, not one of which is to be found in one of the papers now brought into Court by us, which, on the contrary, possess all the defects which the forger, James Alex. Forbes, proposed to remedy by fabrication. We pointed out the defects in the title now produced before the Court; the statement of those defects being admitted by the Government counsel, and urged on the Court as ground on which this title is to be declared invalid—even if genuine. I leave, I say, the argument on the facts, and proceed to discuss the law.

In the United States District Court,

NORTHERN DISTRICT OF CALIFORNIA.

THE UNITED STATES
vs. — No. 420.
ANDRES CASTILLERO

"NEW ALMADEN."

OPINION

OF HIS HONOR

M. HALL McALLISTER,

Circuit Judge,

DELIVERED, JANUARY 16, 1861.

SAN FRANCISCO:
COMMERCIAL STEAM BOOK AND JOB PRINTING ESTABLISHMENT.
1861.

OPINION

OF

HIS HONOR M. HALL M^c^ALLISTER,

CIRCUIT JUDGE,

DELIVERED, JANUARY 16, 1861.

THE UNITED STATES vs. ANDRES CASTILLERO,	"NEW ALMADEN."

The jurisdiction of this Court in this case is a preliminary question, and must therefore be first discussed.

It is urged by the Government, that if the nature and character of a mine under the laws of Spain and Mexico are considered, it resembles an easement at common law, is a usufructuary interest, and therefore is a "property" which cannot be protected by this Court under the Act of Congress of the 3d March, 1851.

It is urged again, that such Act limits the jurisdiction of this Court to claims of land held in fee simple only; and lastly, it is asserted that no test of the jurisdiction of this Court is found, in inquiring into the question whether a mine owned by a person constitutes him the holder of real estate, or not.

Now, as to the idea that the jurisdiction is limited to the determination of only fee simple estates in land, such construction would render the carrying out the Act of 3d March, 1851, almost impracticable. Neither the owner of land under a colonization grant, nor the holder of a mine under titles from the Mexican Government, could be deemed tenant in fee simple. The former held under a grant fettered in many instances with stringent conditions; among them even one against alienation of the estate. Such was the fact in the Fremont case, and we have met with it in others. The owner of a mine held a peculiar estate under the laws of Mexico, and subject to the provisions of the Mining Ordinances. Neither can be said properly to have held an absolute fee simple estate.

To adopt the construction contended for, that fee simple estates in land are alone protected by the Statute of 3d March, 1851, would impute to Congress an intention in framing the Act to forfeit, or leave to their fate, all estates in land less than fee simple; for a clause in the 13th Section of the Act declares, that *all* lands, the claims to which shall not have been presented to the said Commissioners within two years after the date of the Act, shall be deemed, held and considered as part of the public domain of the United States. 9 Statutes U. S. at large, 633.

The word estate is derived from the latin *status*, it signifying the condition or circumstance in which the owner stands with regard to his property. 2 Blk. 103.

Under the Mexican law, two separate parties might be the owners of different interests in the land, and each recognized as the holder of a distinct estate.

In this case the claimant presents his claim for two different estates in land; the one under a title from the Mexican Government in the form of a grant for land *eo nomine*, the other under a title from the same Government in the form of a mine. In discussing this question, as the objection to the jurisdiction is limited to such portion of the substance of the land only as has been converted to mining purposes, the inquiry will be confined to *it;* nor will the Court consider the proposition urged by a portion of the argument of claimant's counsel, that the mining right being "property," such as is protected by the Treaty of Guadalupe Hidalgo, is entitled to the protection of this Court, under the Act of Congress of 3d March, 1851.

In the view this Court takes of this case, a decision of that question is unnecessary to fix a construction upon the Statute of 1851, upon which the jurisdiction of this Court solely rests.

The Treaty may well be borne in mind when the Court attempts to fix a construction upon that statute from its face, and when the intention of the law makers is to be ascertained, whether a literal and stringent, or a fair and more liberal construction, will best carry out the statute. Such regard to the Treaty, and to that extent on this question, we think salutary.

The object proclaimed by the Act of 3d March, 1851, and in its first section, is the ascertaining the "*private land claims*" in the State of California. The eighth section of the Act requires that each and every person claiming *lands* in California by virtue of *any right or title* derived from, etc. The subject to be adjudicated then is a "*claim to land.*" The *nature* of such *claim*, the *estate* and *interest*, are wholly *unlimited.* It would seem, therefore, from the very words of the statute, that a claim to *land* by *any right* or *title* derived from the Mexican Government, and whether acquired for the purposes of extracting the minerals from it, or for any other purposes to which it could be applied, every such claim would be within the Act. So it would appear from the language of the statute, that a claim under a title or right from the Spanish or Mexican Government to any *estate* or *interest in land*, whether a conditional or absolute estate, whether for term of years, for life, or in fee, is within the statute.

For all the purposes of this case, it is only necessary for this Court to decide, that the fair interpretation to be applied to the Act of 3d March, 1851, is to include all species of property claimed under titles from the Spanish or Mexican Government, which are considered and deemed by the laws of either of those governments, and by the law of our own country, as belonging to that class of property whose "*nomen generalissimum*" is expressly mentioned in the statute.

If *land* be designated in the statute in relation to title, as in this case, every portion which formed its original substance is deemed in the eye of the law a part of the land, the law not recognizing a change of substance by a change of use or name.

A simple license to dig gold or quicksilver is a mere incorporeal hereditament, and would not come within the rule of interpretation; but the *owner* of a mine, under the laws of Spain or Mexico, has a *jus in re*, and not a mere *jus ad rem.* Under that interpretation, he who claims a mine as *owner* under these laws, is, in legal contemplation, claiming land under a title from Mexico, as well as he who claims under a colonization grant.

We think that it has been correctly stated, that "Although the things belonging to each species (land and mine) possess all the attributes of land, being immovable corporeal hereditaments, the name *land* is therefore generic, and, in strict legal acceptation, applicable to both species; yet, in common parlance, and frequently even in legal language, this generic name is used to designate one of the two species, while the other, to designate its species, is called a mine, or by some characteristic name."

"The nomenclature is not, perhaps, perfect, but sufficiently so for all practical purposes, for, while the name *land* is usually applied to one species, from the greater frequency of its use in that respect, its definition (in a legal sense) is so plain that no one can fail to perceive that it includes both, when it becomes necessary to predicate of either the *generic* attributes of land."

But the three thousand varas of surface land, as well as a vein of cinnabar included in this mining claim, are certainly to be considered land.

But, leaving mere verbal speculation, let us ascertain the solution of this question by reference to authority. What, then, are the nature and character of the property held in a mine by its owner under the Spanish and Mexican laws?

We know no better authority to refer to than the celebrated commentator on the mining laws of New Spain. The references are to Heathfield's Translation, 2 vols.

Speaking of a mine, and the indispensable necessity of keeping it at work, Gamboa says, that this being required by law, and being a condition the Sovereign has thought proper to annex "*in granting the right of property*," it must be performed. (2 Gamboa, Heath. Trans., 92, Sec. 18.) Again, he states, in considering the privileges awarded to the miners by the authors he was at the time combatting: "Another circumstance treated by the authorities (authors) as a privilege, is the per mission given to the miner to appropriate nine parts of the produce, paying to the crown a tenth only, as an acknowledgment for giving its subjects a *beneficial* and *direct interest* in this *valuable class* of property." Both Gamboa and his opponents seem to have considered the miner's interest in his property both "beneficial and direct." *Ibid*, p. 157, Sec. 15.

Again: Gamboa makes reference, in a case he is discussing, to the laws of Peru, which directed that upon the death of the proprietor of a mine, his executors shall, if his heirs be in Spain, sell it, "*like other landed property*, within thirty days." *Ibid*, p. 95, Sec. 22.

Under the laws of Mexico, all remedies, whether framed for originally acquiring, maintaining or recovering the possession of immovable or landed property, were held applicable to mines. 2 Gamboa, 258, Sec. 6.

Gamboa, in the 14th section of his Commentaries, vol. 1, p. 20, discusses the doubts which had arisen whether the mines in the kingdom of the Indies were to be regarded as the peculiar right of the crown, or whether they are to be considered as the absolute property of the subject. This he does with his usual ability, and comes to the conclusion that the mines of the Indies "are a right of the Crown, *and that as this right is quite consistent with the property granted to the subject therein, it must follow, beyond dispute, as a consequence of their being made over to the latter; with the power to dispose of them as of anything of his own, that all the incidents* of property must attach in favor of the proprietor, and that, therefore, they (the mines) may be exchanged, sold, leased or alienated by contract, donation, or inheritance; may be given in marriage or charged with a rent, and that interest may be demanded for the purchase-money while remaining unpaid. Ibid, Sec. 25, p. 28.

"But all the above qualities," continues this eminent commentator, "are to be understood as governed by this essential condition: Those to whom the property devolves, by universal or particular succession, must conform to the ordinances and fulfill the obligations thereby imposed, being the law." 1 Gamboa, Sec. 24, p. 27.

He further tells us: "The grant of the Sovereign, therefore, conveys to his subjects a direct and beneficial right of property." This last clause has been translated more literally, using the technical terms employed by Gamboa, thus: "And there passes to the subject this *dominiun directum*, or right of property (á propiedad), and also the *dominiun utile*, by virtue of the gift and concession of the Sovereign, which we hesitate not to name *una modal donacion*."

The learned writer then proceeds to say, that such qualified gift will appear upon considering the rules by which that species of gift is defined by law, that is to say, that it be a free and complete act, which being perfected, a charge attaches on the donee from that time forth (and the being worded as a condition makes no difference), and that upon the failure of the modification limited by the donor in his own favor, or in that of a third person, or the kingdom or republic, the gift determines, as will be seen by reference to various texts and doctors," a reference to which is made in a note. *Ibid*, Sec. 25, p. 28.

These rules Gamboa considers precisely applicable to the second ordinance he is considering, for he states it thereby gives "and makes a grant to his subjects of the property and possession of the mines discovered, or to be discovered, with power to dispose of them as of anything of their own," which amounts to a complete act of gift, no price being paid for the grant, nor for the registry or denouncement of the mine. But the ordinance proceeeds, "observing, both in regard to what they have to pay us by way of duty, and in all other respects, the regulations and arrangements established by this edict in the manner hereinafter mentioned," which is the charge or qualification, and which refers to the payment of the fifth from that time forth, and to the observance of the ordinances which regulate the mode of working the mines, the number of hands to be kept at work in them, their boundaries, and the other matters required to be observed, upon the omission or non-performance of which the gift determines, and the mine becomes liable to be denounced by any one." 1 Gamboa (Heathfield), p. 29, sec. 26.

If any title has been acquired by the claimant—a question hereafter to be discussed—and the inquiry shall arise as to his forfeiture of his title, *it* will be more appropriate to the discussion of such forfeiture than to the question of jurisdiction, as to the matters alleged as ground of forfeiture. We have cited thus fully from Gamboa, although his Commentaries, which have given him so much celebrity, were made upon the Ordinances of 1584, known as the New Code, and are alluded to by a majority of the Board of Land Commissioners in this case as "the celebrated Commentaries of Gamboa on the Mining Laws of Spain, which, although published before the Ordinance of 1783 was adopted, is a work of inestimable value at the present time." Transcript, p. 85. The dissenting Commissioner in the case, also, does not place his dissent in the matter in which he disagrees from the majority of his associates to any want of authority in Gamboa's Commentaries, but upon their alleged misconception of certain passages in that work. *Ibid*, 108. The same favorable testimony is borne to them by the counsel of both parties in this case who cite from and rely on them.

But we rely more on them by reason of the statement, verified by examination, that the "Mining Ordinances of 1783," which were promulgated about twenty years after the publication of Gamboa's Commentaries, adopted his views both as regards the rights of the Crown and the rights of the subject in the mines, and made the law as he said it was:—"a comparison of the twenty-fourth, twenty-fifth, and twenty-sixth paragraphs of the second chapter of Gamboa's Commentaries with the fiftieth of the Mining Ordinances of 1783 will illustrate this."

The caption to this title is, "Concerning the fundamental ownership (*dominio radical*) of mines, of their concession to individuals, and of the duties for which they are to be paid." Mining Laws of New Spain of 1783; (Halleck), p. 222.

The first article declares the right of the Crown in mines. It describes that right by the term *dominio radical*, which conveys a similar meaning with the *dominium altum* of which Gamboa speaks. This we infer from the second article. This is in the words: "Without separating them from my royal patrimony, I grant them in property (*en propiedad*) and *possession* in such manner that they may sell them, exchange them, rent them, donate them, pass them by will, either in the way of inheritance or legacy, or in any other manner alienate the right which in the mines belongs to them on the same terms on which they themselves possess it, and to persons capable of acquiring it."

This article certainly did not intend to separate the mines from the royal patrimony. The *dominio radical* stated in the grant, the *dominium altum* spoken of by Gamboa, and "the rights of sovereignty in the mines," as they are designated by the Supreme Court in the case of Fremont, it was intended not to separate from the Crown; but in the same instrument in which this reservation is made, the royal donor granted the mines to his subjects in property and possession (en propiedad y posecion) in such manner that they may sell them, etc. There can be no doubt that this grants the mines to individuals in property and possession.

The framers of these Ordinances of 1783 undoubtedly adopted the views and opinion of Gamboa, in the sections cited at large from that commentator by this Court especially. (1 Gamboa, ch. 2, Sec. 24, p.27.)

The mine is land in the Spanish, as "fundo" and "bienes raices" and "bienes immobles;" the one translated, is land; the second, *real estate;* the third, *immovables.*

We deem the foregoing authorities, without citing others, sufficient to establish:

1. That the transfer of a mine under Spanish and Mexican law was the granting of "a direct and beneficial right in this valuable class of property."
2. That such property was deemed by the Mexican laws of conveyance, and those as to the remedies to be applied to the recovery of the possession of it, as property in land.
3. That while the *dominio radical* or the *dominium altum* remained in the Crown, the *dominium directum* or right of property (ó propiedad) and also the *dominium utile* were in the subject.
4. That there was no inconsistency between this right of the subject and the reservation to the Crown of the *dominium eminens.*

Having ascertained the nature and character of the property held by the owner of a mine under the Spanish and Mexican laws, the inquiry is: "What view does the common law which obtains in our country take of the property of a mine as one in land?"

This is an important investigation in discussing the question of jurisdiction under the statute. If property in a mine is considered, under the laws of Mexico, real estate because it is land, and if it is so viewed by the common law, these facts will illustrate the propriety of the interpretation this Court has placed upon the statute. Such illustration will have been derived from the laws and acts of the two parties to the Treaty of Guadalupe Hidalgo, to carry out which such statute was enacted.

The venerable father of the common law (Lord Coke) lays down the rule: "By the name of *minera* or *fodina plumbi*, the *land itself* shall pass in a grant, if 'Livery of Seizin' be made, and also be recovered in assize *et sic de similibus*." 1 Co. 6, A.

We learn from any text-writer of modern times on the subject, that an action of ejectment cannot be brought for *incorporeal* hereditaments that lie in grant, except for tithes, and that by statute in England of 32 Henry VIII., Ch. 7.

That ejectment can only be maintained for the possession of a corporeal hereditament, such as land or a mine.

Notwithstanding the difference which exists between the absolute ownership of the gold and silver in the King of England, and the distribution of the property in mines which subsisted in Spain and Mexico between the Crown and its subjects, it is held at the common law that land does not cease *to be* because converted to mining purposes, and grants for copper, lead and other mines have been held to pass estates in lands and be recoverable, as it always had been, by ejectment. Ejectment lies for a coal mine (or any other) upon the principle that it is not to be considered as a bare profit *apprender*, but as comprehending the ground or soil itself which may be delivered in execution. Adams on Eject. 19.

In the case of Stoughton *vs.* Leigh (1 Taunton, 402), an application was made for dower, out of *several mines and strata of lead out of the lands* of the husband, to a Court of Equity; a case was directed by the high Court of Chancery to the Court of Common Pleas of England for its opinion on the case. The counsel for the doweress admitted rather reluctantly in open Court, "that where mines have been actually *wrought* as part of the estate of the husband, they may perhaps be collaterally subject to dower, together with the *rest of his real property*." *Ibid*, pp. 404, 405.

In that case a second argument was prayed on behalf of the heir, which the Court refused, thinking the case *sufficiently clear.*

The Court of Common Pleas certified to the High Court of Chancery in the above case their opinion, arising out of the first and second statements in the case, submitted as follows. Their response to the first statement applicable to this question will be only given. The remaining portion of the case refers to the mode in which the Sheriff should act in the service of an execution against mines.

To the first statement of the case presented, the Court of Common Pleas certified: "That the widow of John Harbury (the deceased) was dowable of all his mines of lead and coal, as well those which were in his own landed estates as also the mines of lead, or lead ore and coal, in the lands of other persons, which had been in fact open and wrought before his death, and wherein he had an estate of inheritance during the coverture; and that her right to be endowed of them had no dependence upon the subsequent continuance or discontinuance of working them, either by the husband in his lifetime, or by those claiming under him since his death." *Ibid*, 409.

Such decision, which solemnly enunciates the principle that the property in a mine is *real estate*, and constitutes a part of the estate to which a widow is entitled at common law, as tenant in dower, affords a conclusive proof that *land* converted to mining purposes remains *land* in substance, and the law therefore considers it real estate.

A few observations on the above case of Stoughton *vs.* Leigh will illustrate to what extent a mine is deemed by the common law *land.* As early as the time of Littleton, a widow was entitled, as tenant in dower, only to a portion of the *lands* and *tenements* of which the husband was seized during the coverture; and such has been the law ever since in every country where the common law has obtained.

The Courts in that case (both the Chancery and the Common Pleas) could not have cut out the heir and awarded dower to the widow out of any property other than *lands and tenements* of which the husband had been seized. Now, it cannot be urged with propriety that a mine is to be deemed a tenement.

The Chief Justice said that "the words (lands and tenements) must receive the same exposition." The Court, though, evidently placed their decision upon the ground that the mines being landed estates were real estate. Apart from any legislation like that of Spain and Mexico, which creates a different ownership of the surface of the soil and of the soil beneath between individuals, land extends downwards to an indefinite extent, and, by the common law, beneath the soil is a part of the land, and belongs to the owner of the surface of the earth above.

The change of the ownership of the intermediate soil to another owner does not change it from its original substance of land, even in Mexico, where the change is made, as we have seen by the review of her laws. Blackstone, discussing the general character and attributes of land at common law, tells us that land has indefinite extent downwards as well as upwards * * * * * * * so that the word *land* includes not only the face of the earth, but everything under it * * * * * * and therefore, if a man grants all his lands, he grants thereby all his mines of metals and other fossils. * * * not but the particular names are equally sufficient to pass them. But *the capital distinction is this*, that by the particular name nothing else will pass except what falls with the utmost propriety under the name used, "but by the name of land, which is *nomen generalissimum*, everything terrestrial will pass." 2 Black. pp. 18, 19.

In the case of Townley vs. Gibson (2 Term Rep. 701), the construction of an Act of Parliament was before the Court; one of the Judges, delivering his opinion, says: "Whether by this Act of Parliament the mines passed to the tenants? That is the question here. The soil undoubtedly passed; now what are the mines but part of the soil?" When a review of the common law teaches us, that by the name of *mine* the land itself will pass; that an action of ejectment is an appropriate remedy to recover possession of a mine as well as land; that mines can be recovered by a widow as part of her dower, although she is entitled to a portion only of the lands and tenements of which her husband had been seized during his coverture; that mines pass by an Act of Parliament, by which the soil passes as part of it; that in a deed, where mines are mentioned *eo nomine*, that nothing but what properly and strictly comes within that term—such as his metals—will pass, but by the name of land which is *nomen generalissimum*, the grant passes thereby all his mines and fossils. When such review gives such results in our country, which harmonize with our view of the Spanish and Mexican law on this point, must not an American tribunal consider, that when Congress used the words "claiming *lands*," in the Statute of 3d March, 1851, they were used in the sense they are understood and interpreted by the laws of this country and of Mexico—the two parties to the Treaty of Guadalupe Hidalgo?

The case of Fremont vs. The United States (17 How. 542), has been cited as a controlling authority on this question of jurisdiction. It cannot be deemed so, without a violation of the rules of judicial construction. In Carroll vs. Carroll's Lessee (16 How. 287), the Court say: "If the construction put by the Court of a State upon one of its statutes (and the proposition is applicable to any Court) is not matter in judgment, if it might be decided in either way without affecting the right brought in question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the *precise* question necessary to be determined, to fix the rights of the parties, and to decide to whom the property in contestation belongs."

Now, the Supreme Court in the Fremont case could have decided either way upon the title of the colonization grant, under which Fremont claimed, without affecting the question before us; and this is what they actually did do, and they in so many words tell us: "The only question before the Court is the validity of the title." What title? It could have been none other than that of the colonization grant, the only title presented to the Court. If the only question that was before them was the validity of that title, how can an authoritative decision upon a totally different question be imputed to the Court? All that was suggested in the argument of counsel for the Government in relation to mines, was referred to by the Court in these words: "And whether there be any mines on this land, and if there be any, what are 'the rights of the sovereignty in them,' are questions which must be decided in another form of proceeding, and are not subjected to the jurisdiction of the Commissioners or the Court by the Act of 1851." (565.) In a word, no claim to landed property known as such under the laws of Mexico and this country as a mine, was before them, and it therefore was not decided upon by them.

The Court does refer, as it seems to us, to the *dominio radical* found in the Title V. of the Ordinances of 1783, the *dominium altum* spoken of by Gamboa, and designates the property reserved by the Crown as "the rights of the sovereignty in the mines." But no decision was made which should control this Court in its action on the claim of an individual to a right in a mine which he alleges he has derived from the Government of Mexico.

The only case in which such question has come before a Court in this country, is that of Delassus vs. The United States (9 Peters, 117). The suit was instituted in the District Court of the United States for the District of Missouri, and carried on appeal to the Supreme Court.

In the language of Chief Justice Marshall (p. 131): "The suit was instituted under the Act of the 26th of May, 1824, enabling the *claimants to lands* within the limits of the State of Missouri and Territory of Arkansas, to institute proceedings to try the validity of their claims."

This case has been cited by counsel for claimant as authority. We do not consider the question was so directly adjudicated as to make it a decision which should control this Court.

It is true, that substantially a lead mine was recovered, and the decree of the Court was in favor of the petitioner's claim as a tract of land; and lastly, Chief Justice Marshall says (p. 142): "The lead mine has been mentioned, but the Act of Congress makes no reservation of lead mines." This leaves this implication, that the term "land" included "lead mines," and that it required an *express* reservation in the Act to exclude it; but the question arose in the case like that in the Fremont case, from the suggestion of counsel, and was not so raised so as to constitute a *res adjudicata.*

The Ordinances of 1783, under which we have heretofore discussed the question of jurisdiction, continued in force throughout New Spain to the time of the captivity of Ferdinand VII, when great changes were made by the general Cortes between 1811 and 1814. The Cortes passed the Act of January 26, 1811. This Act is to be found in Galvan's "Collection of the decrees and orders of the Cortes of Spain, which are *actually in force in the Republic of the United Mexican States*," is translated by Rockwell from the "Printed volumes, published by Authority," and by Halleck from "Note to Article 22, Title VI, Mexican '*Ordenanzas de Mineria*.'" This decree abolished the monopoly of quicksilver reserved by Law 1, Title 23, Lib. 8 of the *Recopilacion de las Indias*, and the right reserved by Article 22, Title 6, of said Ordinances of 1783, of taking *mines* of that metal from the *discoverer*, and working them on account of the *Royal Teasury*, which in the language of the decree, "leaving uncertain the interest of the owner, and taking it out of trade, necessarily restrain people from engaging in the useful and expensive undertaking of discovering and working mines of quicksilver." It consequently modified considerably the tenure by which the quicksilver mines had been previously held. Though this Act made no alteration in the mode of acquiring title, or in the principles of the mining laws regulating mines which previously existed, it certainly enlarged the tenure of the holder of a quicksilver mine, and rendered his right of property more secure and certain.

It is true that this decree of the Cortes, with all their other acts, were annulled by Ferdinand VII, on his restoration in 1814, but the troubles which ensued in Mexico constrained him to re-establish the Constitution on the 9th day of March, 1820.—Galvan's Decretos del Rey Don de Ferdinand VII, p. 284. Subsequently, by decree of April 15, 1820, he declared the "Decrees" of the said general and extraordinary Cortes in full force *through America*.—Galvan's Decretos de Ferdinand VII, p. 292.

Independently of these reluctant decrees, the Courts in this State have held that the decrees of the Spanish Cortes, except so far as they were incompatible with the new order of things, were in full force in Mexico.

"It is true," says one of the members of the Board of Land Commissioners in this case, "that this decree of the Cortes was, in common with all the other acts of that body, annulled on the restoration of King Ferdinand; but it is also true, that this, like the others, was revived by the revolution of 1820, and was in force at the time the independence of Mexico was achieved." He then asserts that the principle above cited has been "universally admitted, and has been so decided repeatedly by this Commission."—Trans. 111.

After the most careful review, the conclusion to which we have come is, that the Court has jurisdiction.

The next question which, like that of jurisdiction, is a preliminary one, will now be disposed of.

It arises out of the objection that the proceedings in California, in obtaining title to and possession of the mine, being before the Alcalde, the whole were therefore void, not having been made before the mining deputation. It is gathered from the record of the proceedings of the local authority in this case, that there was no mining deputation in the department, and that was the only time since the settlement of Upper California, that a mine had been worked in conformity with the laws; and there being no *Juez de Letras* in the second district, the Alcalde of first nomination, etc. The fact of there being no mining deputation in Upper California was thus announced in a public judicial proceeding in December, 1845, the evidence of which has been on record for years in the archives: the petition in this case was filed in 1852, with the documents of title in which the fact was asserted; and in the years which have intervened not a *scintilla* of evidence has been introduced to contradict the statement thus publicly made in a public document some fifteen years ago. The reasons why Mining Judges and Deputies did not exist in California, will be found in the construction in Mexico of the portion of the Ordinances of 1783, which constructed this somewhat complicated machinery of mining tribunals.

Those reasons are such, even if that portion of those Ordinances was not expressly repealed when Mexico achieved her independence, as would authorize the claimant as a discoverer of a mine which gave him an incipient right, and entitled him under the mining laws in full force to denounce, register, and take possession of the mine before the ordinary judges, there being no Mining Judges.

Even the strictest common law rule adopts the axiom, "*Non cogit ad impossibilia*," and a Court acting on principles of equity as this Court does, would violate them by enforcing a forfeiture solely on that ground. We will now inquire into these reasons.

Gamboa tells us that judicial matters, such as registry, denouncement, the giving possession, and so forth, are the province of the Justices and (by way of appeal) of the royal audiences, as we shall more particularly show in the proper place. —1 Gamboa, p. 149, Sec. 15.

In his Commentary, 2d v. p. 286, Sec. 1, he observes, speaking upon this subject: "This ordinance is not observed in the Indies, nor could it be enforced there, without great damage to the public, and particularly to the miners, etc.—*Ibid.* Sec. 1. He then proceeds to discuss the question, p. 288, Secs 5, 6; and on p. 290, Sec. 10, he states, "Such as *denouncements*, insufficient working, boundaries, questions of the right of possession or property, the proving of entries in the register, the removal of the pillars of support, or the embezzlement of bullion; all which belong to the *Chief Alcaldes or Mayors*, (whom he designates, p. 286, Sec. 2.) 'Ordinary Judges,' and by way of appeal to the Royal Audiences."

Now if special Mining Judges did not exist, and the Ordinance of 1783 on the subject was not observed, nor could be enforced in the Indies (Mexico), how could they have obtained in California without special legislation?

Independently of the fact that no special Mining Judges existed, and the provisions of the Ordinance in relation to them were not enforced in Mexico, there are other reasons for the non-existence of them in California.

To authorize their legal existence here, special legislation was absolutely necessary to organize them in a mode essentially different from that prescribed by the Ordinances of 1783.

Those provisions demanded, previous to any legal organization of "Mining Deputations," a state of things which did not exist in California, a country where the first mine that was ever worked in conformity with laws was the one in controversy.

Title 2d of those Ordinances, Section 2, provides the source from whence the Mining Deputies were to receive their election and authority. It prescribes that "all those, who, for more than one year, shall have worked one or more mines, expending on them, as owners thereof in whole or in part, their capital, their labor, or their personal attention and care, shall be enrolled (matriculados) as miners of that place (lugar), and their names shall be entered in the Book of Enrolled Miners, which shall be kept by the Judge and Notary of that Mining place (*Mineria*).—Mining Laws of Spain and Mexico, 1783; Halleck's translation, p. 201, Art. 2.

By the third article of same law it is prescribed that the miners so enrolled, and certain suppliers being miners, the millers (maquideros) and the owners of *Haciendas*, for grinding and smelting in each place (lugar), shall annually assemble in the beginning of January in each year, in the House of the Judge of Mines, to elect persons who are to fill the office of Deputies of said Mining Place (Mineria).—*Ibid*, pp. 201, 202, Art. 3.

By fourth article of said law it is prescribed that each of the enrolled miners shall be entitled to a vote at such elections, and some qualification is then provided for by this section in relation to the voting by the suppliers, millers, and owners of *Haciendas*. *Ibid*, p. 202, Art. 7.

In the seventh article it is provided that the Judge of each *Real* or *Asiento*, (which words are translated by Rockwell, Mine-town or Establishment; Rockwell, p. 35, Sec. 7), and the Deputies of the preceding year, shall preside over and regulate the election; and in case of disagreement, the casting vote is given to the Judge of Mines.—*Ibid*, p. 202, Art. 7.

By the eighth article it was provided that in each *Real* or *Asiento* of Mines, there shall be a Deputation composed of two Deputies.

According, then, to Gamboa, that portion of the Ordinances which related to Mining Deputations was not of force, and *ex natura rerum* could not practically exist in California, for there was no one *Real* or *Asiento* nor no *Reales* or *Asientos* (enrolled merchants in some or any of those places, who, under the Ordinances, were to elect and organize the "Mining Deputations").

It is urged by the Government, that a complete answer is found to all the above suggestions, inasmuch as the ordinance requires the discoverer to present his written application, if there be no Deputation of Mines in the district in which the mine was discovered, to the *nearest thereunto.*

The most reasonable construction to place on these words, is to refer to the nearest mine-town, mining district or establishment within the limits of the jurisdiction of the department within whose borders the mine was discovered. Under the mining laws the origin of the title by denouncement and registry has always been left to the local authorities; and when these words were used in the Ordinances of 1783, the intention of carrying, under any circumstances, a local jurisdiction into a distant tribunal which might exist in a foreign department, is not to be imputed.

In this case the claimant certainly applied to the proper local authority, the Alcalde. In the case of Mena *vs.* Le Roy (1 Cal. 220) the Supreme Court of this State decided that Alcaldes in Departments of California, New Mexico and Tabasco, had, under the laws of Mexico, the powers of Judges of First Instance, where there was no such Judge of First Instance in the district.

In conclusion, on this point, we refer to what Gamboa says: 'It is to be observed that when a question arises concerning a contract for the purchase or sale of a mine, the right of succession, under a will or otherwise, or any point of like nature, it is competent not only to the Mining Judge and Chief Alcalde, but to the ordinary Justices of the Territory, to entertain the suit, and that it is only upon questions arising under the Ordinances, that the jurisdiction, in the first instance, belongs to the Mining Judge. If there be no such Judge, the question must be tried by the other Justices, as may be noticed in the Ordinances of Peru, above referred to."—Rockwell, p. 362.

The last authority we will refer to on this subject, is that of

Peña y Peña. It seems to be a principle in the jurisprudence of Spain and Mexico, that where cognizance of any particular matter is given to a special tribunal not being in existence, the matter reverts to the ordinary tribunal which had jurisdiction of the same kind of matter, if judicial in its character.

Peña y Peña (2d v. p. 53), says: "A special tribunal is destined to take cognizance only of a certain class of causes, or of particular persons. It is called *special* in contradistinction to the *ordinary*, which is established to take cognizance indiscriminately of all classes, causes and persons, so that a *special* tribunal is an exception to the ordinary tribunals; so that some writers on public law call them exceptional tribunals. From this it is inferred, that an exception being extinguished, the general rule remains in force. So, also, a special tribunal being extinguished, all its jurisdiction returns to the ordinary tribunals as to its source, and remingles with them from the very nature of things, without its being necessary to invest them with the authority of the new tribunal." Peña y Peña, 2, p. 371–2.

Such seems to be the principle of the Spanish Law, although it is not one of the common law.

We have heretofore considered the power of the Alcalde to deliver the juridical possession of the mine in the absence of any Mining Judges in California, in view of the Ordinances of 1783, and the construction placed upon them by Gamboa, and that view has induced us to conclude that he had the power to do so.

But the question may be viewed in another aspect. Since Mexico achieved her independence, we believe that her legislation has expressly transferred the denouncement and registry of mines to the ordinary Judges. By the 7th "Article of the Constitutive Acts of the Mexican Federation," passed 31st January, 1824, by the "Second Constitutive Mexican Congress," the Federation was made to "consist of States, and Territories, the *Californias* belonging to the latter class, and remaining directly subject to the Supreme power."—White's Col. vol. 1, p 375.

By the 18th Article, it was provided that the judicial power should be confided to a Supreme Court of Justice, and to such tribunals as may be established in the several States, and by the 23d Article, that "the judicial power of each State shall be exercised by such tribunal as may be established *by its* Constitution, but that the Legislatures of the different States may provisionally organize their interior government; and until that is done, the laws actually in force shall be observed." White's Col. pp. 378, 379.

In Article 123 of the "Federal Constitution of the United Mexican States," established by said "Constitutional Congress" on the 24th day of October, 1824, it was declared, "the judicial power of the Union shall reside in a Supreme Court of Justice, and in Circuit Courts and District Courts." White's Col. p. 404.

From the time, therefore, of the above "Constitutive Act," and the "Federal Constitution of the Mexican States," the whole judicial power became vested in the "Supreme Court of Justice," in the "Circuit," and "District" Courts, and in such tribunals as the Constitution of each State should "establish." From that time, even if Gamboa should be in error in supposing that the portion of the Ordinances of 1783 in relation to Mining Deputations did not obtain, nor could be enforced in Mexico, it is still certain that since the legislation we have referred to, it could not legally exist in California.

The influence which had been exerted by that legislation is evident from the decree of the Mexican Congress of May, 1826, which in the first article prescribes—

Art. 1. "The Tribunal General of Mining must cease, *according to the General Constitution*, in so far as it relates to the Administration of Justice, with which it was charged."—Decree of 28 May, 1820; Halleck's Mining Laws, 409. And whether such Mining Depuations could exist in the States, depended, from the time of the adoption of their respective constitutions, upon the fact whether they were "established," or "designated" thereunder.

The Federal Constitution of 1824 was overthrown in 1836, and the "Constitutional Laws" adopted in its place, but these did not establish *special* tribunals.

Subsequently, with that kaleidoscopic irregularity which distinguishes the movements of the Mexican Government, Santa Anna, having displaced the said "Constitutional Laws," and assumed dictatorial powers under the plan of Tacubaya, on the 27th day of November, 1841, issued a decree creating a *Junta*, to form and present, as soon as possible, a new project for the *re-establishment* of the *Special Tribunals* of Mining, with the modifications which *the present system of government* requires," etc.—Laras' "*Decretos y Ordenes de Gobierno Provisional.*" Halleck's Mining Laws, p. 425.

"The Establishment of Mining," created by the 2d article of the Mexican Congress (Halleck's Mining Laws, p. 409), continued in existence until the 2d day of December, 1842, when by a decree of that date issued by Nicolas Bravo (*provisionally* substituted for Santa Anna), a new regulation was made, *re-organizing* said Establishment of Mining, under the name of the Board for the Encouragement and Administration of Mining (*Junta de Fomento y Administrativa de Mineria*).

By the 10th Article of Title 1st of said Decree it is provided, that the attributes of this *Junta* shall be those which include an economical and faithful administration of the fund mentioned in this decree, etc., in conformity with the regulation which it shall draw up and transmit to the Supreme Government for its approval. In this regulation, there shall, moreover, be determined: 1st, the manner in which quicksilver shall be obtained, distributed, and sold to those who reduce ores, fixing the cases and mode in which the working of quicksilver mines in the Republic is to be supplied, rewarded, or in other ways stimulated and protected.

2d. Everything relating to the redemption of the debt of the endowment fund, according to what may be directed in the respective title.

3rd. The regulation and direction of the Junta itself; and finally, it shall be an attribute and object of its most efficacious solicitude, to promote the encouragement of the business or branch (*ramo*), its funds, and its College (*Seminario*).

The 16th article of the same title authorizes the said Junta to settle the business pending by the extinguished "Tribunal of Mining," and the "Establishment of Mining." The 24th Article, Title 4, of said Decree provides, "The Governors of Departments, in concert with the Departmental *Juntas*, and with the previous approval of the Supreme Government, will establish in each of them the number of Courts of First Instance which are required within them."

Article 25 of the same title directs that "Each Court shall be composed of three Territorial Deputies, *elected in the manner which is prescribed in the old Ordinance of Mining*, and of these three individuals, the first shall be President of the Court, and the other two, associates."

The foregoing decree is wholly translated in Halleck's Mining Laws, p. 434 (Laras' Dec. y Ord. del Gob. Prov. 1842–3. No. 549, p. 221, 229). On the 24th day of May, 1843, Santa Anna having resumed the functions of Provisional President of the Mexican Republic, issued a decree that "In accordance with my intention to *encourage* whatever may contribute to the *national* aggrandizement and *wealth*, and considering as one of the means *most suitable* for that purpose the granting of rewards and exemptions to the important branch of *Mines of Quicksilver*, so necessary for the reduction of the *precious* metals, the *most important branch of the industry* of the Republic, without which the others can make no progress." After this preamble, the Decree, in its first article, prescribes that the Royal Orders of January 13, 1783, November 12th, 1791, of December 6th, 1796, and of August 8th, 1814, with respect to exemption from excise duties (alcabala), granted to articles of consumption in mining, will be observed with respect to mines of quicksilver in the Republic.

Article 2d. No general municipal impost shall be levied upon quicksilver extracted from the mines of quicksilver of the Republic.

Article 3d. Permits quicksilver to be sold throughout the nation without permits, passes, or other Custom House papers.

Article 4th. Provides there is granted to each one of the first four operators who shall extract in one year from the mines of the Republic 2,000 quintals of quicksilver, a premium of $25,000.

Article 6th. Exempts all operatives in mines of quicksilver from all military service and all personal taxes. (Laras' *Dec. y Ord. del Gob. Prov.* 1842–3. Translated in Halleck's Mining Laws, p. 452, 453.)

On the 5th July, 1843, Santa Anna issued another Decree, having the same object in view—the encouragement of quicksilver mines. (*Ibid*, 1843. Halleck's Mining Laws, p. 454, 455.)

In conclusion, on this point, we consider that it has been shown by the preceding observations, that according to the views of Gamboa, that portion of the Ordinances of 1783 which related to "Mining Deputations," were not enforced in Mexico (New Spain)—that they could not be legally organized in California by reason of there never having been "*Reales*" or "*Asientos*" there, and, as a consequence of none such having existence in Mexico prior to her independence, they could not in California,—that Gamboa lays down the rule, that in the absence of Mining Deputies the ordinary judges may act—that a similar principle is asserted by Peña y Peña—that it is proof that no Mining Deputations existed in California; on the contrary, that the alcaldes acted. Such is the testimony of Mr. Larkin, the United States Consul at Monterey.

In conclusion on this point, "no Courts of First Instance" were ever created in Upper California under the decree of Nicolas Bravo, of December 2d, 1842. Such fact, if it ever existed legally, would be proved and must be to have had the "previous approval of the Supreme Government," and that the election had been made in the manner which is "prescribed in the old Ordinance of Mining," which was the only mode in which such tribunal could be legally constituted—that is, the members must be elected by the miners of each "*Real*" or "*Asiento*," not one of which existed in Upper California.

The Court cannot consider the objection to the jurisdiction of the Alcalde who delivered the juridical possession of the mine an available one.

The next question to be considered is the genuineness of the documentary title presented by the claimant.

There are two classes of this title.

The first consists of documents which are connected with the proceedings which took place in California in relation to the mine.

The other is the evidence of the action of the Supreme Government of Mexico, on which the claimant relies as a ratification and confirmation of the title to the mine, and as curing all defects, if any such exist in it.

It is alleged by the Government that both classes of the documentary title, and each one of them, whether executed in California or Mexico, are forged, and consequently void.

The number of witnesses called to testify in this case, the protracted examinations to which they have been subjected, the mass of immaterial facts which have been elicited, have swollen the transcript to four volumes, amounting to upwards of three thousand printed pages, and has had the effect of presenting to our attention about nine hundred pages of briefs.

In exhibiting such a case the Court is like a man who stands by an immense magazine of wheat. He may take a handful and hold it out to view, but he cannot exhibit each grain in the mass to the eye of any purchaser.

All that is practicable to do is to take a general view of the testimony, save where minuteness to ascertain the weight of testimony to prove the authenticity or genuineness of documents where forgery is alleged.

We shall first consider the evidence given in relation to the documentary title given to the claimant by the local authorities of California, then turn to that connected with that which was obtained by claimant in Mexico.

There are three links in the chain of the claimant's title. The first two are the registry of Castillero in his two communications addressed to the Alcalde, dated respectively November 22d and December 3d, 1845.

Pico, the Alcalde who signed the Act of Possession and gave juridical possession of the mine to Castillero, proves the signatures of the latter to those applications. José Noriega and Antonio Suñol, the attesting witnesses to the Act of Possession, both swear to the genuineness of Castillero's signatures, being acquainted with his handwriting, and having seen him write.

The third link in the chain of claimant's title is the Act of

Possession. The Alcalde, Pico, who signed it, and delivered the juridical possession of the mine, and the two witnesses José Noriega and Antonio Suñol, each and all swear directly each to his own, and the signatures of the two others. The testimony of these witnesses is direct and positive, and if the documents are forged or antedated, each and all are guilty of perjury. Now, the testimony of Antonio Maria Pico has been on the files of this Court in this case nearly three years, and that of the two attesting witnesses, José Noriega and Antonio Suñol, have been five years. No attempt has been made to impeach their testimony by witnesses against their character or their want of reputation for veracity.

So far from such attempt having been made, it appears from the transcript that each and all of these witnesses have been called and examined by the parties in this case at different stages of it, each in its own behalf.

They, then, who have testified as to the genuineness of these documents, stand unimpeached, and must be treated by this Court like all others who stand in the same attitude. So long as the law deems them competent, and the Court finds their testimony not disproved, it must act upon a belief in it. In this case, however, a strict invocation of that rule is not necessary. The forgery or antedating of documents is a fact which is to be proved by those who allege it. Now, the most careful review of the evidence in this case has induced this Court to believe that the testimony of the witnesses is confirmed by other testimony from various quarters—by individuals, by facts and events so nearly simultaneous with, and following so immediately, the proceedings of the local authorities in California, that they cast their shadows upon them.

Those events and facts are proved by the Mexican Archives under the charge of the Surveyor-General of the United States, from the official correspondence of the time, and the judicial records of this State.

Before reference to them we proceed to a witness who was not a party to, nor attested either document. José Fernandez was *Sindico del Juzgado* at one time, at another a second Alcalde. He proves as directly the signatures of Pico, the Alcalde, and those of the two attesting witnesses to that document, as they proved their own. "I know this document," says the witness, "saw it twice, once in 1845, in Court, afterwards when second Alcalde." He further states, "he was Secretary to Alcalde Pico; that this document was handed to him by Gutierrez, who wrote the body and paid him his fee of $3.50."

He is asked, "When handed to him by Gutierrez, what did you do with this document?"

He replied: "It remained there in the Court." He states, "he was in charge of the Archives." We will now refer to some facts.

Alcalde Pico, in the concluding clause of the Act of Possession, after stating the grant by him of three thousand varas to Castillero, declares: "*This* Act of Possession being attached to the Expediente deposited in the Archives under my charge."

Pico's term of office expired one or two days after these proceedings, and he was succeeded by Chavolla as Alcalde. On such occasion, under the law and usages, an inventory of all papers and effects in the Juzgado is taken and signed by the outgoing, and a receipt given for them by the incoming Alcalde. Such inventory produced from the Archives of the City of San José, by the Clerk of that City, Chapman Yates, on the 30th January, 1858, is filed in this case, and it designates, among numerous other papers, one "*Posecion de la Mina de Santa Clara, á D. Andres Castillero.*"

This record of possession must be the one preserved by the Alcalde in the Archives of his Court, and when the old Alcalde system was, in 1850, replaced by the Municipal Authorities of the City of San José, it passed into the Mayor's office, whence, in January, 1851, it was taken to the office of the County Recorder of Santa Clara county and filed, where it has remained to the present time.

Unless these records are forged, and got clandestinely introduced upon the records (of which there is no proof), they confirm the truth of the attesting witnesses to the documentary title. The next circumstance which confirms that truth is this: Under the Mining Laws, the Ordinances of 1783 prescribe, that after the written statement of the discoverer shall be noted in substance in the book, for his security, there be given to him, *as his corresponding title*, a *copia autorizada* of all proceedings in giving possession. The written statements or representations of Castillero in registry were not returned to him, but remained in the Alcalde's office. He, however, received certified copies of them on the 13th January, 1846, signed by Pedro Chavolla, Alcalde, and by José Suñol and Pedro Sainsevain, as attesting witnesses.

The *Copia Autorizada* was delivered to Castillero. This document, which is a copy of the expediente, has been filed in this case.—Transcript, p. 2693.

The history of this document, so far as the evidence goes, is that one Robert Walkinshaw, at the time acting as the agent of Alexander Forbes, part owner and sole lessee of the mine, placed in the hands of a professional legal firm in the City of San Francisco, in January, 1853, this *Copia Autorizada*, to be used in relation to some litigation which had arisen in relation to the possession of the New Almaden mine. It remained in the office of those gentlemen, when it was delivered back to Walkinshaw with other papers, and a receipt taken for them.

These facts are established by Mr. Hall McAllister, one of the said legal firm, and Mr. Reese, in their depositions. —Trans. 2698, 2712.

Walkinshaw, on receiving this document, with the others, from Mr. McAllister, handed them with others to his agent, John Young, with whom he deposited all his papers when he left this country, to which he never returned, as he died in Scotland in April, 1848, and Mr. John Young became the sole executor of his last will and testament. On receiving the papers Mr. Young enveloped and labeled them "Papers relating to disputed *barra* between Walkinshaw," etc.

The time when, and the circumstances under which, this document was discovered, are detailed by the depositions of John Young and Thomas Bell.—Trans. 2684, 2696.

To prove the identity of this *Copia* the Alcalde, Antonio Maria Pico, was examined in July, 1860. He swears that the Act of Possession in this document was signed by him, "Antonio Suñol and José Noriega; these latter signed in my presence as witnesses." He also testifies: "I have no doubt that I delivered this document to Castillero, because I see my receipt thereto for twenty-five dollars, my fee. The body of the document is the handwriting of Gutierrez, and bears my signature, which was placed on the day of date."

In this *Copia* there are two copies, purporting to be such, of the two representations of Castillero to the Alcalde of 1st Nomination. Each of these is signed by Castillero, Pedro Chavolla, Alcalde Pico, and two attesting witnesses, P. Sainsevain and José Suñol. The Alcalde testifies that he is acquainted with the signatures of all of them, and that they are genuine. José Suñol is dead. Pedro Chavoya proves his own signature and those of P. Sainsevain and José Suñol. He was Alcalde at the date, and signed the documents at their respective dates. Pedro Sainsevain proves his own signature, that of Pedro Chavolla and José Suñol.

The document in the *Copia* of the act of possession, the third link in the chain of claimants' title, is the document which Alcalde Pico, as we have seen, has sworn to be genuine, and he has no doubt he delivered it to Castillero, was presented to the witness, José Noriega, one of the attesting witnesses. He testifies the handwriting of the body of the document is that of Gutierrez. "It bears the genuine signature of Antonio Maria Pico, Antonio Suñol and myself; we all signed it at the same time, and in each other's presence, I presume on the date of its date. I have no reason to suppose it was not." He then states, in answer to the inquiry, that the receipt from Antonio Maria Pico to Castillero for twenty-five dollars is in the handwriting of Gutierrez.

At the end of many years, on the procurement of this testimony, the parties in interest, with the single exception of José Suñol, who had died, have been able to invoke every witness who was a party either to the original record or its certified copy.

The earliest act of Castillero, as the evidence informs us, was to communicate to Governor Pio Pico, under date 10th December, 1845: "The mine has been denounced by me, and, between a few, we have formed a company, etc." He also sent a sample of the quicksilver and says: "There is such abundance of quicksilver that eight arrobas of ore give one of metal." In this letter he expresses a wish that the vacant lands near our works be conceded to cut wood, and asks for an order to place him in possession of the Island of Santa Cruz, which had been granted to him by the Supreme Government.

This letter was transmitted by Governor Pico through the Minister of Exterior Relations, with the sample of quicksilver, to the President of Mexico, and he requests his Excellency may be made aware of, and satisfied with, so happy a discovery.

On the margin of this letter is the following order by the Minister: "April 6th, 1846. Received and noted with satisfaction, and with respect to the other matters contained, let him inform attentively as he may think fit."

The letter of the Governor of California, communicating to the Supreme Government the letter of Castillero, giving the discovery of the mine and its denouncement, was dated 13th February, 1846.

The answer made under said order to the Governor is in these words (Trans. p. 1806): "His Excellency, the President *ad interim*, learns with satisfaction, by the letter from Señor Castillero, which your Excellency sent with your official of 13th February last, the important discovery which has been made in that department. His Excellency having seen the sample of that ingredient cited in said letter, and which your Excellency sent me by Don José Maria Covarrubias, I have the honor to say this to you, by supreme order, in reply to the said communication, and with respect to the other matters referred to in Señor Castillero's letter, that Government will please report attentively what it deems convenient."

Now, all this correspondence between the Governor of the Department of California and the Supreme Government of Mexico in relation to the discovery and denouncement by Castillero, unless it was forged and clandestinely introduced into the archives, has been filed among them, since within a few days after the proceedings of the local authority had placed Castillero into juridicial possession of the mine.

These communications between Castillero (voluntarily sought by him) on one side, and the Territorial Government and Supreme Government on the other, and the approval of both of the discovery and denouncement of the mine, is certainly another circumstance tending to confirm the authenticity of the documents as sworn to by the witnesses.

If Castillero had anything to do with this alleged forgery, crime took an extraordinary course with him, for it impelled him as soon as possible while the event was recent, to give to the public authorities an opportunity of ferreting out his crime, before the dust of the future should have settled upon his foot prints.

Five days after writing to the Governor about the mine, Castillero makes a second commuuication under date of 15th December, 1845. He supposes that his Excellency may not have received his previous letter, and he again informs the Governor of the discovery of the mine. This letter is also in the Mexican archives.—Statement of Hopkins, Trans. 3068; proved by 13th answer of Governor Pio Pico, Transcript, 2533.

Now if this letter has not been forged and clandestinely introduced into the archives, the presumption is that it must have been sent to the Governor at the time it bears date, and such also tends to confirm the testimony of the witnesses.

But the proceedings in giving possession of this mine were not concluded or done in the dark; one of the Mexican functionaries gets hold of them. On the 31st day of December, 1845, Manuel Castro, Prefect of the Second District, makes an official communication to the Secretary of the Departmental Government, that Don Andres Castillero had denounced, and is now working, a quicksilver mine found in the jurisdiction of the town of San José Guadalupe on private property. This letter of the Prefect Castro was answered, the blotter of answer is in the archives; Transcript, 2551. Proved by answer 10th of Pio Pico, Transcript, 2533; Hopkins' statement, 3068.

Having thus satisfied ourselves that the witnesses who have sworn to the genuineness of the documentary title obtained by the petitioner, so far from having suspicion thrown upon their testimony, are confirmed by record evidence from the Mexican archives now in charge of the Surveyor General of the United

States, we will proceed to one or two additional species of testimony.

Capt. John C. Frémont testifies that he paid a short visit to the New Almaden mine; he left it about the 24th January, 1846. This must have been about twenty-four days after the juridical possession of the mine had been given. He visited it in company with Capt. Hinckley, who introduced the witness to the owner, Castillero, who showed him about, and the excavation from which he had taken the ore, showed him two or three heaps of the ore and gave him some specimens, some of which he brought away.

Before visiting the mine, the witness states he had conversed with Capt. Leidesdorff with regard to purchasing the mine. When there, "I spoke slightly with Castillero on the subject, and Mr. Hinckley also said something to him at greater length tending to the same end, but Castillero was not at all disposed to converse about selling. About this time, I think, Castillero was engaged in building a house below in the valley, to be used for the occupation of himself or workmen. I learned from Castillero that he held the mine under a denouncement, and then I, for the first time, became acquainted with the Spanish system of acquiring mines by denouncement."

In an official letter of Thomas O. Larkin, written as Consul of the United States, at Monterey, to the Minister of the United States, at Mexico, under date of the 3d April, 1846, among other things, he states that Don Andres Castillero is going as Commissioner to Mexico from the Military Commander of California, Gen. José Castro. He concludes his communication thus: "Near the town of San José, eighty miles from Monterey, Don Andres Castillero has discovered a quicksilver mine; the ore produces from sixteen to sixty per cent.; I have seen him, from an old gun barrel, in thirty minutes, run out about thirty per cent. in pure quicksilver. This must be a great advantage to California."

On the 4th of May, 1846, Mr. Larkin, as such Consul, addressed to the State Department a long report upon the mineral resources of California. Certain extracts are certified by Lewis Cass, and under the seal of the Department of State, to be true copies of the original dispatches of Thomas O. Larkin, U. S. Consul at Monterey, dated 4th May, 1846, which are to be found in the State Department.—Transcript, 2657.

The Consul communicates to the Department, that "From the town of San José, and near the Mission of Santa Clara, there are mountains of quicksilver ore, discovered by D. Andres Castillero (of Mexico), in 1845, which the undersigned has seen twice produce twenty per cent. pure quicksilver, by simply putting the pounded rock in an old gun-barrel, one end placed in the fire, the other in a pot of water, etc. * * * There appears to be no end to the production from these mountains. Working of the quicksilver is but now commenced, under great disadvantages, from not having any of the materials generally used in extracting that material, etc."—Trans. 2657.

In the same communication Mr. Larkin states what in substance Castillero told Fremont as to the mode of acquiring under Spanish laws a title to a mine by denouncement. Mr. Larkin states that "By the laws and customs of Mexico respecting mining, every person or company, foreign or native, can present themselves to the *nearest authorities*, and denounce any unworked mine; the authorities will, after the proper formalities, put the discoverer in possession of a certain portion, which I believe is according to its extent. The possessor must thereafter occupy and work his mine, or some other may denounce against him," etc.

There are various other official communications, but enough of this species of evidence has been cited. Various others will be found in the Transcript.

If we turn from the record evidence derived from the Archives of Mexico, and that from the official correspondence of a Consular Agent of the United States, to the judicial records of California, we will find historical evidence of the genuineness of the proceedings to which the witnesses have sworn. In March, 1847, in the suit of G. C. Cook vs. James Alexander Forbes and others, the complaint was that Andres Castillero, James A. Forbes and others, were working on the land of plaintiff contrary to law, praying that they be removed. The parties having appeared, the case was continued until the mine was surveyed. Two men made a report, and the case was dismissed. If there were no registry, no act of possession, how could there be a mine in existence to survey?

On the 14th August, 1847, James Alexander Forbes, then British Vice Consul for California, writes to John Burton, Esq., Justice of the Peace of San José, that two persons have commenced digging a pit by the direction of G. Cook, within the limits of the *juridical possession of the said mine.* * * * "Permit me to refer you to the documents which exist in your office, upon which was founded your conviction of the justice of your decision in relation to the claim of Mr. Cook in March last, and to request you will be pleased to adopt such measures for protecting the rights of the owners of the said mine, and of those who are legally interested in the same, as you may deem most conducive to that end."—Trans. 810.

This letter was produced by Chapman Yates, Clerk of the City of San José, from the archives of that place, on the 30th January, 1858 (Trans. 769), and proved by the witness McCutchen (767.)

Subsequently, on the 5th May, 1847, James Alexander Forbes, in a letter to Mr. Alexander Forbes, alludes to the "*juridical possession which was given of the mine by the local authority of this jurisdiction,*" and also of "*the three thousand varas of land given in that possession as a gratification to the discoverers.*"—Trans. p. 842.

Weekes' amended possession, given 21st January, 1848, refers *to the original act of possession*, and declares that "*the right and title of the mine to the mine and land granted as a reward in the original act of possession, shall remain valid.*"

This circumstance, while it confers no title on the claimant, being the act of one who, without the consent of both parties, had no authority, is however the recognition of a *de facto* magistrate of the genuineness of the proceedings to which the witnesses in this case have sworn.

In the action between Walkinshaw vs. Forbes, complaint was filed 18th October, 1849, in which plaintiff claimed "*one-eighth part* of the mine by title derived under the original act of registry."

The mine was denounced on 6th October, 1849, by Mr. Horace Hawes, for *abandonment* and *insufficient registry*, and the mine is described as situated on Berreyesa's rancho, and as known *in its original title of registry as the Mine of Santa Clara.*

In the pleadings of plaintiff it is alleged its last possessors were Andres Castillero, Alexander Forbes, James A. Forbes, Robert Walkinshaw, and the two Robles.

Alcalde May's proclamation, on 23d October, 1849, made in relation to the suit, citing parties to appear, describes it as the quicksilver mine situated in the District of San José, known and designated, *in its original act of registry*, as that of Santa Clara, and now known by the name of New Almaden.—Trans. p. 297.

Now, a great portion of the evidence relied on to sustain the allegation of forgery and antedating of the documentary title of the petitioner, consists of the letters which passed between James Alexander Forbes and other parties in interest, filed by the Government, and which were before the Circuit Court on the argument for injunction, and some letters interchanged between James Alexander Forbes and Alexander Forbes, explanatory of those filed by the Government. Among these numerous letters from various parties in interest there is *one* letter alleged to have been written by Alexander Forbes to James Alexander Forbes, under date of March 28, 1848, which is the only letter where a positive assertion is to be found that forgery or antedating had been actually committed.

Nor is the fact asserted in THIS letter alluded to in any other part of the voluminous correspondence. We refer to it now simply in connection with the documentary titles obtained by Castillero in California.

The letter of 28th March, 1848, speaks a language different from that uttered in any other. The sentences which do so are these: "Were I not already so deeply interested in this negotiation I would never think of investing another dollar in it, but this interest renders it necessary to have the control of all the shares, in order that I may dispose of the whole whenever an opportunity may offer, and save myself from the heavy loss that would ensue, should it unluckily leak out, that in fact, *the documents procured by Castillero in Mexico, as his title to the mine and lands, were all obtained long after the occupation of California by the Americans.* This unfortunate irregularity cannot be easily repaired, and serious objections might be made to our new Act of Possession."

Now, the charge of antedating in this letter, if the Court could believe in its authenticity, apply to only such documents as were obtained in *Mexico* by Castillero, and hence the fact that the charge is not by the letter applied to such as were obtained elsewhere, is one to be considered when determining the truth of witnesses who have sworn directly to their genuineness in California.

The Court, in view of foregoing considerations, must take the authenticity of the documentary title obtained there as satisfactorily proved.

We turn, now, to the documentary title obtained in Mexico, which loses its importance, because, satisfied as the Court is with the proofs in this case of the authenticity of the documentary title obtained from the local authorities of California, and as the title held under them is sufficient to sustain the confirmation of the claim to the title to the mine, no aid is requisite from the action of the Supreme Government to sustain it, save as to the three thousand varas granted by the Alcalde.

No action of an Alcalde can grant to a party such an amount of surface land as "*pertenencias*," or for any other purpose. He, whatever the President can do, has only power to give such extent of "*pertenencias*" as the mining laws allow.

A *discoverer* of one or more mineral hills (*cerros*) absolutely new, may acquire, in the principal vein which they may select, as much as three *pertenencias* continued or interrupted.

As *discoverer* the Alcalde had the power to assign to Castillero three "*pertenencias*" as such.—Halleck's Mining Ordinances, Art. 1; Trans. 54.

Castillero formed a copartnership on the 8th December, 1845, with the two Robles', José Castro, and Padre Real for the working of the mine, and thus working in partnership, the Alcalde had the power to assign to Castillero *four* additional *pertenencias.*—Ordinances of 1783, p. 252; Halleck's Mining Ordinances; Trans. 54.

Thus, seven *pertenencias* is the largest amount an Alcalde is authorized to assign as such, and to *grant* land to any extent was utterly beyond his jurisdiction.

As the appellate Court may take a different view of the evidence of the documentary title obtained in California, and it is made necessary, under the view this Court takes of the action of the Alcalde in relation to his (the Alcalde's) grant of three thousand varas, that we now refer to the documents of title obtained by Castillero in Mexico, we will now do so.

It has been before observed, that the allegation of forgery and antedating as to them, mainly rests upon the letters written between James Alexander Forbes and some of his associates in interest.

Both of the judges on this bench have heard the nature, character and legal effect of those letters as evidence, elaborately argued on two occasions, once on the discussion of the motion for an injunction in the Circuit Court of the United States for this Judicial District, and on the present trial of title in this Court. Everything has been said, and heard by them from both sides, on the question, which learning and research could invoke. With the very elaborate arguments presented to them on that point, it is deemed needless to travel in detail through the numerous letters offered in evidence on this point. They are all set forth in the Transcript, and open to the appellate tribunal, who, after an examination of them, can correct any error committed by this Court in the conclusion it has come to, upon the character and legal effect of all the letters on which the allegations of forgery and antedating in this case rest.

A careful perusal of these letters has satisfied the Court that, with the exception of the letter of 28th March, A. D. 1848, which James Alexander Forbes swears he received from Alexander Forbes, there is nothing in them which even tends to prove that forgery or antedating had been committed. In other words, there is no proof afforded that the documents presented by claimant are the result of either.

They do show that James Alexander Forbes was *willing* to have titles forged and antedated, for the purpose of curing what he deemed irregularities and defects in the original title. They also prove that he actually suggested to some of his associates the importance of prompt action in the premises, and complained of their delay. This suggestion was made, at one time, by a memorandum left with one of his associates, and at others by letters to one or two of them.

Now, the *willingness* of an owner, or of all the owners, to better their title by forgery and antedating, will not defeat their original title if sufficient to pass the estate.

The question presented to the Court, in cases where forgery is alleged, is whether the titles produced are the fruits and results of such forgery.

In the United States *vs.* West's Heirs (22 How. 315), the Attorney General for the Government contended that a provisional or equitable grant, which may be converted into a legal title, upon the contingency of the approval by the Departmental Assembly, and the performance of other conditions, must be regarded as wholly abandoned, when the conditions are not complied with, and another and a different claim set up under a forged title.

West, the petitioner, died during the pendency of the proceedings before the Board of Land Commissioners; the case was brought up to this Court, which confirmed the claim for a league and a half.

The Supreme Court say on appeal: "We have only to say that the fraudulent attempts to enlarge the grant were made after California had been ceded to the United States; and though the proof of it is undeniable, and was an attempt to dafraud the United States, that cannot take away from the wife and children of West their claim to the grant, which was made to him before California had been transferred by treaty." The Court, therefore, confirmed the claim for one and a half leagues, about the genuineness of which there was no doubt.

Now, in this case, throughout the whole of these letters, there is no evidence to prove either forgery or antedating by any one, even James Alexander Forbes. The only exception in the whole correspondence is the letter of the 28th March, A. D. 1848, which Forbes swears he had received from Alexander Forbes.

We have given a copy of this letter, in which the following language is used: "and save myself from the heavy loss that would ensue, should it unluckily leak out, that in fact, the documents procured by Castillero in Mexico, as his title to the mine and lands, were all obtained long after the occupation of California by the Americans."

From the evidence set out in the Transcript, we believe this letter to be a forgery. The *loss* and *contents* of the original are proved by James Alexander Forbes and Robert Birnie, the former the master spirit and the latter his instrument.

We shall not attempt to go into the details of all the numerous facts which have forced upon the Court the conclusion that the letter of 28th March, 1848, is fabricated, but refer only to a few circumstances.

Forbes, the witness, is impeached by nine witnesses, all of whom resided in the county of Santa Clara, where the witness did. Some of these knew him in 1846, some in 1847, and some in 1850.

This letter of 28th March, 1848, alleges that all the documents procured by Castillero in Mexico, were obtained "long after the occupation of California by the Americans."

A portion of the letters in evidence in this case were purchased by one Henry Laurencel, who, it seems, had some interest in the event of this suit, from James Alexander Forbes, after he had sold out his interest in the mine, and had become hostile to his former friend, Alexander Forbes, for the sum of twenty thousand dollars.

These letters so purchased were deposited at a banker's in this city, subject to the joint order of Forbes and Laurencel, but were brought into this Court by process of this Court, and filed here by the Government.

Subsequently other letters, explanatory of these, and between the same parties, were brought into Court.

The attempt by the production of these letters on the part of the Government, was to prove that forgery had been committed with regard to the title papers, or some of them, in 1850, in accordance with a memorandum made and left by James Alexander Forbes in Tepic in 1849.

This theory was disaffirmed by the letters subsequently filed by the claimants, particularly by the letter of James Alexander Forbes, on 5th May, 1847, to Alexander Forbes, in which he tells the latter of his having seen the copy of the two-league grant, signed by Castillo Lanzas, ordering the Governor of California to put Castillero in possession of the land, and speaks of the juridical possession of the mine of three thousand varas as a gratification. Trans., 842.

Now, when James Alexander Forbes sold for *twenty thousand dollars* the letters filed by the Government, they were sold for the purpose of proving forgery and ante-dating. Where was the letter of 28th March, 1848 (if in existence), at the time of the sale of these letters by Forbes to Laurencel?

It is the only one which gives an express statement of forgery, and is the most important in the whole correspondence.

The account of his reasons when in selling certain documents for a pecuniary consideration, which, for the purpose of enhancing the value of the evidence sold to Laurencel he did not include this original letter among those he sold, are inconsistent.

Forbes, in his answer, in the latter part of it, states in his 197th answer (Trans. 895): "If this letter had been in my possession, or rather, accessible to me, I would have presented it with the others; but it had been mislaid, and I had forgotten where I had put it."

In reply to question 199: "While you were making selections from your correspondence for Mr. Laurencel's inspection and for sale, did it occur to you there was such a letter in your possession as this of the 28th March, 1848?"

The witness had stated that he had *sold* no documents to Mr. Laurencel, but "he paid me for a specific use of those papers."

After reiterating his denial as to a sale, he answers the question as to his recollecting the letter. He says: "I certainly did recollect of the existence of the letter alluded to, and that, having received it a long time before the dates of the correspondence which I allowed Mr. Laurencel to use, I had laid the letter in question aside among some other papers, and I was unable to lay my hands upon it when the aforesaid correspondence was submitted to the inspection of Mr. Laurencel.—Answer 199, Trans. 896.

The attention of the witness was then called to the fact that among the papers sold or delivered for a special use to Laurencel, there were seven letters prior to the letter of 28th March, 1848. His answer is, in the latter part of it: "My answer (200) alluded to those letters which were considered of the greater importance in that correspondence, which were comprised in the dates I have mentioned, 1849 and 1850." And in his answer 201, he says: "In my said answer 199 I had in view the dates of those letters of that correspondence which were considered of the most importance." Now, what paper could he consider more important than the one of 28th March, 1848?

He searched, he says, for that letter when he sold the use of the papers to Laurencel. When asked, "Did you at the time mention to Mr. Laurencel that you had received such a letter?" he replied, "I did not."—Trans. 897, Ans. 205.

In his answer 443 (Trans. 943), he assigns as his reason, and says: "I will *now take occasion to state what was my real* object in retaining that letter in my possession. I knew that the counsel himself had gone to the city of Washington, attended by William E. Barron, for the purpose of getting a bill passed for the taking of testimony in Mexico; and if they should not be successful in obtaining the passage of such a bill, the witnesses would be brought here for the purpose of supporting the title to New Almaden, and after such testimony should have been given in this Court I was determined to exhibit that letter to the authorities of the United States."

He was asked "whether he ever wrote to Mr. Alexander Forbes, requesting any explanation of the expressions in that letter, or to Castillero, requesting some information as to the title?"

The witness answers, he never did, and he considered the attempt useless, inasmuch as he believed the last act of possession was obtained for the purpose of remedying anterior defects in the title (Answer 371, Trans. 919.) In answer 374 he says. "I made no inquiry with regard to the matter set forth in that letter, for the reason already stated, namely: that I considered it next to impossible for me to obtain such information, and more especially as I had been already informed by Mr. Alexander Forbes that in case everything else failed we should fall back upon that possession."

The last reason he assigns for making no inquiry about the letter of 28th March, 1848, was, it stated an important fact which he considered would never be made the subject of correspondence, neither on the part of Mr. Castillero or Mr. Forbes, even had there been a less precarious mode of conveying such correspondence from Mexico to California. Can this witness be deemed to have given a clear account of this letter which he secreted, and made no inquiry for years until June, 1858, a period of ten years from its date, when it is produced by a copy; Forbes swearing the original was stolen from his carpet-bag on the 30th June last?

When asked by counsel for claimant, "Do I understand you to say that on the 30th of June last, and after the conclusion of your examination before Judge Hoffman, and after you had suffered Birnie to make a copy of that letter, the said letter was stolen from your carpet bag at your lodgings, at the Railroad House in this city?" This was on the evening of 30th June, 1858, that Birnie made the copy.

Forbes answered: "That letter was in my possession up to nine o'clock in the evening. I had occasion to leave my lodging for a short time; for security I took that letter out of my coat pocket and put it into my carpet-bag, locked my room door and went up as far as Montgomery Street. I was absent half an hour or more; on my return I found my room door locked as I had left it; and on retiring to bed I had occasion to go to my carpet-bag, when I found that letter was missing."

This is an improbable story, coming from a man who is proved by the correspondence as not only willing to have forged title, but urging his suggestions upon his associates to fabricate it.

There is improbability in the story, as he tells it, as to the manner in which he lost it.

The witness deemed it an important document, and he reserved it *as* his real object, as he tells us, to deliver it to the authorities of the United States, in the event that witnesses from Mexico should be brought here to testify. Why should the character of the letter, as true, depend upon that fact?

It is improbable that a document deemed so important should be left in a carpet-bag in a large public house, and left in a carpet-bag, as the witness swears, for "security."

We shall no further pursue the facts spread out in the Transcript to establish the forgery of the 28th March, 1848, so far as James Alexander Forbes is concerned. His coadjutor, Robert Birnie, takes the stand. Sixteen witnesses, old neighbors of Birnie for four or five years, who knew him well and his reputation, say it is so bad they would not believe him on his oath. Whoever desires to arrive at a knowledge of Birnie's reputation has only to read the testimony of one of these witnesses.

The general fact sworn to by him that he was not to be believed on his oath, is confirmed by all the rest. That witness is Nathaniel Jones, and his testimony to be found in the Transcript, p. 2769.

Mr. Jones is a farmer; held the office of Sheriff in 1850 and 1851; was Public Administrator a short time after; was then elected Supervisor of the County; is the Corresponding Secretary of the Contra Costa Agricultural Society, and Vice-President of the Bay District Agricultural Society, representing Contra Costa county. This witness swears he has lived in the neighborhood of Birnie for some four or five years. He would not believe him on his oath.

On his cross-examination this witness testifies: "It is not from any single act of his, but it is from his want of occupation, and the universal belief among the people that he swears falsely and procures false evidence in land cases; he is utterly worthless, and a loafer."

Now such was the coadjutor of Forbes, who copied the letter of the 28th March, 1848, on the night of 30th June, 1858; who swears he did so, and he swears the letter he copied was one directed to James Alexander Forbes, dated ("I believe") 28th March, 1848, from Monterey.

He swears to every thing about the letter that Forbes did about his copying, and also he identifies the original letter which he copied as that of Alexander Forbes.

He can say nothing about the stolen letter, as no one was present save Forbes and the carpet bag. But Forbes could not return the favor Birnie had done him.

On his cross-examination, Birnie deposed that the first notice he had to attend as a witness, "was from a subpœna to appear instanter. I came over in the boat yesterday with Mr. Randall, the Deputy Marshal, Mr. Forbes and Mr. Laurencel were in company with the Deputy Marshal. I went to Mr. Forbes and asked him the object of this subpœna so suddenly. He told me that it was to testify about the copy of the letter I got from him," etc. Answer 36; Trans. 861, 862.

Forbes was called some two days after the examination as a witness, and he knew that Mr. Randall, the Deputy Marshal, if he did not tell the truth in despite of his friend Birnie would bring out the truth, as he Randall was cognizant of the falsehood of Birnie; he, Forbes, therefore actually told the truth, and falsified all that his friend had sworn to. "I went," says Forbes, "on our arrival at Oakland or soon thereafter, at the request, or rather by *his consent*, thinking it would be less disagreeable to Birnie to speak to him before the subpœna was served, as the *subpœna* called for his appearance *instanter*." Ans. 35; Trans. 876.

"I told him," says the witness Forbes, "simply, that the United States Marshal was there and had a *subpœna* for him; that he would not be required to go to San Francisco until the following morning, provided he would be ready to go at 5 o'clock in the morning. I then left to see the Marshal, and informed him that Birnie would be on board in the morning." So that what Birnie had deposed to was expressly falsified by Forbes, from the fact of the Deputy Marshal's presence.

Escaping from this forged letter, we will look briefly to the testimony adduced by claimant to sustain the genuineness of the documentary title obtained in Mexico.

Great delay in the administration of justice in this case has taken place, from the fact of the tenacity of the Mexican Government in adhering to the law or regulation inhibiting the use of the great seal to evidence transactions done in Mexico in foreign countries.

The inability of claimant to clothe the evidence he had to procure in a form to be received in the courts of this country under existing laws, has had the effect of making this case drag along at a very slow pace. They have had the means, however, to put an end to further delay, and by the exertion of them to bring their witnesses from their homes in Mexico to give their testimony, and testify personally to the genuineness of the documentary title which the claimant obtained from the Mexican Government. The impression generally has been entertained that titles may be easily forged, and that the Government of Mexico was approachable by clandestine means.

The correspondence of which so much has been said, which was filed by the Government in this case, was naturally calculated to fortify that impression. That correspondence did establish to some extent the settled purpose of one of the parties to have papers antedated and forged, and that one or more of the other parties did not promptly repudiate his suggestions, which the Court consider may have been the result of many motives into which it is unnecessary to inquire, under the view entertained and enunciated by this Court, of the nature, extent, and legal effect of that correspondence as evidence to prove forgery or antedating. The record shows that an application was made by Eustace Barron and Castillero to Castillo Lanzas, while Minister of Relations, to authenticate copies of various documents in the public offices of Mexico relating to the Almaden Mine, with the great seal of the Republic. The application was refused, upon the ground that the uses to which the great seal may be put are defined by law and do not embrace the authentication of copies of public documents. One of the witnesses examined in this case was Lanzas himself, and he gives the laws which regulated the use of the great seal (Trans. 2237.) See the letter of Castillo Lanzas giving the reasons why the President denied the use of the great seal save for the special purposes designated by law (Trans. 2384). Now, it strikes the Court, if the precision and tenacity of the Mexican Government about the great seal are so great that it would not yield to the intercessions of Andres Castillero, he certainly could not have possessed such influence as has been imputed to him to obtain a forgery of documents in all the public offices through which his title passed. This Court has decided that the only evidence produced to prove a fabrication of these documents is the forged letter of 28th March, 1848, and the proof which has been produced to prove the authenticity of these documents is as strong as it can be made. We must come to the conclusion that the archives of the Mexican Government must have been forged, and the eleven witnesses sworn in this country under its law, and examined in the presence of her magistrates, have perjured themselves. The deposition of John Forsyth, United States Minister in Mexico, is in the Transcript, 1111. The following motion in relation to it was passed by this Court:

"THE UNITED STATES
vs.
ANDRES CASTILLERO. } No. 420.

On motion of Messrs. Peachy and Yale, of counsel for claimants, and by consent of parties, it is ordered by the Court that the deposition of the Hon. John Forsyth, remaining under the seal of R. B. Owen, United States Commissioner, be and the same is hereby published." Trans. 1110.

In his deposition, Mr. Forsyth deposes, he went first to the office of the *Junta de Mineria* in company with the British Consul, John P. Brodie of California, agent of the claimant, and others, and where was produced from the archives of said office an expediente, which, being carefully compared with a copy in the hands of the said Pardo and Brodie, proved to be absolutely alike and correct in every respect, and to that copy he made a certificate dated the 4th day of August, 1858.

"On the 30th July, 1858, I was present in the *College of the Mines* with the same parties, when an expediente was produced from the archives, which was compared, etc., which copy was certified by me on the 4th day of August, 1858. On 29th of July, 1858, I was present at the office of *Foreign Rela-*

tions, when and where the Chief Clerk of the Section of Europe produced from the archives of said office an expediente which was compared, etc., and to that I certified on the 4th day of Aug. 1858. On the same day I was present at the office of the *Ministry* and *Police*, when the Chief Clerk of said office produced from the archives of said office an expediente in the presence of the same parties, which, on being compared," etc.

"On the 30th July, 1858, I was present at the office of the Escribano, or Notary, Don Juan Navarro, where and when said Navarro produced from the archives of his office a book formed of sheets of stamped paper, stitched together and consisting (exclusive of the fly-leaves in the beginning, and the index at the end) of one hundred and twenty leaves, and titled '*Año de* 1846, *Protocolo de Instrumentos del Escribano Don Nazario Fuentes*.' In the presence of the same persons, certain original instruments, contained in said book, were examined, and being compared unto a copy found to be correct and similar, with the exception of two slight omissions, which were certified by the Notary on the same day, and to that copy I certified on the 4th day of August, 1858. These original documents were found in the several offices where they appropriately belonged, and were produced by the officers having the custody of them; and I saw nothing whatever to cause me to doubt that their being genuine originals. I, as Minister, certified each of the copies hereinbefore mentioned, and the facts set forth in those certificates are true, and the certificates are in accordance with the laws of Mexico."

Mr. Forsyth further deposes that the Government will not allow the great seal of Mexico to be attached to copies of such documents, nor will they allow the originals to be withdrawn. "And the manner in which the copies herein mentioned have been authenticated is the only way in which such copies can be authenticated."

Now, all these expedientes, in the archives of the *Junta of the College of the Mines, in the Ministry of Foreign Relations*, in the office of the Ministry of Government and Police—four of the public offices and departments—must have been forged in each one of them, and introduced clandestinely into the archives of each. And the same must have been done in relation to the original documents produced from the archives as sworn and certified to by Mr. Forsyth from the archives of the Escribano. Now this is what is most improbable to do without detection.

The claimants have offered the testimony of the three members of the *Junta de Fomento* in the year 1846, namely: Don José Vicente Segura, Don Maria Flores and Don José Maria Bassoco. The testimony of the first two was taken in Mexico, and that of the testimony of some eleven other witnesses was taken in San Francisco, and proves the genuineness of the documentary title obtained by Castillero; we shall limit ourselves to their testimony.

The following witnesses were sworn in San Francisco, and examined: José Maria Bassoco, before the District Judge; Manuel Couto, who was a Clerk in the *Junta de Fomento* in 1846; remained Clerk until the *Junta* was displaced by the *Administracion del Fondo* in 1853, and since then has remained Clerk in that Administration. He copied Castillero's proposals to the *Junta*. The testimony of Don José Maria Lafragua, Minister of Foreign Relations under President Salas, in the latter part of 1846, proves the *expedientes*.—Trans. 15.

Professor Balcarcel was a Member of the Faculty of the College of Mines in 1846; was present at the meeting of the Faculty when the result of the assay of quicksilver was ordered to be printed.—Trans. 1865.

Another witness, Antonio del Castillo, Member of the National College, kept the minutes of the proceedings of the result of the assay; deposited the specimens sent by Castillero in 1846, in the Cabinet of Minerals.—Trans. 1935.

It is useless to pursue this detailed inquiry into the testimony. It is set out in the Transcript, and direct and positive to the genuineness of the documents obtained by Castillero, in Mexico, in 1846.

The witnesses are eleven in number who have been examined in this country, and they stand free from any impeachment.

In addition to the testimony of Mr. Forsyth, and the eleven witnesses from Mexico, who testify to the genuineness of the documents obtained by Castillero in this city, there is added a document of some significance.

The witness Couto was asked on the cross-examination—"You say, that all these things were done by the *Junta ?*" Answer of witness—"I do." "You know they were done by them ?" "I do." "Was there a record kept of them—of the discussions of the *Junta* on the subject of such applications ?" Answer of witness was—"The result of each day's deliberations was written down in a book, and signed by the gentlemen of the *Junta.* This record was called the book of the *Actas.*" "Where is that book now ?" Answer—"In my possession, in the office in Mexico. These books are not allowed to leave the office." "Were not the final resolutions of the *Junta* on the subject of any application extended more formally than in the *acts* or journal of their proceedings, to which you have referred ?" Answer—"This book of the *acts* is a formal record. The first and last sheets of the book are stamped. The book is stamped in the stamp-paper office, and the pages are all numbered in that office before it is stamped, so that it is the same as if each page was stamped. The same was paid to the stamp office as if each leaf were stamped. The *Administrator de Papel Sellado* certifies on the first page of the book the number of pages in it. This book undergoes all this preparation before it is used by the *Junta.*"

"Is this the only book in which the final resolutions of the *Junta* were recorded ?"

Ans.—"Yes."

"Why did you not bring a copy of the acts of the *Junta* upon his petition with you, that being as you have said, a mode by which the *Junta* executed contracts and assumed obligations ?"

Ans.—"Because my business here was only to prove my own signatures, and to prove that the dates upon the documents in the expediente of which I have spoken were the true dates of those papers, and to prove that they have been in my custody."

The result of this examination was to induce the taking measures to get the *actas* from Mexico, and they will be found in the Transcript, 1682. Here is a whole year's business of the mining body, their proceedings, day after day. Session of 6th May, 1846, there is an entry, stating that Don Andres Castillero appeared and made a verbal report regarding the discovery, denouncement, and actual condition of the quicksilver mine situated in the mining district of Upper California. The Junta resolved that Señor Castillero should present his indications in writing.

Session of 14th May, 1846. "From the Ministry of Justice, of date 9th, acknowledging receipt of the official letter, in which was communicated to it the discovery of the mine of quicksilver in Californias."—Trans. 1684, 1688.

Session 18th May, 1846. "In the third he informs, that of the one thousand two hundred and seventy quicksilver flasks existing in the negotiation, there are only a very few having flaws, and that they ought to be worth three dollars each per piece. Let this difference be represented to Señor Castillero, and to the Government, when his propositions are approved." Trans. p. 1690."

Session of 25th May, 1846. "An official letter from His Excellency the Minister of Justice, dated 20th, approving the propositions of Don Andres Castillero, which the Junta had transmitted to the Supreme Government, and informing that he had sent to the Ministry of Government the petition for two square leagues of land (sitio de ganado mayor) as a colonist, upon his mining property."—Trans. 1694.

"The Junta resolved that the proper judicial agreement be drawn up immediately, and that application be made for the five thousand dollars, on Mazatlan or Guadalajara, to which Castillero agreed; and finally, that by the mail of Wednesday the proper orders be sent to Tasco, that the administrator deliver to the order of Señor Don Tomas Ramon del Moral all the quicksilver flasks in good condition in the store-houses there, at the rate of two dollars."—Trans. p. 1694.

Session 29th May, 1846.—"It was also resolved, in conformity with the report of the Controller's Office, that twenty-five dollars be paid to the notary Calapiz, for the proceedings in the instrument of agreement, which had been made with

Don Andres Castillero, to assist his quicksilver enterprise in the mine of Santa Clara in Upper California, embraced in the official order for the suspension of all payments in this Branch."—Trans. p. 1697.

These "*actas*," where we see from day to day entries of facts made at the proper dates to meet the acts of Castillero to procure his title, harmonize with the balance of the testimony to negative the idea of forgery or antedating, or that all the documents procured by Castillero in Mexico were all obtained long after the occupation of California by the Americans.

The questions the Court will now discuss are:

1. Whether the claimant has proved satisfactorily a ratification by the Supreme Government, of the act of Alcalde Pico, granting to him three thousand varas of land at the time he delivered to him the mine.

2. Whether the claimant openly and fairly submitted that transaction to the executive supervision, in the propositions he made.

These are important inquiries, in the solution of which, so far as this Court is concerned, the destiny of these three thousand varas depends; for if it be not ascertained beyond reasonable doubt that the grant of the Alcalde was as clearly and fairly presented in the propositions as the other things proposed, or that there is not a direct and distinct ratification of the Alcalde's act, the transaction is a nullity and has no legal existence.

In Castillero's communication to the *Junta de Fomento*, under date of 12th May, 1846, submitting his views as to a contract respecting a mine he had discovered and denounced, he submits various details; among them, he states that he had denounced and taken possession "not only of the said mine of Santa Clara, but also of the extent of three thousand varas in all directions from that point."

The statement of all he had to say as to his past acts and future views having been made, he closes with these words: "My propositions, then, are the following—"

Then follow nine propositions.

The *seventh* only, will now demand our attention.

The original communication of Castillero, with its various propositions, were sent by the *Junta* with their recommendation in favor of it, through the Minister of Justice to the President, who, therefore, had them before him.

The result of his action in the premises is the written order on the margin of the communication he had received from the *Junta*, recommending Castillero's propositions to his approval. It is in these words: "Granted *in the terms* which are proposed; and with respect to the land, let the corresponding order issue to the Minister of Relations for the *proper measures of his office*, with the understanding that the Supreme Government accedes to the proposition."

It is contended that the above order approves *in all its parts* the agreement. Such is the construction placed upon the order by the Minister of Justice in his letter communicating to the President of the *Junta de Fomento* the result of the action of his Excellency the President, under date of 20th May, 1846.

Counsel for claimant places as comprehensive a construction on the order as did Mr. Becerra, the Minister of Justice. He states: "*All* that is proposed is granted, *the two square leagues among other things*."—Mr. Peachy's Brief, 5.

Such are the interpretations placed upon the order of the President by those two gentlemen. The construction to be placed upon this little document now rests upon this Court; if it be erroneous, it is gratifying to feel that there is an appellate tribunal to correct such error.

As to the interpretation of the Minister of Justice, if his only object is to give his inferences and his interpretation of what was done by the President, his course may, in the estimation of many, be deemed correct; but it must strike some, that in the performance of his official duty as a subordinate officer, where large interests were concerned, it would have been as well to issue the order of his superior so that it might speak for itself, without placing his own construction on it. In doing so, he has introduced language not to be found in the order. The words "*in all its parts*," have been seized upon by all who, interested, have written or spoken about the title, and its ratification by the Supreme Government of Mexico, drawing their inference from those words, and the coloring thrown upon the order by them, when in fact no such words exist in the order.

That part of the interpretation of the learned counsel for claimant, which considers the language operates to convey the two square leagues, we will consider hereafter. The inquiry at present is exclusively as to the three thousand varas of surface land.

Castillero was not an illiterate, ignorant man; the evidence shows he was well informed and educated. He was familiar with the mining laws. Colonel Fremont testifies that in the early part of 1846, he obtained from Castillero all the necessary information which he (Fremont) was able to use for his individual benefit subsequently, in obtaining a mining title at Mariposa. It is reasonable to believe, that one so generally intelligent and cognizant of the mining laws, knew precisely what an ignorant Alcalde was doing at his suggestion, as it is reasonable to believe it was, as he was present, and it was done for his benefit. Castillero must have known that in the annals of his country there was no precedent for an Alcalde to grant three thousand varas to a miner, either as "pertenencias," or by way of grant.

It is important, in justice to the President and to all parties in interest, to look with care when such important interests were entrusted to him, to see, when he bound his country and himself, to what extent he did so. It cannot be urged that the interpretation of a subordinate of a Government of the legal document of his superior, is to be conclusive on this Court in the construction of it. We have cited the construction placed upon the order by one of the counsel for the claimant. The first part of it is in these words: "All that is proposed is granted." We do not differ in this from the learned counsel. We merely add the negative to his affirmation and add: "All that is *not* proposed is *not* granted."

We now turn to the proposition of Castillero. He had in his communication to the *Junta de Fomento*, in the statement he had made in it, preliminary to his propositions, informed that body he had "denounced and taken possession not only of said mine of Santa Clara, but also of an extent of three thousand varas in all directions from that point."

Thus far he as an honest man acted; but he looked to his interests, as we shall see.

By the minutes of the *Junta*, it appears that he appeared before them personally, and gave a verbal account of his discovery, and having been requested to make a written statement, he handed, on 12th May, 1846, his written propositions.

These propositions were either prepared or drafted by Castillero, or under his eye. Conversant as he was with the mining laws, he must have known what a gross violation of the ordinances the Alcalde had committed in granting him three thousand varas, which he stated in his communication to the *Junta de Fomento* he had denounced. Now, there is no ground known to the mining laws on which a denouncement could be made of three thousand varas as the appurtenance to a mine.

The statement of Castillero is not only without proof, but is negatived. In the act of possession the reason averred by the Alcalde for delivering the juridical possession of the mine was, that the time between the denouncement and this date had expired. This is the only time the word "denouncement" is used in the act of possession. After stating the delivery of the mine, he says, "I have granted three thousand varas."

Now the assertion of Castillero that he had denounced these three thousand varas, is falsified by the very record on which the title rests which is presented to this Court for confirmation. No man, shrewd and educated like Castillero, makes a false statement, deliberately in writing, without some motive. We can only gather that motive from his subsequent conduct. Now, the principal object of Castillero in invoking the action of the Supreme Government was to procure their ratification of the title to his mine, so as to secure it from any attack that might be made by reason of any serious irregularity that may have been committed in the proceedings; or from want of power in the Alcalde, there being no Mining Deputation in California. Another object was to procure pecuniary means by way of a loan, and the prompt use of retorts, cylinders, and other apparatus to work his mine. These were his principal objects, and with his knowledge of the gross violation of the ordinances which had been committed, he feared that an insertion of the grant by the Alcalde in his proposals, and asking a ratification of his possession under it, would jeopardize or defeat his whole application. He determines, therefore, to insert in the preliminary part of his written statement the Alcalde's grant, and so word his proposition as to possession, that if an unrestricted ratification was given, he might claim under it the land as the subject of the grant as well as that of the mining title.

His seventh proposition, the only one of the nine which asks for the approval of possession, is in these words: "The *Junta* shall represent to the Supreme Government the necessity of approving the possession which has been given me of the mine by the local authorities of California, in the same terms as I now hold it." Not one word is used that conveys an idea of the grant for three thousand varas, or the possession of it. Why was not an approval of the possession of those asked? Was it an inadvertence? It does not look like one. Castillero, if he intended this proposition to cover the land he held as well as the mine, could not be deemed acting inadvertently. He actually converts two separate and different acts of the Alcalde into one and the same transaction; it confounds two different transfers of different species of property, conveyed and regulated by different systems of law. It asks, if so intended, and if not intended why claimed, three thousand varas of surface, together with a mine, "*in the same terms as I now hold it.*"

The statement that he had *denounced* this land must have been introduced from a desire to aid the effort made in the seventh proposition in converting the two different transactions into one. Now, if Castillero intended to effect his object of obtaining the approval of the Government in this mode, it was a fraud; if it was done through inadvertence, and he only in fact intended to propose for an approval of the possession of the mine, the grant gives him no right to the three thousand varas. The possession of them was never confirmed. To prove the separate character of the two acts, and that Castillero only proposed the approval of the possession of the mine, we submit the following reasons:

As we consider the views expressed by one of the counsel for claimant, as to the character of the delivery of the mine and the transfer of the three thousand varas, as correct, we shall cite them: It seems that in the year 1848, Mr. Alexander Forbes applied to Alcalde Weekes to grant an increase of "*pertenencias*" to the owners of the Almaden Mine, as provided by the ordinances. Upon this, the counsel for the Government objected: "Why, if the original Act of Possession, dated 30th December, 1845, had been in existence in January, 1848, by which the Alcalde granted a mining possession of the three thousand varas in every direction from the mouth of the mine, should Alexander Forbes have prayed the Alcalde to grant an increase of '*pertenencias*' in 1848, as provided by the Ordinances? For three thousand varas, measured in every direction from the mouth of the mine, includes many more "*pertenencias*" than the *seven* which Alcaldes are authorized to grant when a newly discovered mine is worked in partnership." To this objection the counsel replies: "A careful examination of the Act of Possession given by Pico in 1845, discloses the fact that the Alcalde gave possession of the mine, *and also* granted to Castillero three thousand varas in every direction from the mouth of the mine. He first declares that he gives juridical possession of the mine known by the name of Santa Clara, and then proceeding to enumerate several reasons for what follows, he *grants* to Castillero three thousand varas, etc., so that the giving juridical possession of the mine was *one act*, and the granting of three thousand varas was *another act*, both of which were recorded in the same instrument, which is usually called the Act of Possession. What, then, did he mean by the mine? What was its extent? Evidently he intended by the mine such a number of '*pertenencias*' as the discoverer of a mine in a new hill was entitled to by the ordinances, which would be *three* if he worked the mine alone, and *seven* if he worked it in partnership with others."

The distinction between the *judicial* possession of the mine and the grant of three thousand varas, is very explicitly, says the counsel, stated by Castillero in his proposals to the *Junta de Fomento* on the 12th May, 1846. There he says: "Wherefore I have denounced and taken possession, not only of the said mine, but also of three thousand varas," etc.

Now, what we consider is, that Castillero himself being personally conversant with the difference between the possession of the mine and the possession of the land, seeks to sustain his title to the latter upon a grant of the Supreme Government as a ratification, and to which he is not entitled, as he did not propose it for ratification in his seventh proposition, or in any other.

Among the nine propositions submitted by Castillero to the *Junta de Fomento* is the eighth, which is in these words: "It shall also represent [to the Supreme Government] the advantage of there being granted to me, *as a colonist*, two square leagues upon the land of my mining possession, with the object of being able to use the wood for my burnings."

We have seen that the written communication by Castillero, with his nine propositions annexed, were transmitted by that body to the President, with their commendation of the petition of Señor Castillero. That the petition was before the President, with its various propositions, together with the recommendation of the *Junta.* On the margin of this communication from that body the grant for two leagues of land is to be found, as alleged.

Before giving the language which is relied upon as a grant of two leagues of land, the Court will advert to the announcement made of its interpretation by Mr. Becerra of the action by the President, under date 20th May, 1846, which was the first announcement that was made to D. Vicente Segura, President of the *Junta.*

Mr. Becerra wrote that "His Excellency has been pleased to approve, *in all its parts, the agreement* made with that individual." Where is the agreement to which Mr. Becerra [illegible]

Castillero had made no agreement with the *Junta de Fomento.* All he did do, he tells us at the end of his proposals: "The subscriber submits this *request* to the deliberation of the *Junta,* which, if accepted, may be made into a formal contract and made legal in the most proper manner."

The communication of the *Junta* was not in form or substance a petition. Petitions are not made from one department to another of the same Government. In the exercise of their powers under the mining laws, the *Junta* exercised their right to recommend the petition of Castillero to the Supreme Government.

There was no agreement before the President; but there was a recommendation of the *Junta*. What they sent for his approval, the only petition made by any one, was the *petition of Castillero* in relation to which the *Junta* say in their letter: "In this view, the *Junta*, in sending up to your Excellency *the petition of Señor Castillero*, has no hesitation of recommending it very efficaciously," etc. Now to what petition did the President accede, and what did he grant? He must have referred to Castillero's petition, the only one before him, and the word *grant* must be of things in the terms proposed by Castillero in his propositions.

On one of the papers before him (the recommendation of the *Junta*), is an *acuerdo* or written order signed with the rubric of the Minister of Justice. It is in these words: "May 20, 1846. Granted in the terms proposed; and with respect to the land, let the corresponding order issue to the Minister of Relations for the proceedings so far as his office is concerned, with the understanding that the Supreme Government accedes to the petition."

It is strenuously urged, that among the nine things proposed, all being proposed are granted, and that the two square leagues among the rest are conveyed.

Now, all that Castillero asked the Junta to recommend to the Supreme Government in his eighth proposition was a colonization grant. His proposal was, in terms, to grant him two leagues *as a colonist.*

This was all the President did; it was all that Castillero proposed. To consider that the word "granted" applied to *all* the propositions of Castillero, and conveys and transfers all property in each, is to do violence to the language, and to annihilate an axiom of almost universal prevalence—"*Expressio unius, est exclusio alterius.*"

The word "granted" applies to all that is proposed, which is not excluded. But after using that word, it excepts the land, and thus qualifies that word in relation to the land. After the word "granted," in the terms proposed, the language as to the land is, "and *in respect to the land*, let the corresponding order issue to the Minister of Relations for the proper measures of his office, with the understanding that the Supreme Government accedes to the petition."

Becerra, the Minister of Justice, in his communication to Vicente Segura, President of the *Junta de Fomento*, states the *agreement* made with Castillero had been approved in all its parts; also states (and it is the only reference he makes to the land) "that on this day the corresponding communication is made to the Minister of Exterior Relations and Government, to issue the proper orders respecting which is contained in the 8th proposition for the grant of lands in that Department."

The Minister of Justice sent a copy of this letter to Castillo Lanzas, the Minister of Relations, and says: "I have the honor to transcribe it to your Excellency, to the end that, with respect to the petition of Señor Castillero, to which His Excellency the President *ad interim* has thought proper to accede, there be granted to him as a colonist two square leagues upon the *land of his mining possession.* Your Excellency will be pleased to issue the orders corresponding."

Lanzas, the Minister of Relations, on the 23d May, 1846, at Mexico, addresses a communication to the Governor of the Department of California.

He premises what he has to say to the Departmental Governor, with a copy of the letter which Mr. Becerra, the Minister of Justice, had written to the *Junta* on 20th May, 1846, and sent one to him, and a copy of the letter which he, Lanzas, had received from the Minister of Relations, and then Lanzas concludes to the Governor in the following language: "Wherefore, I transcribe it to your Excellency, in order that under what is *prescribed by the laws and dispositions upon colonization*, you may put Señor Castillero in possession of the two square leagues which are mentioned."

Now the interpretation by Lanzas of the *grant* was correct. Castillero proposed for a grant as a colonist, in his eighth proposition. It was such, and was the only one proposed that the Supreme Government had granted. The grant was viewed by the Minister in its true light, a colonization grant; he did not direct the Governor to place Castillero in possession, but stated that he had transcribed to His Excellency in order that under what is prescribed *by the laws and dispositions upon colonization, you may put Castillero in possession of the two square leagues* which are mentioned.

In the recommendation made by the *Junta* in favor of his application for land, they declined to express any opinion.

It was, in fact, a subject with which they had nothing to do. The origin of title to mines, and of the granting of lands, and the regulations of them, belonging to two different systems of law; and those laws to the administration of different tribunals. The colonization decree of 1824, and the regulations of 1828, made under that law, had given the granting power to the Governors of departments, subject to the approval of the department, and in special cases to the Supreme Government.

The Minister of Exterior Relations and Government was the functionary through whom the President communicated with the Governors of the departments, and hence the order in this case to the functionary having charge of the granting power where the land was situated, and where the provisions made by the Colonization Decree of 1824, and the regulations of 1828, made for the protection of the rights of third parties, which by the local authorities could be more practically enforced than in Mexico.

Here ends the Expediente of the two square leagues of land. A grant was never issued, nor was a solitary movement made by the Governor towards one, nor a survey of the land made or possession of it given by any Mexican functionary.

The letter addressed to the Governor of California by Castillo Lanzas, was dated in Mexico, May 23d, 1846, some ten days *after* the 13th May 1846, the day the Congress of the United States declared by resolution, and the President announced by proclamation to the people of the United States, that war existed between the United States and Mexico by virtue of the commencement of actual hostilities on the part of the Republic of Mexico.

The Supreme Court of the United States say: From the capture of Monterey on the 7th July, 1846, till the surrender of Los Angeles, and the organization of a Territorial Government by Commodore Stockton, under the United States, there were about six weeks. * * * In the Act of 1851, and the decisions of this Court, that day is referred to as the epoch at which the power of the Governor of California under the authority of Mexico to alienate the public domain terminated.—U. S. vs. Pico, 23 How. 321.

The case of the United States vs. Castillero (23 How. 464), has been cited as a controlling authority in this. If it be in fact so, it will be the duty of this Court so to consider; but in its opinion, it cannot be so regarded, without violating clear principles of judicial construction.

In the case of Cohens vs. Virginia (6 Wheaton, 264), the canons of judicial construction are thus laid down by Chief Justice Marshall: "It is a maxim not to be disregarded, that general expressions in an opinion are to be taken in connection with the case in which those expressions are used. If they be beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, *when the very point is not presented.* The reason of this maxim is obvious. The question actually before the Court is investigated with care and consideration in its full extent; other principles which may seem to illustrate it, are considered in relation *to the case decided;* but their possible bearing or relation on all other cases is seldom completely investigated."

Now, apply these rules of judicial construction to the case cited.

For years the granting of lands situate in the Department of California, and up to the time of the acquisition of this country by the United States, were regulated by the Colonization Law of 1824, and the Regulations of 1828, of Mexico. Provisions which she deemed called for by her colonization policy, and conditions and terms having for their object the protection of the rights of third parties, were embodied in them.

Among them, one of vast importance confided the granting of lands to the local authorities—the Governors, or, as they once were termed, "Political Chiefs," subject to the approval of the Departmental Assemblies, and, in cases specially provided for, to the action of the Supreme Government.

This was the uniform, almost universal law. This Court is asked to decide in this case, where no grant from the Governor was ever placed upon the record, where no grant by that functionary was ever made, where no "*informe*" was taken, where no solitary provision of the law made for the protection of third parties was observed, to consider the *decision* of the Supreme Court in the above case, which enunciates the principle "that the Colonization Law of Mexico of 1824 and the Regulations of 1828," do not apply to "*islands*" situate on the coast, a *decision authoritative* in this case. If it is to be so treated, this Court will violate all the principles of judicial construction, and decide that *whether or not islands on the coast are subject to the Colonization Law and Regulations* is the "*very point presented*" *in this case, which is, whether those laws and regulations apply to colonization grants of lands in the interior of the country.*

In the case of the United States vs. Osio (23 How. 273), the Supreme Court decided, that an "island" situated in the Bay of San Francisco, not claimed under the Colonization Law of 1824 or Regulations of 1828, but under certain special orders issued to the Governor by the Mexican Government, and the Governor issued a grant under them, the *power* of the Supreme Government to grant the *island* was deemed undoubted; but the claim to it was rejected on other grounds.

At the same term (23 How. 464), between the same parties now before the Court, after making a statement of the petitioner's title, the Court in that case discuss the question of the character of the property claimed. They say (p. 465) "*islands* situated on the coast, it seems, were never granted by the Governors of California or by any of her authorities, under the Colonization Law of 1824 or the Regulations of 1828. From all that has been exhibited in cases of this description, the better opinion is, that the power to grant the lands of the 'islands' was neither claimed nor exercised by the authorities of the Department prior to the twentieth day of July, 1838, as was satisfactorily shown in one or more cases heretofore considered and decided by this Court.

"On that day (July 20, 1838), the Minister of the Interior, by the order of the Mexican President, addressed a communication to Governor Alvarado, authorizing him, *in concurrence with the Departmental Assembly*, to grant and distribute the lands of the desert islands adjacent to that Department, to the citizens of the nation who might solicit the same. * * * * *

"Grants made by the Governor under the power conferred by this dispatch, without the concurrence of the Departmental Assembly, were simply void, for the reason that the power, being a special one, could only be exercised in the manner prescribed. It was so held by this Court in United States vs. Osio, decided at the present term, and we are satisfied that the decision was correct."—*Ibid*, 466.

But the grant in this case (say the Court), was not made under the general authority conferred by that dispatch.

On the same day, the 20th July, 1838, a dispatch of a special character was addressed by the same Cabinet Minister to the Governor.

"By the terms of the communication the Governor is informed, that the President, regarding the services rendered by the claimant, etc., has directed the Minister to recommend strongly to the Governor *and the Departmental Assembly*, that one of the islands, such as the claimant might select, near where he ought to reside with the troops under his command, be assigned to him, before they proceed to grant and distribute such lands under the general authority conferred by the previous dispatch."

It is upon the following remark of Mr. Justice Clifford, upon the facts stated by him above, that reliance is placed to show that the case is decisive upon the question before this Court on a colonization grant. "Beyond question," says Mr. Justice Clifford, "the legal effect of that second communication was to withdraw such one of the islands as should be selected by the claimant from the previous order, and to direct that it be assigned to this claimant." And the following remark is also relied on, which will be found on page 469: "Emanating as the dispatch did from the Supreme power of the nation, it operated of itself to adjudicate the title to the claimant, leaving no discretion to be exercised by the authorities of the Department."

On what was based the assertion of the doctrine the Court had above enunciated? Why, upon the decision made that the granting of "islands" on the coast had never been claimed, nor the power over them exercised by the authorities of the Department; and that the power of granting "islands" was in the Supreme Government, and to which the colonization laws and regulations did not apply.

There is nothing in this case to justify the idea, that if the Court had decided that those laws and regulations DID apply to islands, they would have decided as they have done; and by so doing, thus impute to them a decision which would sanction the repeal by the President of Mexico of all the colonization laws by an act embodied into an order for the violation of them.

Such was not the action of the Court.

Having decided that the Colonization Laws and Regulations did not apply to "islands," they administered to them those laws which in their opinion did.

Now, Spain was an absolute Government, but at the same time a government of laws, and the absolutism of the monarch consisted in the concentration in his person of all the powers of Government, executive and legislative. He could, therefore, change the law at pleasure, but while the law continued in force, he was as much bound by it as was his subject; and any act done by him in contravention of *existing* laws should be disregarded by the Judiciary.

By one of the decrees made as early as the year 1369, it was provided: "*Royal Letters or Warrants* that may be granted contrary to law or contrary to our judicial system, invalid and not to be executed."

This is the caption of the decree which was issued by Henry II, at Tors. The decree itself provides, "That sometimes it happens, that by personal importunities, or in some other manner, we grant Royal Letters or Warrants contrary to law or contrary to our judicial system, by the present decree we ordain that such Royal Letters or Warrants shall be of no value, and shall not be executed, although they may contain a clause *that* they may be complied with, notwithstanding any privilege, order, or ordinance to the contrary."—*Novisima Recopilacion*, Book III, Law 11.

In the year 1448. John II, at Valladolid, issued a decree with the following caption:

"Royal orders to dispossess any person of *his property*, without being first heard and sentenced, invalid and not to be executed." This is the caption.

The Decree itself prescribes: "If it shall happen that we have given, or shall give any Royal Letter *that any* be dispossessed of his property, or public office, and should it be given to others, it is our will and command that such letters may be respected, but not to be executed; and as it is never to be understood that we take property from any person without being first notified and sentenced, and care must be taken that *the laws of the kingdom must be complied with in all* such cases, and the same to be strictly observed in every particular as they are written, etc. * * * * * But if any one in a public office commits any notorious malpractice, the same being certified up to us, the letters we thereupon may give, we command they shall be complied with."—*Ibid,* Book III, Title IV, Law VI.

To repeal a system of laws and regulations made under them, which have prevailed for a series of years "*in* writing," and have become a rule of property in the acquisition of it, from the Government, without any legitimate exercise of the right of previous repeal, is not a principle to be recognized by this Court as existing in a government of laws, unless the appellate tribunal shall so decide. This we do not consider that Court has yet done. In the case cited as controlling this; they have decided that the Colonization Law of 1824, and the Regulations of 1828, "did not apply to islands," and this is all they have decided. We return now to what is called the grant. "If this grant is anything that passes title, it is a colonization grant." Such a one the petitioner applied for in terms, "as a colonist." Such an one, the President, therefore, in the "*acuerdo*" granted, when he directed, with respect to the land, "let the corresponding order issue to the Minister of Exterior Relations for the corresponding measures of his office, with the understanding that the Supreme Government accedes to the petition."

Mr. Becerra, the Minister of Justice, tells the President of the *Junta de Fomento* what kind of grant it was, if we did not learn it from the eighth proposition of Castillero, and the fact displayed on the marginal title by the direction of the President, that the grant to become one must take the course that all colonization grants of lands must take to be valid; that is, must be made under the then *existing* laws.

Mr. Becerra, in his communication of 20th May, 1846, to Castillo Lanzas, transcribes for the latter a copy of foregoing letter he had written on same date to the President of the "*Junta*" to the end "with respect to the petition of Señor Castillero, to which His Excellency the President *ad interim* has thought proper to accede, that there be granted to him, *as a colonist*, two square leagues *upon the land of his mining possession.* Your Excellency will be pleased to issue the orders accordingly."

Lanzas addresses in Mexico, in obedience to foregoing orders, a communication to the Governor of the Department of California, and concludes his letter in these words: "wherefore I transcribe this letter [the copy of which he had received from Mr. Becerra, the Minister of Justice] to your Excellency, in order *that under what is prescribed by the laws and dispositions* upon colonization, you *may* put Señor Castillero in possession of the two square leagues which are mentioned."

Now, this order for two leagues, from the President down to the last functionary, had been treated as a colonization grant, and none other can it be considered; as such it must have applied to it the laws and regulations which govern such, or it is invalid to pass title.

This Castillo Lanzas dispatch was issued, as we have seen, on the 23d May, 1846, in Mexico, so short a time before the day when, by the decision of the highest judicial tribunal in our country, the power of the Government of Mexico to alienate any of its public domain had ceased to exist (23 How. 321). There could not have been a sufficient time within which to place Castillero in possession "in conformity with the laws and dispositions upon colonization."

The condition of California is portrayed by James Alexander Forbes at the time he held an interest in the claim in this case, and was on friendly terms with his associates, in his letter of the 5th May, 1847: "This Departmental Government [he writes to Alexander Forbes] is completely '*acefalo;*' that is to say, it has no Mexican head, or Governor; in consequence of which, the possession of the two *sitios*, ordered by the dispatch of Señor Castillo Lanzas, has not been obtained, nor cannot be obtained, nor even mentioned without imminent risk of opposition on the part of the American Government in this Department."—Trans. 843.

And yet the Government made as much speed as it well could do. On the 20th May, 1846, the alleged grant was made; on the same day it was transmitted by the Minister of Justice, Mr. Becerra, to the Minister of Exterior Relations, and the dispatch drafted in less than three days from the date of the alleged grant. All was vain; the Government found she had undertaken to alienate a large body of land, the *possession* of which she could not deliver under either the laws of colonization or any other.

That the Lanzas dispatch is no grant—that the Supreme Court has confirmed no one claim under what purported on its face to be a colonization grant—and no grant was given, where not a single provision of the law or regulations on colonization had ever been complied with—this Court has been unable to find; and if it existed, the learning and untiring research of the numerous counsel in this case would have detected such. In the case of The United States vs. Osio, and of The United States vs. Castillero, both claimants had grants from the Governor. The title of the claimant in the latter case is thus described by the Judge who delivered the opinion: "All of the documentary evidences of title produced in the case are duly certified copies of originals found in the Mexican Archives, as appears by the certificate of the Surveyor-General, which makes a part of the record. * * They consist of a special dispatch from the Minister of the Interior of Mexico addressed to Governor Alvarado, the petition of the claimant for the same, and the *original grant to the petitioner*, signed by the Governor, and countersigned by the Secretary of State of the Department." The grant was made by the Governor in 1839.

The case of the United States vs. Osio was rejected, mainly on the ground that the granting power was not exercised in strict conformity to the general dispatch from the General Government under which he acted.

The Castillero case was decided in favor of the claimant, on the ground that the Governor acted in strict conformity with the special dispatch on which he based his grant.

They gave precedence in both cases to the action of the Supreme Government in the granting of "*islands*" over the Departmental Governors, as the colonization law and regulations did not apply to them.

We cannot consider The United States vs. Castillero cited as controlling this case. There are some curious features here, apart from those already alluded to. Considering this document in any light, it must be regarded as inchoate and imperfect. It left the President's hands in a direction given to all colonization grants.

The Secretary of Foreign Relations drafted the order to the Governor of California, and closed his communication with these words: "Wherefore I transcribe to your Excellency, in order that in conformity with what is prescribed by the laws and dispositions upon colonization, you may put Señor Castillero in possession of the two square leagues mentioned."

This seems to be plain enough. If the land is not found, and cannot be delivered—if the condition of the country is such that the grantor has lost the power of consummating the contract and delivering the land—it is difficult to perceive how either equitable or legal principles interpose to demand relief in equity in a case where such claim is not legal.

By the insertion by Mr. Becerra, the Minister of Justice, in his letters of the action of the President, we find the land located by Mr. Becerra on the *mining possession of Castillero.* As the mine is described in the act of possession as *situated on the rancho of the retired sergeant José Reyes Berreyesa,* it follows that the location of two square leagues upon the lands of Castillero's mining possession must injuriously affect the rights of a part at least of another man's land for the use of that other. While we admit the power of the Supreme Government to take the land of one and give it to another, under the laws of Spain and Mexico, for mining purposes, and on the terms they prescribe, we cannot acquiesce in its power to take from its owner his lands for any purpose not authorized by law.

This Court have decided in this case, that the three thousand varas granted by the Alcalde to Castillero, was an unwarrantable exercise of authority on the part of the Alcalde. We regarded, however, the merits of the claimant as both discoverer of a mine of quicksilver, and as working it in copartnership; and the Court so considering, concluded to award him the highest number of "*pertenencias*" allowed to any discoverer and partner in working a mine.

The "*pertenencias,*" as to mines, are regulated by a separate body of laws, and the Court has awarded the claimant the highest number that those laws concede.

It considers, therefore, that it has gone as far as any equity demands in such a case.

6

DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF CALIFORNIA.

THE UNITED STATES

v.

EX'RS OF J. L. FOLSOM, DEC'D.

RANCHO

"Rio de los Americanos."

OPINION

OF HIS HONOR

OGDEN HOFFMAN, DISTRICT JUDGE,

As to the Jurisdiction of the Court over Surveys.

P. DELLA TORRE, U. S. ATTORNEY.
EDMUND RANDOLPH, *of Counsel.*

HALLECK, PEACHY & BILLINGS, *Claimant's Attorneys.*
THOMPSON, IRVING & PATE, *of Counsel.*

SAN FRANCISCO:
GEO. H. BELL, BOOKSELLER AND PUBLISHER,
No. 153 MONTGOMERY STREET.
1859.

W. E. LOVETT,
Att'y at Law,
San Juan
Monterey Co.
California.

Entered according to Act of Congress, in the Year of our Lord 1858,
By GEO. H. BELL,
In the Clerk's Office of the District Court of the United States for the Northern District of the State of California.

W. E. LOVETT,
Att'y at Law,
San Juan
Monterey Co.
California.

No. 359.

THE UNITED STATES, APPELLANTS, *v.* THE EXECUTORS OF J. L. FOLSOM, DECEASED, CLAIMING THE RANCHO "RIO DE LOS AMERICANOS."

June Term, 1859.

THE proceedings in this case were supplementary to final decree, and arose under the decision of the Supreme Court in the case of *The United States* v. *Fossat*, 21 How. 445, in which the Supreme Court determined that the power of the District Court over the cause, under the Acts of Congress, does not terminate until the issue of a patent, conformably to the decree.

The case was argued on the part of the United States by *Mr. Edmund Randolph*, and on the part of the claimants by *Mr. R. Aug. Thompson* and *Mr. John J. Williams;* and the discussion, generally, was participated in by many other members of the bar. The argument was made before both Judges.

HOFFMAN, *District Judge:*

A decree having been entered at a former term, confirming the claim in this case according to the boundaries mentioned in the grant, the appeal therefrom was, by consent of the District Attorney, acting under the instructions of the Attorney-General, dismissed. A motion is now made that the survey be brought into court to be examined and passed upon, and that a final decree be entered confirming to the claimants the lands so surveyed. This motion is made that the court may exercise the jurisdiction which, by the recent decision of the Supreme Court in the case of *The United States* v. *Fossat*, (21 Howard, p. 445,) it is supposed to possess.

As the same proceeding may be taken in the case of every claim confirmed by this court, and as the jurisdiction the court is invited to exercise is one it was not by any one suspected to possess until the decision referred to appeared, an argument on the point was called for, in the hope that on a full discussion some of the difficulties and embarrassments which were felt on all sides to surround the subject might be removed.

It would be idle to conceal the fact that the questions presented and the doubts raised by the recent decision of the Supreme Court have been found, by this court and the counsel engaged in these cases, in the highest degree perplexing and embarrassing. No construction of the opinion of the Supreme Court was suggested by which all the difficulties could be obviated, or objections answered.

But, as the latest decision of the Supreme Court on a class of cases to us, in California, of vital importance, it is the duty of this court to endeavor to ascertain its true interpretation and the principles it establishes, and to adopt those principles in all cases to which they are applicable—without pretending to judge of their correctness, or to inquire, except in order to arrive at its meaning, how far previous decisions of the same court have been followed or overruled.

A brief statement of the case of *The United States* v. *Fossat*, as it was presented to the Supreme Court, is necessary to a correct understanding of its recent decision.

The original decree of this court confirmed the claim to land within four external boundaries mentioned in the decree. Three, only, of these boundaries were designated in the grant, but it appeared to this court that the fourth, or northern boundary, the existence and location of which was not disputed, was sufficiently indicated by the petition and the *diseño*, to both of which the grant referred, as well as by the name (*Capitancillos*) of the land granted. The land within these boundaries was found to exceed, by a fraction, the quantity of one square league. But as that quantity was described in the grant as "one league of the larger size, *a little more or less*, as is explained by the map accompanying the *espediente*," and as the Supreme Court in the case of *The United States* v. *Sutherland* has declared, "that in Mexican grants a square league seems to have been the only limit of estimating the superficies of land," and that "if 'more or less' was intended in the grant it was carefully stated," it seemed to this court that the whole land within the boundaries, and including an excess of a fractional part of the unit of measurement, might reasonably be considered as intended to be conveyed by a grant which described the quantity as " one league, a little more or less."

The Supreme Court, however, decided these views to be erroneous, and held that as only three boundaries were mentioned in the grant, the fourth must be run for quantity, "which was the only criterion for determining that boundary furnished by the grant;" that the words " more or less " must be disregarded, and the precise quantity of one league be considered to be clearly expressed; that "if the limitation of the quantity had not been so *explicitly* declared " it might have been proper to ascertain the fourth boundary by referring to the petition, the *diseño*, and to evidence, to ascertain what land was included in and known by the name of *Capitancillos*, but that no such reference or inquiries were admissible in that case, as the grant was free from ambiguity or uncertainty.

The Supreme Court accordingly affirmed the claim "for one league of land, to be taken within the southern, western and eastern boundaries designated in the grant, to be located at the election of the grantee or his assigns, under the restrictions established for the location and survey of private land claims in California by the executive department of the Government."

It further ordered that the " *external boundaries designated in the grant* may be declared by the District Court from the evidence on file and such other evidence as may be produced before it." (20 How. p. 427.)

The duty thus imposed upon it, this court thereupon proceeded to discharge. It was not suspected by the court, or suggested by any of the counsel, that that duty extended further than to "declare the three external boundaries mentioned in the grant," *i. e.* to designate them, unmistakeably, in its decree, and to decide the vexed and only disputed question in the case, viz: whether the southern boundary was the ridge known as the *lomas bajas*, or the *sierra* behind it.

The fourth boundary was, by the decision of the Supreme Court, to be determined by quantity alone; nor was this court required to declare it, for it was directed to declare only "the external boundaries *designated in the grant, within which* the land confirmed was to be located at the election of the grantee or his assigns, under the restrictions established by the executive department of the Government."

A decree was accordingly made by this court, in which the three external boundaries mentioned in the grant were "*declared*" and described with as much precision as was possible without a survey; and the only disputed question in the cause, as to what was the southern boundary, (viz.: the *lomas bajas*, or the main *sierra*), was elaborately discussed and decided.

An appeal from this decree having been taken to the Supreme Court, it was dismissed as "improvidently taken and allowed." In its opinion, the court considers at large the nature and extent of the jurisdiction conferred on the District Court by the Act of March 3, 1851, and it decides that it possesses the power to inquire into and decide all questions of extent, locality, quantity, boundary, and legal operation which may arise in the cause. It further decides that as under the Acts of 1824 and 1828, it was the duty of the Surveyor to fulfill the decree of the court, and the court had power to enforce the discharge of that duty, so, under the Act of 1851, the duties of the Surveyor begin under the same conditions, and the power of the District Court over the cause "does not terminate until the issue of the patent conformably to its decree."

It would seem that the right and the duty of the District Court to control and correct surveys by the Surveyor-General, in all cases, could not be more explicitly declared.

But the Supreme Court goes further. The appeal was dismissed because this Court had not entered a final decree. And this court is directed to "ascertain the external lines of the land confirmed, and to enter a *final* decree of confirmation of that land." This direction, when taken in connection with the previous remarks of the court as to the power and duty of the District Court with respect to surveys, and also with the fact that this court had already declared the boundaries with as much precision as was practicable without a survey, can only mean that it must direct a survey to be made, and that such survey, when approved, must be embodied in a *final decree* of confirmation.

The decision of the Supreme Court is not based on the ground that this court had failed to execute any special mandate directed to it; for, as before stated, this court had been merely directed to declare "the external boundaries," not of the land confirmed but, "*designated* in the grant, *within* which the land was to be located at the election of the grantee or his assigns, under the restrictions established by the executive department of this Government."

As the three boundaries mentioned in the grant were not those of the land confirmed, but of the tract *within* which the one league confirmed was to be taken at the election of the grantee, subject to executive restrictions; and as this court was directed to declare only those three boundaries, it is clear that it performed all the duties enjoined by the Supreme Court, and that the case was not remanded because the court had failed fully to comply with the previous mandate of the Supreme Court. This fact is, by the Supreme Court itself, admitted in its recent decision. "The District Court," it states, "*in conformity with the directions of the decree*, declared the external lines on three sides of the tract claimed, leaving the other line to be completed by a survey to be made." (21 How. p. 447.)

The defect in the decree of this court must have been other than a non-conformity with the mandate of the Supreme Court. I have been unable to give any other construction to the opinion referred to than that this court, after declaring the three boundaries within which the league confirmed was to be taken, at the election of the grantee, and after the grantee had made his election, subject to executive restrictions, should have caused or permitted a survey to be made, and should have, by its final decree, confirmed the land so surveyed to the claimant.

Such being the clear purport of the decision, with regard to the case before the court, we are next to inquire to what extent the principles laid down are to be applied to the other cases.

The view generally taken by the bar regards the decision as laying down new rules, by which all the land cases in California are to be governed; and the case is considered to decide that the decrees of this court, or of the Supreme Court, by which the authenticity and general boundaries of a grant are declared, are not "*final* decrees," but that the court is, in all cases, bound to direct a survey to be made, or to revise and pass upon surveys already made, and by its final decree to adopt a survey, and declare with precision the boundaries of the tract confirmed.

In support of this construction, reference is made to that portion of the opinion of the Supreme Court which decides that this court has, under the act of 1851, jurisdiction to determine all questions of extent, locality, and boundary, as fully as it was possessed by the courts under the laws of 1824 and 1828; to the declaration that the decrees of this court, hitherto supposed to be "final," were not final decrees under the Judiciary Act of 1789, and that the Supreme Court has entertained appeals from them by "a relaxation of its rules," rendered proper by the "peculiar nature of these cases;" and to the order at the close of the opinion that the appeal be dismissed as improvidently allowed, and that this court "proceed to enter a '*final* decree' of confirmation of the land confirmed."

If the language of the opinion of the Supreme Court be alone considered, it is perhaps not easy to avoid giving to it this construction. But the objections to it seem insurmountable. The 13th section of the act of 1851 prescribes the duties of the Surveyor-General with regard to private land claims in California. It is declared to be his duty to cause all private land claims in California, which *shall be finally confirmed*, to be accurately surveyed, and to furnish plats of the same," etc. It is obvious, therefore, that the final decree of confirmation must precede the survey, for, until the claim is finally confirmed, the Surveyor is not required or authorized to act.

Again: The 10th section provides that in cases of appeals from the decisions of the Board of Commissioners, the District Court shall proceed to render judgment, etc., and shall, on application of the party against whom judgment is rendered, grant an appeal to the Supreme Court, etc.

The authority to entertain such appeals is not explicitly given to the Supreme Court, but it results, by necessary implication, from the provisions above cited, and from the allusion in the 15th section to the "final decrees rendered by the said Commissioners, or by the District or Supreme Courts of the United States." Unless, then, the decrees of this court which have been appealed from were, in some sense, "*final* decrees," it is not easy to perceive how the Supreme Court, by any relaxation of its rules, or from considerations of convenience, could have had jurisdiction to review them on appeal.

The fact that the Supreme Court has heretofore entertained, and will hereafter entertain, appeals from such decrees, must therefore be taken as proof that they regard those judgments and decrees as "final," and appealable under the act of 1851; though it appears that they are not final decrees under the judiciary act of 1789.

It is also evident that such decrees must be final decrees of confirmation, and the lands confirmed must be deemed "finally confirmed" within the meaning of the 13th section, for otherwise the Surveyor would have no authority, nor could he be required, under the provisions of that section, to survey them.

A contrary construction would lead to the most important and perhaps disastrous consequences.

It is well known that both the Boards of Commissioners, as well as both the District Courts of this State, in common with all the gentlemen of the bar, have hitherto regarded the decrees by which the authenticity and validity, and the general boundaries of a claim have been declared, as "final decrees" of confirmation, under which the survey was to be made and a patent issued. In no case has a survey first been made and adopted or embodied in any subsequent final decree of confirmation.

In pursuance of such decrees, or similar ones, by the Supreme Court, many patents have issued.

If, then, it should be held that none of those decrees were final, and that the lands confirmed by them were not "finally confirmed," in the sense of the act of 1851, it might follow that the patents have been irregularly issued, and are void as having been issued without authority of law.

There also may be cases in which no appeal has been taken from the decision of the Board to the District Court, or in which such appeals have been dismissed. If, then, the decisions of the Board are not final decisions, or decrees, it is difficult to perceive how final decrees in those cases can be made. For the Board has ceased to exist, and the District Court may never have acquired jurisdiction over the cause. I am persuaded that a construction of the opinion of the Supreme Court involving such grave consequences, ought, if possible, to be rejected.

By referring to the cases cited by the Supreme Court in its opinion (viz: those of *Mitchell*, 15 Pet. 52, and *ex parte Sibbald*, 12 Pet. 488,) as instances where the court directed, by its mandate, certain lands to be surveyed, and "maintained and declared the duty of the Surveyors to fulfill the decree of the court," it will be found that the decrees of the Supreme Court, requiring those duties to be performed, are expressly called, by the court itself, its "final decrees."

In Mitchell's case, the language of the court is—"on consideration whereof, this court is of opinion that the title of the petitioner, etc., is valid by the laws of nations, etc., and do *finally* order, decree, determine, and adjudge accordingly; and this court doth *in like manner*, order, adjudge, determine, and decree, that the title of the petitioner is valid to so much of a certain other tract as shall not be included in an exception hereinafter made;" and it proceeds to give particular directions for ascertaining the land so excepted.

In Sibbald's case, after declaring the duty of the Surveyor to fulfill the decree of the court, it orders "that the Clerk of this court make out a certificate of the *final* decree heretofore rendered in the case of *The United States* v. *Sibbald;* and, also, a mandate according to such *final decree*, the opinion of the court in that case and on these petitions." (12 Pet. 495.)

It appears, therefore, that the decrees of the Supreme Court by which the general validity of the claims in those cases was ascertained, and by which directions for a survey of certain tracts were given, were not only regarded by the court but in terms declared to be *final decrees;* although some proceedings subsequent to and in execution of the mandates were required to be had by the inferior court and by the Surveyor,—the latter of whom, it may be remarked, was by the sixth section of the Act of 1824, required to make a survey *after* a final decision in favor of a claimant.

That the decrees under which the Surveyor, by the Act of 1851, was required to survey, were not by the Legislature intended to contain or embody a precise description of the land, as ascertained by a previous survey, is further evident from the fact that the same section confers upon the Surveyor-General a certain provisional and *quasi* judicial authority to fix and settle disputed boundaries between adjoining ranchos.

But if the final decree of this court, under and in obedience to which he acts, has already fixed with precision every line of the claim which is confirmed, the Surveyor can never exercise the authority which the law-makers have been at pains to confer.

It would seem clear, that the statute contemplated that the claim might be finally confirmed, and the Surveyor called upon to survey it under a decree affirming its validity and fixing its general boundaries or those of the tract out of which the quantity confirmed should be taken, thus leaving to the Surveyor the opportunity to exercise the authority with respect to interfering claims or boundaries which the law-makers intrusted to him.

On the whole, I incline to the opinion, that the decision of the Supreme Court ought not to be construed as determining that none of the decrees heretofore rendered by the Boards, the District Courts, and by itself, are final decrees; and that final decrees, defining with precision the boundaries of the land, must in all cases be entered.

I am aware that this view is apparently in conflict with some expressions in the opinion; but it has seemed less open to objections than the other construction suggested—to adopt which would involve as consequences:

1. That no final decree has ever yet been made in any land case.

2. That the survey is to be made by the Surveyor-General of claims *not* finally confirmed, but which are *finally* confirmed only after survey; when the language of the statute is express, that the claims to be surveyed by him are those which shall be "finally confirmed."

3. It would leave the regularity and even the validity of all patents, heretofore issued, open to grave doubts.

4. It requires us to suppose that the Supreme Court have treated as *final,* and therefore appealable, decrees which were not final—and this by a relaxation of their rules, which, as the law only gives to that court jurisdiction of appeals from final decrees, it cannot be supposed that they would have felt themselves at liberty to make.

Assuming, then, that the decrees of this court, heretofore rendered, are to be deemed "final," in such a sense as that an appeal from them can be taken, and that the Surveyor-General, under the thirteenth section of the Act of 1851, may be required to survey them, we are next to inquire what further jurisdiction over the case this court is, by the opinion under examination, declared to possess.

That the case of Fossat was remanded in order that a survey might be made, and a decree embodying such approved survey entered, is clear.

It may be said, however, that such a proceeding is merely decided to be necessary in that particular case—and that it should not be taken except in cases precisely similar to that of Fossat, viz: where the question of boundary or location has been raised and decided in the regular course of the suit, and where the Supreme Court has remanded the cause, in order that the location might be fixed. But this interpretation of the opinion is inadmissible.

It has already been shown that this court had performed every duty required of it by the previous decision of the former court, and that the cause was not remanded because this court had failed to fulfill the previous mandate in the case.

That the Supreme Court have, in their opinion, laid down principles generally applicable to all cases, I think, is evident.

In the first place, they discuss and decide the point whether this court has, by the Act of 1851, any authority to decide questions of extent, location, and boundary. Such questions they declare may be "essential in determining the validity of a claim,"—and the power to decide upon "validity" involves the power to decide upon all questions of boundary.

Secondly. In answer to the objections that this court has no means to ascertain the specific boundaries of a confirmed claim, and no power to enforce the execution of its decree, the Supreme Court decides that this court has such power and that it is the duty of the Surveyor to fulfill the decree of the court; and the court declares, "that the power of the District Court over the cause does not terminate until the issue of a patent conformably to its decree."

I am aware that in a previous opinion, delivered in the same case, (20 How. 425,) the same court declared that "the jurisdiction of the Board of Commissioners in the first instance, and the appellate jurisdiction of the courts of the United States, are *limited* to the making of decisions on the validity of the claim, *preliminary* to *its location and survey by the Surveyor-General of California*, acting under the laws of the United States."

No mode of reconciling this declaration with any construction of the last decision in the case of Fossat, was suggested at the bar or has occurred to either of the Judges. It must, therefore, be treated as overruled by the later case.

As then, "the power of this court over the cause does not terminate until the issue of a patent conformably to its decree," and as it has jurisdiction to determine all questions of extent, location, and boundary which may arise, it is the duty of the court to exert this power, and to exercise the jurisdiction at the instance of a suitor.

I therefore think, that in all cases where a decree of confirmation has been entered, and a survey under it has been made, on which a patent is about to issue, which survey is objected to as erroneous, it is the duty of the court to direct the survey to be returned to it, that it may hear and determine the questions of location and boundary which may be raised.

In coming to this conclusion, I have not overlooked the great difficulties of reducing it to practice.

The first and most perplexing question is that of parties. By whom can objections to a survey be made? Every party entitled to object to the survey must have a right to take testimony in support of his objection, and a right to appeal from the decision of this court to the Supreme Court.

It is, therefore, of the utmost consequence to determine who are the proper parties to the proceeding.

At first blush, the answer might seem obvious, viz: That the parties to a proceeding to correct a survey, are only the original parties to the suit, viz: the United States and the claimant. But the solution of the difficulty is by no means so easy as it might appear. During the long period which has elapsed since the claims were first filed before the Board, many changes of interest have occurred. Suppose, then, that the original claimant has parted with all his interest, or it has been sold on execution. He may have no motive to dispute any location, however erroneous—and he may not be disposed to allow the use of his name to the present owner. Cannot the latter be heard to object to the location of what has become his exclusive property? Or suppose that the original claimant, though really entitled to only two leagues to be taken from a tract the boundaries of which contain four leagues, has, through error or fraud, sold out four leagues to two purchasers—two leagues to each. He, therefore, has ceased to have any interest in the controversy. The real contest is between the purchasers, each of whom desires that the patent may cover the land conveyed to himself. Is neither to be heard? or only he who has the good fortune to obtain the use of the name of the original claimant. The United States may have no objection to the survey. It will, therefore, be confirmed, unless objected to on the part of the claimant. Which of the parties, in the case supposed, has the right to object? If both have, what limits can be assigned to the rights of intervention?—for in some cases, the grantee may have sold to hundreds of purchasers.

Again: If the right of both sub-grantees to be heard in the case supposed be admitted, ought not persons so immediately interested in the result of the inquiry to be heard, notwithstanding that the original claimant may not have sold out his entire interest? The part retained by him may be so situated that any possible location of the claim will include it. He has, therefore, no interest to object—on the contrary, he desires a patent to issue without delay. But the purchasers under him have a direct and vital interest in obtaining a location such as cover the tracts conveyed to them respectively. Is the court to refuse to hear them?

Again: Grants, in most instances, have as one or more of their boundaries the lands of other parties. The court, in fixing the location of rancho "A," necessarily determines one of the boundaries of rancho "B," by which it is bounded.

Ought not the owner of the latter to be heard to show what his boundary is? If he is not, he is excluded on the ground that the suit as to the boundaries of his neighbor determines nothing as to his rights. The result might thus be, that when the second rancho is before the court for location, the evidence in that case would compel it to adopt a boundary line different from that fixed in the first case.

If the second location were the correct one, the claimant in the first case would lose his land. It would then be too late to extend his lines in another direction so as to give him the quantity mentioned in his grant.

But the boundaries of rancho "B," in the case supposed, may involve an inquiry into the true location and boundaries of rancho "C," and several other circumjacent tracts. How then can the court, hearing each case separately, unassisted by topographical maps, and unable, except in rare instances, to visit the lands, hope to arrive at any satisfactory conclusion.

Again: Two or more grants are often made within the same general boundaries—an original, or first grant, and one or more *sobrante* grants. Ought not both grantees to be heard, that the court may give, if possible, such a location to both as will satisfy the claims of each?

If all these parties have the right to appear, take testimony, and to appeal, it may reasonably be apprehended that the litigation upon which we are entering will be far more protracted than that which has already occurred respecting the validity of the claims.

If these parties are excluded how can justice be done? When we consider the immense interests involved in the location of grants, the vague and indeterminate character of the boundaries mentioned in the grants and delineated on the *diseños*, the opportunity afforded for plausible objections to any location which can be made, and how impracticable it is for a court to learn through depositions the natural features of a country it has never seen, and of which no topographical map is exhibited, and therefore how difficult it will be for it to render any decision in which the parties will acquiesce, or which will be satisfactory to itself, it may well be doubted whether the evident anticipation of the Supreme Court that few cases will re-appear before it on appeal will be realized.

Before dismissing this subject a further observation may be made. The settlers claiming to hold under the United States are heard, if at all, through the District Attorney. In many cases they may have just objections to a location which has been made so as to improperly include their claims. In many cases they may object to any location in order that the issue of a patent may be postponed, and that they may continue to enjoy the use of the land.

The number of locations to be passed upon may be some hundreds. The District Attorney, like the court, is unacquainted with the topography of the country. How can he determine, when objections supported by affidavits are presented to him, which he ought to urge in the name of the United States, and which he ought to refuse to make as vexatious and intended for delay? May he not be driven to adopt the rule to make objections which seem plausible and are supported by an appearance of proofs? In such case it is to be feared that the jurisdiction the court is about to exercise may be as often the means of delaying indefinitely the issue of a patent to a rightful claimant, and of plunging him into a new and protracted litigation, as of correcting errors of the Surveyor-General in locating claims.

For these reasons I would gladly have declined the jurisdiction I am urged to assume. For, notwithstanding the almost unanimous opinion of the bar to the contrary, it has appeared to me that the evil results of its exercise may outweigh the good.

Under the recent decision of the Supreme Court I have not felt at liberty to do so.

With regard to the particular case more immediately under consideration, it follows, from what has been said, that this court cannot now proceed to examine the survey which has been made. The court, as already stated, regards the decree heretofore made as *final*, in a sense to authorize an appeal from it, or a survey of the lands as finally confirmed. It is not, however, exhaustive of its power over the case, for that does not terminate until the issue of a patent. The court does not therefore proceed, as of course, to enter a decree for the land as surveyed, which would be necessary if the decree heretofore made were only interlocutory.

But it will hear objections to the survey. None are made in this case. The survey originally made is satisfactory to the parties now moving to bring it before the court. That survey has been disapproved at Washington by the executive officers of the government and a new one directed to be made. When that shall have been done the parties now moving may make their objections and bring the questions involved before the court.

Oct. 4, 1859.

NOTE.—Since the foregoing decision was rendered, Judge Hoffman has decided (in the case of *The United States* v. *John Bidwell*, claiming the Rancho "Arroyo Chico,") upon the rights of settlers with respect to their standing in court. Judge Hoffman says:

> " In this, as in all other cases, all persons who allege that any of the land included in a survey of a rancho is public land of the United States, must urge their objections in the name of the United States and through the District Attorney. To that officer is committed the duty of seeing that no public land is improperly embraced within a survey of a private claim. When he has no objections to interpose, the settler cannot be permitted to intervene in the proceeding. When he settled upon that land, and, notwithstanding that it was claimed under a Mexican title, chose to assume it to be public land, he was aware that the United States would assert her rights through her proper officers, and that the judgment of the courts, declaring that the land was not public but private land, would be final and conclusive on the rights of the United States and all claiming under them.
>
> When, therefore, the United States, through her officers, admits that the survey is properly made, or declines to make objections to it, then no settler can be heard to contest it."

ARGUMENTS

ON PART OF THE GOVERNMENT

AND

OPINION

IN

LIMANTOUR CASE,

No 548.

Decree of Confirmation in the Pueblo Case No. 280.

CITY OF SAN FRANCISCO,
vs.
THE UNITED STATES.

In this case, on hearing the proofs and allegations, it is adjudged by the Commission that the claim of the Petitioner is valid, and it is therefore decreed that the same be confirmed.

The land of which confirmation is made is that known by the name of the Pueblo Lands of San Francisco, and is bounded as follows: Beginning at the little cove to the East of the Fort, and running across to the beach so as to leave the Fort and Casamata to the North; thence running along the beach to Point Lobos, on its Southern part; thence, a straight line the summit of the Devisadero—continuing said line to the East as far as the *Punta del Rincon*, including the *Canutales*, and *El Gentil*, the said line will terminate within the Bay of the Mission of Dolores, the estuary of which will form a natural boundary between the Municipal Jurisdiction of that Pueblo and the said Mission of Dolores. Thence along the shore of the Bay of San Francisco, as it existed in the year 1834, to the point of beginning. For a more particular description, reference to be had to the copy of the Order, from Governor Jose Figueroa to Gen. Mariano G. Vallejo, dated Monterey, November 4, 1834, marked "Exhibit No. 18 to the Deposition of M. G. Vallejo, taken in No. 280, H. I. T." and now on file among the papers in the case.

(Signed) ALPHEUS FELCH,
R. AUG. THOMPSON,
S. B. FARWELL,
Commissioners.

A true and correct copy of the original on file in this office; which I attest.

GEO. FISHER,
Secretary U. S. Land Commission in California.

San Francisco, December 21, 1854.

THE

OFFICIAL ARGUMENT

AGAINST THE

LIMANTOUR CLAIM.

LOUIS BLANDING, *U. S. Associate Law Agent.*

THE

OFFICIAL ARGUMENT

AGAINST THE

LIMANTOUR CLAIM.

The following is the Brief of Louis Blanding, Associate Law Agent of the United States in the case No. 548 of José Y. Limantour *vs.* the United States, for certain lands in and near the city of San Francisco:

On the part of the Government it is maintained, in the first place, that this *Grant is not genuine.*

We are aware of the strength of a title whose muniments are produced, apparently perfect in all their parts, and bearing the signatures of superior officers, which have been proved on the record of the case, we are aware of the strong presumption in favor of such a title; but we are equally aware of the legal truth that this presumption is not conclusive, but open to rebuttal. If the chain of circumstances in this case is perfect in its links, and these are connected by the proofs, if, in support of this, it is shown that the action of these superior officers (Micheltorrena and Bocanegra,) admitting their signatures to be genuine for the sake of the argument, does not necessarily fix the genuineness of the grant, but is consistent with the fraud of the case, or the presumption of fraud, as shown by the circumstances; then we insist that the better case has been made out for the Government.

The circumstantial evidence for the claimant is negative in its character, and conflicting in its detail. On the part of the Government this evidence is positive and harmonious with itself. The evidence for the claim has been impeached in material points by witnesses whose character has not and cannot be successfully assailed. The evidence for the U. S. stands without impeachment, and being to matter of vital bearing upon the case, as we shall hereafter show, we have entire confidence in its weight.

We trust that we shall show that the evidence of the claimant can apply to any other case as well as to this, that his chain of circumstances does not and cannot be made to compass about this particular case; but that the case stands solely upon the presumption derived from these signatures of Bocanegra and Micheltorrena, which we will meet by presumptions of as high if not higher a nature.

We will first consider the evidence of the complaint.

On the 8th of January, 1843, Governor Micheltorrena wrote to the claimant requesting his aid by advances of money and merchandise, which he then had on board his vessel, lying then no doubt, at San Pedro, the port of Los Angeles, distant about twenty-five or thirty miles.

The next date in the transaction is the 10th of January, on which Limantour formally petitions the Governor for two tracts of land, stating first, the consideration and inducement to the same, that he will give a receipt for $4,000, on account of a larger sum due him by the Government.

He then describes the land sought, with great accuracy by the points of the compass, and mentions in the most familiar manner certain localities and natural boundaries. It has not been shown that prior to this time Limantour had held any intercourse or had any dealings with the Governor, and the letter of the Governor shows that the suggestion of obtaining land for money and merchandise came from himself, for the first time at this date, the 8th January, 1843. The parties were, therefore, at this time, strangers to each other, and had transacted no business of this kind. Thus, in two days time, the 9th and 10th Jan., we find Limantour acceding to the proposition of the Governor, a stranger to him, and in difficulty,—advancing money and goods at a distance of twenty-five or thirty miles, and for this purpose he must have, in this time, transported and delivered them; negotiated and completed his negotiations with Micheltorrena, and received drafts on Mazatlan for some considerable but uncertain amount, for the testimory of Abrego is far from being definite, being based upon his memory alone, and is open to formal objection which is made at this time, on the ground that the accounts of which he speaks were not produced, nor any reason given to excuse the failure to produce them or a certified copy at least.

Not only this, but in this same contracted period of two days, we find Limantour estimating the balance due him, and then framing a petition for land, with the most accurate description of two distinct tracts. We say that from the nature of the case and the conditions of things, at this time and place, the transaction, as shown upon the papers, is in the highest degree improbable, and is not explained by saying that Governor Micheltorrena had been delayed three months on his march for want of these supplies. It does not excuse or explain this unusual, unnatural haste—and the witness Jimeno himself answers this by informing us that Micheltorrena did not reach Monterey till August, 1843, about six months after this hurried transaction, to resume his march.

On the 11th of January Micheltorrena refers the petition to the "competent Justice" for a report, and entitles this reference "Jurisdiction of San Francisco," and on the 14th January Jimeno, the Secretary of State, refers it to Richardson as Captain of the Port of San Francisco. The report of a competent Justice on this matter has not been shown in any way. Jimeno does not know what lands were petitioned for—does not know that any grant was ever made—does not know of what authority or officer he asked information, or about what lands information was asked. Now we insist that the conflict here is entitled to weight. Jimeno refers the matter to a Captain of the Port, who says himself that he was only engaged in freighting and piloting vessels. He was not the Justice. The testimony for the Government shows that he was not even Captain of the Port at that time, but that the Ensign Prado was then Captain.

Micheltorrena entitled the reference, "Jurisdiction of San Francisco," and on the 25th February, at Los Angeles, ordered the title made out "the competent justice," having taken all necessary steps, &c. Now, who were these competent justices of the jurisdiction of San Francisco? The Captain of the Port? what had he to do with this matter, or what could he know about it? It may raise a presumption where a paper is produced bearing the Governor's signature, but we apprehend that when testimony unimpeached directly meets this presumption, it must give way and yield to a conclusive positive statement. Francisco Sanchez and Jesus Noe show by their testimony that they were the Judges of the "Jurisdiction of San Frencisco" in 1842 and 1843; the public records show the same, and they both testify that they know nothing of this grant, and were "never called upon to report or give information" concerning it. Micheltorrena is made to say that the matter was referred to the competent Justice, and that this Justice reported in the matter. The competent Justice appears in person, and under oath says that the matter never was referred to him, and that he never reported on it. This statement of the Governor is the only positive evidence on the part of the claimant on this point; no witness knows anything about it—Jimeno himself knows nothing. This point is effectually met, and either discredits Micheltorrena—or proves that his signatures of which many were attached to blank documents, as the evidence shows, were used for fraudulent purposes, and that this is one of them. It strikes us that this is just such an error—just such an oversight as would be committed by parties not experienced, but who were fully alive to the necessity of having all the important steps and formal parts of the documents in exact order and place, when about to commit a fraud. It is true that Richardson testifies that he made a report to the Governor; it is also true that the expediente, containing all the other proceedings, does not contain this, nor does the Secretary, Jimeno, or his clerk Arce, recollect anything of it. And we observe here that the testimony of Richardson is not entitled to the credit or weight which the counsel for the claimant gives it. On a close examination the witness is seen by his own deposition, to have stood, both prior to and subsequent to 1846, as late as 1852, in the relation of debtor to Limantour, owing him a considerable sum of money, and which was only paid in 1852, in Mexico. This, standing by itself, might amount to little, but observe the conflict in Richardson's testimony. Limantour told him that "his documents were substantiated by the proof of signatures by the United States Consul in the city of Mexico, or the United States Minister." This was in Mexico, in *June or July*, 1852. Now examine the date of this certificate of the U. S. Consul in Mexico, and we find it to be the 2d November, 1852, some three or four months after Richardson had departed from the city of Mexico. This is a distinct, positive statement of the witness, and discredits his entire story. It is no answer to say that it is a mere mistake of time. This witness has been so accurate in his dates, and so ready in his narrative that he cannot be charged with a mistake; his very accuracy now tells against him, and the claimant's counsel cannot make him assume one character at one time, then drop it and put on another at will.

We can now see why it was necessary to make Richardson a party in this matter of the report to the Governor. It was necessary to have some competent report as to the character and condition of the land, so the reference is pretended to have been made to the Captain of the Port, and Jimeno is made to order him to join the Judge of the Jurisdiction with himself, in the report.—(See Jimeno's order.) If he was so accurate and regular in all his proceedings, why was the omission to join the proper officer, and in fact, the only proper officer in the report made? These officers, (Sanchez and Noe,) say they never heard, even by report or reputation, of the grant till 1852, and moreover in commmon with Domingo Feliz, another witness for the Government, testify that Limantour told them that he asked for a grant of a lot in 1844, a year subsequent to this pretended claim, and that this lot was situated at the place called "Los Canutales," about where Thomas Hayes lives, about half way between this city and the Mission Dolores, and which is clearly within the limits of the tract claimed.

Thus they attempt to save appearances by referring to the competent Justice, jointly with Richardson, the Captain of the Port, as they claim. But when the report is made, Richardson acts solely, and the Justice swears he knows nothing of it. If this act, as it stands on the record, at the date it bears, was a genuine act, of the importance attached to it—the action of the proper officer would have been secured to it, or at least he would have known of it, and in the absence of this, a presumption of bad faith arises, that has not been met and stands unexplained. If this report was made in good faith—was really made at the date it bears, the officer who reported in all such cases, we must conclude, would have reported in this—if made fraudulently at a later time, this officer, (the Justice,) would not have so reported, for Limantour knew well that in 1844 he confessed and acknowledged to these officers that he had no such claim—that he was glad that he had no land here, and that his application for a lot had been refused. Recollecting this, and knowing that these officers could not be improperly controlled—and they are as yet unimpeached—and we reach the strong presumption, if not conclusion, that their omission to appear in the proceeding on the report, was intentionally made—and this in fraud—else why fail to appear in a matter properly and exclusively within their sphere of duty.

We next notice the alleged approval of the Supreme Government to this grant; and on this point, at the same sime that we assert that these signatures, proved though they be, are not conclusive, we maintain that too much has been done for the truth of the case. The work has been overdone. The Supreme Government, not satisfied with the approval made on the 18th April, 1843, in answer to the memorial and petition for a particular tract, proceeds, on the 7th Oct. 1843, to give, in advance, a general approval and sanction to any and all future grants. This is directed to the Governor of the Californias, and comes from the "Ministry of Foreign Relations," &c.; and yet no record is found of any of these repeated approvals either in Mexico or California. This raises a presumption which, taken in connection with the fact, that such paper as these pretended approvals are written on, were in circulation in California and in San Francisco at the time Limantour was here, and was actually seen in the possession of Limantour by the witness, Bowman, takes away all force from this point as a conclusion, and renders it, at most, merely presumptive and open to inquiry and rebuttal.

It is strange how mysteriously and utterly all record of this claim has disappeared, if it is genuine. Even the certificate of Micheltorrena, made on the 25th December, 1843, to the second general approval of the Government, and countersigned by Jimeno, and the original of which Micheltorrena says remains in the archives, does not appear there.

Again, this last approval speaks of the property he (Limantour) had acquired, and which had been recognised by the Government. This appears certified by Micheltorrena, and countersigned by Jimeno, and yet in his testimony he knows nothing of it. He takes part on paper in the transaction, his proceedings are a material part of the *res gestæ*, and yet when sworn he knows nothing of it, not even from Limantour himself.

Jimeno says he *understood* Limantour was applying or had petitioned for land—this was said in 1853, at which time Limantour had filed some six or seven petitions before this Board. This is amply sufficient to cast suspicion over the whole transaction, and we leave it with the remark that having shown the grant on its face to be merely *presumptive*; that this presumption is directly met and overcome by the best possible testimony, that cannot and has not been assailed, and that is the testimony of the witnesses—Green, Feliz, Francisco Sanchez, &c.—who testify to the admissions of the claimant himself, that he had no land here, wanted none, and, subsequently, after the claim had been made up, to his admission made in confidence, that the claim was bad, but that it could be carried through.

And here, in allusion to the testimony of Green, it appears that Limantour himself apprehended the very danger to his claim which has now arisen. He could control all the points except the record, and, in confidential communication with the witness, seems to have feared the absence of this link, but intimated that it could be supplied. How does the matter stand on this point now, in connection with Gomez? He is made to find the *expediente*, by accident in Monterey subsequent to this conversation of Green with Limantour, and evidently with the purpose of curing this defect.

Now, this document must have been either in the possession of the claimant or in the charge of the officers who kept the archives prior to its pretended discovery, for its loss has never been pretended.

That the claimant did not have it is evident, for he would have produced it. The officers in charge of these archives swore most positively it was not there prior to this time, nor do they know when or how it came there. The certified copy of the Index of all *Expedientes* on file in the archives at Monterey, made officially in 1851, by virtue of an act of the Legislature of the State of California, shows that this *expediente* was not there at that time.

These archives were in the charge of officers whose character has not been attempted to be assailed, and yet Serrano, a witness for the claimant, remembers that he saw this *expediente* in the archives in 1848 or 1849.

If this is true, it is presumable that it remained there; but it did not remain there, for these officers swear it never was there, until found.

This witness, who saw it only once, who had no intimacy with Limantour, who considered the matter of insignificant character, who had several papers in his charge as well as this, but cannot describe *them*, undertakes to give, after seven or eight years, a most minute description of this *expediente*, the number of leaves of paper, &c.

The testimony and character of Gomez can get no support from this witness and we apprehend that the conclusion is fairly reached that the expediente was placed in the archives by Gomez at the time he pretends to have found it; for if not, the testimony of the officers who had charge of the archives must be rejected. But if this conclusion is reached all the force of this pretended discovery is gone, and the presumption against the case for want of record stands unimpaired.

Gomez says himself that it should have been originally in the Secretary's office, yet Jimeno, the Secretary, knows nothing of it.

Having now reviewed the evidence upon which the claimant mainly relies, we will now briefly state the grounds of presumption on the part of the United States that go to meet and rebut the presumptive claim of the petitioner, for we insist that he has shown no stronger support than a mere presumption in favor of his claim.

In the first place the evidence shows positively that there is no record of this claim in the archives of the General Government, nor in those of the Capital of California at the time of the alleged grant, nor in those of the Jurisdiction of San Francisco where the land is situated, and in which the grants of lands there situated, whether made by Governors, Prefects or Alcaldes, were recorded.

Again, it is shown positively that Limantour, in 1844, denied that he had any land here, and asked for a grant of a lot within the boundaries now claimed.

Again, it is shown positively that he admitted to one, whom he desired to make an accomplice, that his claim was fraudulent but could be maintained.

Again, it is shown that he was connected with Auguste Jouan as his agent for the management of his land affairs in California; that while in this capacity he had altered the dates of one of his grants, or that Jouan had told him to alter the date to conform to the other dates, and that Limantour had made or caused to be made the suitable alteration, and this alteration in the case of 549 has been identified and thus sustains the statement of Jouan to Halleck and Davidson.

It has also been positively shown that Limantour was in possession of many blank copies of stamped paper, with the signatures of Micheltorrena and Bocanegra upon them.

It has also been shown that there was no paper habilitated for the year 1843 in February of that year, at which date the grant bears date, and upon which paper it purports to have been made at this date, and that the archives of this Commission, although showing grants for the year 1843, shows none upon paper habilitated provisionally by the Maritime Custom House of the port of Monterey prior to April of this year, and thus is the testimony of Larkin and Diaz on this point sustained.

This point is also sustained by an examination of the archives of the Surveyor General's Office, and the testimony of the witness Hopkins.

There is also a strong conclusive presumption arising against this claim from the confirmation of this Board of the two claims No. 280 and 81. The claim 81 has the same northern boundary with this claim, viz: the southern line of Yerba Buena, and if the grant in 81 is good, and the Board have so held, then this land was vacant in 1846—that is, held by no grant nor occupied in 1843, the date of this pretended grant.

Again the tract here claimed cannot be the tract intended to be granted, even if the grant is genuine. The description in the petition of Limantour to the Governor, in the order of reference by Jimeno, and in the title as issued by the Governor, distinctly intends a grant of land not within the Pueblo of Yerba Buena, but "comprised" "contained *from* the line of the Pueblo," of land as Jimeno says, "that Limantour represented to the Government did not appertain to the Pueblo of Yerba Buena." If, therefore, a confirmation is made of this claim, this description must govern. It is true that natural points are mentioned, but the Board will take that description which will give effect to the grant, and which will not involve a violation of the intention of the grantor, or a violation of the law of the land, that had expressly exempted corporate property from grant. The decree in the city case has given the line of the Pueblo, and upon this line this claim can alone be confirmed if entitled to confirmation at all.

2. The grant if genuine is not valid.

1. The land claimed in this case is largely embraced within the lines of the Pueblo of San Francisco as established in 1834, and which the Board in its decree in the City case of San Francisco, has recognized. Thus vested in the City, by grant or dedication, no act of the Governor could divest the title of the City to these lands. If the title could be divested by any act of power, that power must be the highest known to the law—and must be exercised, not in accordance with law, but in contravention of law, and only for a special purpose in some great and public emergency.

Now do we find this state of things existing at the date of this grant? We find Gov. Micheltorrena acting under instructions from the President of the Republic, conveyed to him through Tornel, the Minister of War, on the 11th February, 1842. The power conferred by these instructions upon Micheltorrena, extended to all branches of administration which might "conduce to the welfare of the country," and among them was the branch of colonization. It is true that by these instructions, the Governor's power was extended to certain specified subjects—but no greater power was given than the President *ad interim* himself possessed over the same subjects. Now, it has not been shown that at the date of these instructions, the President was invested by express law, or by the necessities of any existing public emergency, with the extraordinary power that would warrant him, even in the attempt to divest vested rights, and hence none such could have been delegated to an inferior officer. To attempt such an act would have beeen in direct contravention of law;—whereas the marginal decree of the Minister Bocanegra, states that the grant as made, has been ratified and approved, "based upon pre-existing lawful provisions, and granted to the local authority of California." We are aware of no Mexican law that permits confiscation under any circumstances, these lawful provisions therefore, could not have gone to this extent, and the ratification of the government could give no legality to an act whose effect was confiscation; for the Government of Mexico at that time was bound by express written law, and the powers conferred upon it, whether ordinary or extraordinary, were defined and did not extend to confiscation of individual or corporate rights.

But grant that the powers conferred upon Micheltorrena, were extraordinary in their character and extent, that they were legally delegated, and that they gave the power to grant the lands of Pueblos. As an act intending to confer extraordinary power, it was insufficient and of no effect, and all acts under it were conditional, until the approval of the Mexican Congress was given to it, and this was never secured to legalize this act of Santa Anna, who was bound by the Basis of Tacubaya and the Convention of Estanzuela, to submit all his acts for approval to the Congress. Up to the 7th July, 1846, this had not been done—the time for the performance of this subsequent condition of submission and approval, was limited to the first Constitutional Congress that met after the act. So far from submitting his acts for approval, Santa Anna attempted to throw off this burden by a decree dated the 3rd of October, 1843; only six months subsequent to the date of this grant, and has thus proved his own failure to comply with the provisions of the law under which he came into power and by which he then held the Presidency. This decree of Santa Anna was annulled by the Mexican Congress on the 1st of April, 1845, which shows the construction put upon the law by the Congress, and the necessity that existed both prior and subsequent to this date, for an approval by the Congress of the President's acts. Among these acts were the instructions or communication, delegating to an inferior officer, to a local authority, whose powers and duties had been clearly defined and limited by previous general laws, the attributes of the President of the Republic, which are claimed for him to have been extraordinary. As such must surely, under the law, the act required approval, which we have shown was never given.

Again, take the case that no extraordinary power was conferred upon Micheltorrena, empowering him to grant lands in or belonging to towns, that the claim here is based upon the ordinary executive power of the Governor under the Colonization laws, and as such we insist that it was invalid and void for want of power in the Governor under these laws. We would refer the Board to our Brief in the case of Leese & Vallejo vs. United States, No. 74, on the Docket of the Commission, for our argument and authorities upon this point. It is needless to repeat them here, as they have been collected and elaborated in that case.

2. This grant was approved by the Supreme Government on the 18th of April, 1843, by virtue of the extraordinary powers conferred upon Santa Anna. The words of the marginal decree signed by Bocanegra are to this effect in express terms. We think it unnecessary here to state our argument to show that under the colonization laws the President had no power to grant or to approve a grant of lands in the Departments, nor are we aware of any other laws that conferred the power.

If Micheltorrena had power to make this grant to a French subject, it was needless to refer the matter to the President for approval. The decree of the 11th of March, 1842, Art. 9th, rendered this reference to the President for approval necessary, for it provides that foreigners could not acquire land in the frontier Departments without the express license of the Supreme Government. On this reference the Supreme Government ratified and approved the grant, and the question here arises, was this act of ratification sufficient? Was it final without further action? We think not; and that it was ineffectual to vest any estate until this act of ratification was approved by the first Constitutional Congress.

By the Basis of Tacubaya, Art. 6, and the Convention of Estanzuela, Art. 2, the acts of the Provisional Executive were required to be submitted to the first Constitutional Congress for approval, and failing to secure this, the ratification remained incomplete, and all titles dependent thereon remained invalid. We would refer here to the case of the Garay Grant, which we have fully discussed in the case of New Almaden, No. 366, and would call the attention of the Board again to the "statement" published in the city of Mexico by authority of the Minister for Foreign Affairs, as bearing directly upon this subject, and affording the necessary light to a clear understanding of its merits. The two cases of Garay and Limantour stand upon the same ground—they both claim to have been made under extraordinary powers, they both failed to obtain the approval of the Mexican Congress, and the Garay grant, which came before the Mexican Government for settlement, was rejected and declared invalid. We deem the Limantour grant as one of even more extraordinary character than the Garay grant, and hence for a stronger reason requiring the action of the Congress to give it validity. Limantour petitions for an absolute sale of the land to himself. Micheltorrena, obviously aware that he possessed no power to sell, grants to him, and the grant is based upon pre-existing lawful provisions, yet no conditions are annexed as required by the existing colonization laws. This grant without conditions, made to a foreigner, claiming to be made by the Governor under extraordinary power but seldom conferred upon this officer, surely possesses a character that requires the claimant to show the strictest compliance with the law, through all its steps. In this he has failed, and upon this we think the validity of the grant depended. But if it is held that the act of the Governor was one of sale and not of grant under the colonization law, then we insist, *a fortiori*, that the approval of the Mexican Congress was necessary to this sale of the public domain.

The Governor of California and the President of the Republic both undertook to act in conformity to existing laws. Did they so act when they failed to annex any conditions to the grant, or could they legally release the grantee from the effect of the conditions invariably required and imposed by law? If they could, is not the act releasing the grantee from these conditions, and the power under which they acted, of such an extraordinary character as to require the sanction of that body to which the law has given the highest authority in such cases, with the power to approve or disapprove the acts of the highest officer in the Republic?

But we maintain that no act of these officers could release the grantee from the legal effect of the conditions required by the colonization laws to be annexed to all grants, and that on the failure to perform the conditions the grantee would lose any right he may have had to perfect the title, and which by the failure of the grantee and by the change of sovereignties and circumstances, it was impossible could now be matured or ripened into a title by the performance of conditions.

Under the Mexican Government and law, the grantee has failed to secure the title. Ample time was allowed for a compliance with the conditions of occupation, cultivation and possession, between the date of the grant in 1843 and the 7th July, 1846. No sufficient excuse or reason is given for the failure, none whatever is attempted, and the evidence in the case shows the failure on the part of the grantee, and an actual abandonment of his claim during the existence of the Mexican power in California. During this time nothing had been done by the grantee binding upon the justice or conscience of the Mexican Government. The case is entirely similar to the cases of Boisdore, Glenn, and de Villemont, where the Spanish Government had parted with the territories of Louisiana and Florida before any interest or title had vested in the grantees. This case differs from the Frémont case. The Supreme Court hold that, in view of the circumstances, the distant position of the Mariposa valley, and the hostility of the Indians, together with the revolutionary condition of the country, there was not an unreasonable delay or want of effort on the part of Alvarado to fulfil the conditions.

In the case before the Board none of these circumstances existed, and the Supreme Court in the Frémont case say that in such a case "it might justly be presumed, as in the Louisiana and Florida concessions, that the party had abandoned his claim before the Mexican power ceased to exist, and was now endeavoring to resume it, from the enhanced value under the Government of the United States."

The court held that the grant to Alvarado vested a *present* and *immediate* interest, but subject to conditions subsequent; that there was a failure to fulfil these conditions, but a sufficient excuse for the failure. Thus the court intimate that had there been no reasonable and sufficient excuse for the failure to perform these conditions during the existence of the Mexican Government in California, the land would have been subject to forfeiture on the action of the Government, or on denouncement by a third person.

It is true that no action was taken by the Mexican Government to forfeit this title, or whatever right the grantee might have had; but we apprehend that it is competent for the United States, the successor in interest, to institute this action, and to ascertain what rights were perfect and what imperfect at the date of the cession or conquest of California.

We apprehend that the U. S. Government is as competent as the Mexican Government to institute proceedings to ascertain the validity or invalidity of the grantee's claim, and to pronounce it good or bad. The United States has the same rights against the grantee that Mexico would have if her power existed in California at this date. Mexico would have proceeded to forfeit the right or title of the grantee if bad, and if the question had been raised. The United States has seen fit to raise the question between the grantee and herself, and has lost none of her rights against the grantee because Mexico neglected to do so. The United States has the same right to reject this title now, that Mexico had to forfeit the land on or before the 7th of July, 1846, if the grantee had failed in his obligations.

It is true that Mexico, up to the 7th July, 1846, took no action in the matter; but the grantee's right was not thereby matured into a title; he stood in the same position—has lost no right, has surely gained none, by the lapse of time. The United States, not proceeding by forfeiture in such cases, has resorted to the course known to her law, and whose effect is the same, she has established this Commission, and the grantee has submitted his claim.

The Government did not create this Board solely for the benefit of the claimants, but more especially for Government purposes and interests, to ascertain and secure her own landed interests by a separation from private property. Thus, and for this purpose, she has raised the question, and has adopted her usual legal proceeding, as the Mexican Government would have acted by proceedings in forfeiture. As the Government of Mexico would not have been barred or estopped, so the United States is not now barred or estopped from inquiry into the legality of this title, by the acts of officers who had approved the title, or who might have certified to the legality and formality of the proceedings in the same; and this however high the position of these officers. This may have raised a presumption in its favor, which was open to rebuttal, however; and this, we trust, has been accomplished.

It is true that no express conditions are answered to this grant, but there were conditions and limitations imposed by law, precedent in time—and amounting to a prohibition upon the Governor to grant, and upon the grantee to take. To enable Limantour to acquire land in the Republic of Mexico in 1843, even though he had obtained the approval of the Supreme Executive—it was necessary that he should remain in and be an actual resident of the Republic. The words of the first Act of the law of the 11th March, 1842, (Rockwell, p. 11) are: "Los estrangeros avecindados y residentes," &c., foreigners who remain, are established and resident, &c. The verb *avecindarse* is defined in Escriche thus, "to become an *inhabitant* of any town establishing one's *domicil and habitation* with intent of remaining *permanently* therein. This is proved by the lapse of ten years." To acquire a domicil under Spanish law, there must be an actual residence or abode in a place with the intention of remaining permanently in the same. (See Escriche, verb. domicilio.) Thus an actual and permanent residence of ten years was necessary, under this decree, to acquire real estate in Mexico.

Actual presence is necessary to residence—2 Burrell's Law Dict., verbum "Resident;" 2 Kent 430 n.—and thus an actual presence of ten years was necessary before the grant could be made. In a legal sense, domicil is the place of a person's dwelling where he has fixed his permanent home.—Story's Conflict of laws, section 41.—Bouvier's Law Dict., verb. "Domicil."

Thus we see that a foreigner who desired to acquire property in Mexico must have qualified himself by an actual dwelling and personal residence of ten years. Now we ask, had the claimant here these qualifications at the date of this grant in Feb., 1843? As a mariner, the subject of a foreign power at this time, and but lately arrived on the coast of Mexico, can he be said to have acquired this right to take by grant? We think it bold assurance in the claimant to stand on this ground; he had shown at this date no intention of remaining permanently in the Republic; he had been but a year and a half on this coast, although he had spent some seven years in the Pacific; he was moving from place to place with no fixed abode, and was trading on the Pacific coast of North and South America. This surely would show no intention of a permanent residence in Mexico, but clearly the contrary, that his visit to the coast was made solely for the purpose of trade and commerce.

With these remarks, we submit the claim to the Board.

U. S. LAND COMMISSION.

Argument of Thornton, Williams & Thornton

ON THE PART OF THE GOVERNMENT.

LIMANTOUR vs. UNITED STATES.

[No. 548.]

The documentary evidence upon which the claim-nt relies is the letter of Micheltorena of the 8th of anuary, 1843, the Espediente discovered by Go-nez, the letter of Jimeno to Richardson of the 14th f January, and to claimant of the 2d February, 843, and finally the grant of Micheltorena and the pproval of the Supreme Government endorsed hereon, dated respectively the 27th of February nd 11th of April, 1843. On close examination of hese documents, the quick succession in which ne follows the other in order of time, the locality nd magnitude of the claim, the profound ignoance of its existence on the part of the public men nd chief officials of the Government, *the date of its resentation to this Board,* and mode in which the roofs have been conducted, are all calculated to xcite the strong suspicions of fraud which have ttached to this claim, and demand the most criti-al examination of the whole evidence offered in ts support. The three letters above referred to urnish no foundation of title, and are offered as onfirmatory evidence showing the origin of a train f circumstances which might have resulted in the rant. The letter of the 8th of January, even if it ere a genuine document, without the assertion of he power to grant lands, would afford little support to this claim, but the assertion of this power, n the manner in which it is proposed to be exerised, is, as we shall hereafter show, convincing vidence that the letter is a forgery. But even if it ere genuine, it is incredible that this letter could ave been the opening of a negotiation resulting in he grant of the 27th February.

According to the evidence, Limantour was at San edro on the 8th of January, a distance of some hirty miles from Los Angelos. It is hardly to be credited, that this letter should have been written, dispatched to San Pedro, that Limantour should have received it, accepted its invitation, traveled to Los Angelos in the rainy season, entered upon and completed large and important negotiations, drafted his proposal for lands, particularly describing them by metes and bounds, making maps of them, having his petition translated from French into Spanish, transcribed in his own handwriting, and presented to the Governor for his action, and all between the 8th and 10th of January, 1843. It is dispatch, especially considering the nature of this pretended transaction, altogether incredible, and inconsistent with the known habits of these people The letters of Jimeno are more to the point, and might furnish some support to this grant were they brought before the Board under less suspicious circumstances. Why were not these letters exhibited to Jimeno when he testified in this case? At all times he would have been the most competent witness to prove them, and especially so when fraud and forgery are charged. But they are thrown chiefly upon the evidence of Richardson and Arce. The latter is positive that the letter of the 14th January is in his own handwriting. This is contrary to the known habits of Jimeno, who generally conducted, as the archives show, his own correspondence; nor is it probable that a letter of this character could have been written by a *mere youthful assistant in the office,* such as Arce was at its date. Yet this witness is confident that the letter is in his own handwriting. We have no doubt of it. But when was it written? Upon this point he is silent. Nor does he say that the signature is the genuine signature of Jimeno, but it is in his handwriting—that is, it resembles the signature of Jimeno—a signature easily forged. Every word of this may be literally true, and the document have been written, as we believe is the fact, in the year 1852. This letter will be further noticed hereafter. The next link in this chain of evidence, is the Espediente found by Gomez in Monterey. To substantiate the genuineness of this document, and that it was properly archived in accordance with the certificate of Micheltorena, dated 20th of May, 1852, is all important to the claimant, and the evidence of the witnesses has been more prominently directed to it than to any other paper filed in the cause. The result of this inquiry has been to discredit the testimony of Gomez, and produce the moral certainty that this document was not in the archives previously to 1853, but about the middle of this year, was fraudulently and clandestinely introduced into the archives, either through the direct agency of Gomez or others in collusion with him. Soon after this pretended discovery—to wit, on the 6th of July, 1853, the evidence of Gomez is taken, in which the circumstances attending this discovery are detailed with minuteness. The signatures are proved, and the two prominent facts elicited, that the witness saw these same papers in the archives at Monterey in 1843, and was at that time acquainted with the party Limantour. So far, his testimony is consistent and apparently fair and honest, but unfortunately for this witness and for the claimant, he is recalled after the lapse of eighteen months to testify further in regard to these facts. Forgetful of his former testimony, he now involves himself in a mass of contradiction, which, taken in connection with the evidence introduced to discredit him, shows conclusively that a fraud has been attempted, in which this witness has participated for a consideration paid, or promised by the claimant. In this cross-examination he states that Arce wrote these titles, and that he recorded them; that the transaction was particularly impressed on his mind, because he received his pay out of the advances made by Mr. Limantour. This is in direct contradiction with his former testimony; true, he afterwards explains it, and applies his answers to subsequent grants, not involved in this case, and as to which he was not questioned ; and to relieve himself from this and other difficulties, he swears he did not allude to this grant, that he was not an officer of the Government at its date, that he knew nothing of it but hearsay, and that he never in his life saw the Espediente till he accidentally discovered it in the archives at Monterey, (122 cross interrogatory.) Here is a still more palpable contradiction than the other. But this is also subsequently explained, after a lapse of fourteen days ; but so explained as to involve him if possible in a grosser contradiction. At the end of the 146th cross interrogatory and answer, as appears by the note of the Commissioner, the witness requested that his deposition might be read to him, in order to "satisfy himself of its correctness," which was accordingly done. He seems at that time to be satisfied with its *correctness*. He does not discover the gross contradiction, nor seek to change it, but "now again appearing," after lapse of fourteen days, he desires to strike out t whole of his answer to cross-question 122, and i sert in its place an answer directly opposite ; a excuses himself for this bold request, upon t ground that he was sick when he gave the first a swer, and did not know what he said. How th did he remember, after fourteen days, that he h said it, without having read his first deposition, been prompted, or informed by any one of it? I possible.

This wretched excuse but involves him deep Yet this is not all. In his first evidence he prov the handwriting of Limantour, and swears that was acquainted with him in 1843. In his last dep sition, under the searching cross-examination the Law Agent, in order to acquit himself of coll sion with Limantour, he swears that he never kn this person until the Summer of 1852; a contrad tion which he has not attempted to explain. Is n all this sufficient to destroy his testimony? B not only has he proved himself unentitled to cred but is contradicted in many important particula by the evidence of other witnesses. He pretends have seen this Espediente in 1843, in the presen of Jimeno. Jimeno is dead, but he has left behi him the record of his evidence, in which he deni all knowledge of this grant. He pretends to ha discovered this Espediente after a search of *t* *hours*, in the presence of Mr. Gleason, among son loose papers *under the table* in the office of the R corder. Mr. Gleason, the County Recorder, swea that Gomez discovered this paper after a search *two days and a half, not under the table, but on t* *dresser ; not in a loose bundle of miscellaneous paper* but *in a package tied up, and labeled.* This becom important in connection with the testimony of M Johnson, (the predecessor of Mr. Gleason,) wh successively as Syndico, Deputy County Clerk County Clerk, and Recorder of Monterey, ha possession of those papers; who, according to h own testimony, frequently examined, and was f miliar with them. In 1851, under an act of the L gislature of this State, he assorted, arranged, an tied up, and labeled the papers of the archives, an placed them, so arranged and labeled, upon th dresser in the Recorder's office, where they so r mained under his successor in office.

He tells us it was impossible that this Espediente coul have been among those papers without his discoverin it, and positively it was not among the papers which h examined and arranged. And yet in the face of a this, it is pretended that this Espediente was discovere by Gomez, in a bundle which Johnson, as is show had examined, arranged and labelled. The thing is ab surd. Upon such evidence no impartial mind can doub that this document was secretly placed in the archive at Monterey by Gomez himself, in June, 1853. A shor time previous to this pretended discovery, he reveals t Mr. Johnson the existence of this claim, and declare it from his own knowledge all fraudulent, which led t another unsuccessful search by Johnson. Shortly afte is, Mr. Limantour arrived in San Francisco ; Gomez ecomes active in his interest, and suddenly, as if by agic, convinced of the justice of his claim. Why us changed ? There is but one solution of this mys-ry. His love of money is stronger than his virtue. ne further remark, and we are done with Senor Go-ez. He informs us in his testimony that he came om Mexico to Los Angeles with Gov. Micheltorena, d remained as a private citizen in this latter place r three months, at the expiration of which time, he ft for his father's Rancho, and there awaited the arri-l of Micheltorena at Monterey till August, 1843. Ac-rding to this, he must have left Los Angeles pre-ously to the 8th of January, the date of Micheltorena's ter to Limantour inviting an interview. Yet he heard iversal complaints among the officers at Los Angeles at their General had granted to a Frenchman the best rt in California ; heard it more than two months be-re the grant was made and even before the pretended terview was had which led to this result. All this is monstrous for human credulity. But the counsel the claimant relies upon the evidence of Manuel Ji-eno as sustaining that of Gomez. In what respects is confirmatory, it is difficult to perceive. He denies knowledge of this grant. He neither heard of it m Micheltorena, with whom he was in daily inter-urse, nor from Limantour, with whom he was ac-ainted. Though Secretary of the Governor, and hav- in his charge the Archives of the Government, he ver saw in those Archives any evidences of this title, heard of it from any source whatever. In the ninth d last direct interrogatory this witness is asked, Have you ever known from the Archives of the Gov-nment of California of the grants of land by Gover- Micheltorena to Limantour, adjoining the Pueblo Yerba Buena, and near the Presidio ?" He answer- "I understand that Limantour petitioned for land, *I do not know that the grant was made.* I recol-t that information was asked for some lands that Li-ntour petitioned for. I, as Secretary, asked for this ormation, but of what authority I asked this infor-tion, I do not recellect" Can this have any reference the present grant, or to the letter written by Arce l addressed to Richardson? None whatever, but nishes in our opinion the strongest evidence that the er is a forgery, and this claim a fraud. The infor-tion was asked by him as Secretary. Was Jimeno retary on the fourteenth of January, 1843, the date his letter ? He answers for himself that Arce was Secretary at Los Angeles, (3d cross-interrogatory,) l Victor Prudon denies expressly that Jimeno acted this capacity until after Micheltorena arrived in nterey ; in fact, he says that in Los Angeles there no Secretary at all. The allusion is evidently to nts subsequently made in Monterey while Jimeno Secretary, two of which are filed in this case gned by himself) on the part of the Government. could not have alluded to any grant prior to the August, 1843, for he asked the information as Sec-ry, and he never acted as Secretary until after that . If such is the fact, this is conclusive proof that the letter is a forgery, written and signed by Arce. admit, as Sanchez testifies, that Jimeno acted for a few days in January, 1853, as Secretary of Micheltorena ; the argument is not weakened, for if such was the case, it had evidently escaped the memory of Jimeno, and he testified as to "*information asked*" *by him*, when *he knew* that *he was acting as Secretary.* He cannot, therefore, have referred to any transactions had at Los Angeles, but to the subsequent proceedings at Monterey, as shown by the copies of grants filed in this case, two of which are signed by Jimeno as Secretary. The only other witness who ever saw the Espediente discovered by Gomez, is Victor Prudon, a witness who in conversation with Mr. Larkin, repeatedly pronounced this claim a fraud, and whose general character is such as to render him unworthy of credit or belief. We shall have occasion again to refer to his testimony. The next and final document is Exhibit No. 4, to the Deposition of Hartnell, purporting to be a grant in fee, without conditions, of a large and most valuable portion of the city of San Francisco and of adjacent lands, in consideration, not of four thousand dollars—not of meritorious services—but differing both from the petition and decree of concession, in consideration of *loans* made to the Government, and on this paper is the marginal decree signed by Boncanegra, purporting to be the approval of the supreme Government. Several witnesses swear that the signatures to all these documents are genuine, and even Mr. Hartnell is of the same opinion. Rarely, if ever, in a case of such importance, has the validity of a claim been rested wholly upon proof of signatures, without proof of other circumstances, such as notorious claim of ownership, possession, knowledge in the community, or at least among public men and high officials, of the existence of the grant—yet upon this weak foundation *alone*, this claim must rest. Surely, such evidence is insufficient. The history of our own country, and especially of its criminal jurisprudence, shows how easily counterfeits are made and forgeries perpetrated, with such skill as to defy detection, unless recourse is had to other evidence than the mere proof of signatures. The history of this very city within the last two years, even within the last few months, justifies the truth of this assertion. Were the counterfeit warrants upon the treasury of San Francisco, which but a short time since deluged the city, distinguished from genuine warrants by signatures or by comparisons of hand-writing ? The writers' themselves, the Mayor of the city, could not by such means know his own signature, and distinguish the true from the false, the genuine from the counterfeit. But if the validity of this claim is to rest upon such proofs as these, surely it should have been the best evidence of this class which was in the power of the claimant. Why did he not produce it? Suppose that these papers are proved to be false, and this claim demonstrated to be a fraud, could the most material of these witnesses, could Arce be convicted upon his evidence of perjury ?

In such manner have these proofs been conducted, and such the character of the testimony, based alone upon opinion, that not one of them could be convicted. Why is it that these papers are not proved by Micheltorena, Jimeno and Boncanegra ? They were all living long after the presentation of this claim, and the two former appear in this case. Jimeno is the most competent witness to prove his own acts, and where fraud is charged and the only issue the genuineness of his signature, to him is the only safe and reliable resort. That neither of the documents bearing his signature were exhibited to him, and that his answers, elicited by timid and cautious interrogatories, are sought to be extended to them only by implication, are facts pregnant with meaning. (*Vide* 1st Starkie's Ev., 489.) The certificate of Micheltorena is in the most general terms. It has no direct or necessary application to this grant. It may every word be true, and yet refer solely to subsequent grants, copies of which are filed.

This transaction, if it existed, commenced with the earliest acts of his administration. His sore embarrassments and "*wretched condition*," must have deeply impressed his mind, and in so short a time could never have been forgotten. Why then, did he not mention this particular grant, in a certificate prepared for this particular case? The grant must have been in Mexico, according to Richardson's deposition, at the date of this certificate. Why did not Mr. Limantour show it to Micheltorena, and why did not Micheltorena certify that it was genuine? Why did he not acknowledge it before Mr. Black, the American Consul? This officer was as competent to take such acknowledgment, as to make the certificate appearing on the record. It may have been necessary io deceive him, and ingenious knavery devised a plan in the general terms of this certificate. This evidence, incompetent as it is, is in keeping with the whole testimony on the part of the claimant. The certificate of Black, of Micheltorena, and Arista, all throw suspicion on the claim.

It is most remarkable, that neither Alvarado or Castro, or Jimeno, or Sanchez, or even Arce, or the inhabitants of Yerba Buena, knew anything of this grant; and passing strange, in a transaction of this importance, that the act of the Governor (as was usual in even ordinary cases) was not attested by the Secretary, particularly as the document was to be transmitted immediately to the capital of the nation for the ratification of the Supreme Government.

The evidence of Richardson and Prudon is taken for the purpose of denying the existence of the Pueblo of Yerba Buena, or of contracting its limits, for the purposes of this grant. Richardson's testimony lends little aid to this claim. Upon all other points than the one above mentioned, it is loose and uncertain. He had heard of this grant prior to the change of Government, but only from De Haro and Ridley, both of whom were dead when he testified. He saw in Mexico, in 1852, in the latter part of June, what Limantour told him was the grant, with the certificate of the American Consul. It is a singular fact that this certificate, as shown by its date, was not obtained for four months after Mr. Richardson left Mexico for his farm at Saucelito. Comment is unnecessary. Prudon is relied on, in support of the last witness, to prove that there was no such Pueblo as Yerba Buena. He "never knew that there was any thing here, but a little hamlet." There was no Municipal Hall, or Parochial Church—essentials to a Pueblo. He never heard this place called otherwise than Yerba Buena, or Loma Alto, whilst it was always customary to say the Pueblo of Son Jose, the Pueblo of Los Angelos, &c. Briefly, he never heard of the Pueblo of Yerba Buena, and yet he translated the petition of Mr. Limantour from French into Spanish, in which, *the Pueblo of Yerba Buena* is prominently set forth as one of the boundaries of the tract solicited. And again, he professes to have seen this same document afterwards in the archives at Monterey. This is a palpable contradiction, and independent of other facts, is sufficient to discredit his testimony. "Falsus in uno, falsus in omnibus," is an appropriate maxim.

Since the above was written, other evidence has been taken in this case, under the permission of the Board. But it does not vary the issues which have already been made. The deposition of Serrano, on the part of the claimant, is offered in support of Gomez. He swears to the existence of the Espediente, exhibited in the deposition of Hartnell, in his own office, in the years 1848 and '49, and from memory, without having seen it since, repeats its contents and *proves a copy*. Considering the time that has elapsed, and the fact that he only read it once, and inattentively as a document of no importance, this is a most remarkable instance of the power of memory—and the more so, when nothing else is recollected. There were other Espedientes in his possession, important as affecting interests of magnitude, bearing directly upon the rights of native Californians; yet he recollects nothing of their dates or contents; but only remembers this single Espediente, which he regarded as an "insignificant affair," and with such distinctness that he almost repeats it and proves the accuracy of the copy filed in this case. The improbability of this testimony; the reluctance with which this witness testified when interrogated by the counsel for the Government; the evasions and subterfuges to which he resorted; the ready shelter found from detection in pretended forgetfulness of all circumstances connected with the fact that this paper had been in his possession; and the contradictions in which he involved himself under cross-examination strip him of any title to credit or belief. The case is not strengthened by his testimony.

This Espediente, so seen by the witness in 1848 and '49, purports to be based in part on the "investigations and steps," taken by the competent justice. Who is this competent justice? The marginal order of reference signed by Micheltorena, is to the competent justice of the jurisdiction of San Francisco. It is not W. A. Richardson, because in the letter of the 14th of January, addressed to him as the Captain of the Port, (which office he did not hold at that time,) he is directed to associate this competent justice with him. It is not Francisco de Haro, as intimated by Richardson, because at that time, de Haro was acting in the subordinate capacity of clerk to Francisco Sanchez and Jose de Jesus Noe, who were the only competent *judges of this jurisdiction;* and they both swear that no such steps and investigations were ever had by them. The very fact that the report of the justices is not, as in all other cases, found on the record excites a suspicion which is ripened into a certainty of fraud by the oaths of the only competent justices that no such report was ever made by them, and so far from it, that until 1852 or '53, they never heard of the existence of this claim. The petition is for vacant land. The marginal decree directs the inquiry, whether or not the lands mentioned "*belong to private persons, corporation or community*"—and the result is announced *that they are vacant;* that the "*first tract* is situated *one league*, a little more or less, from the line of the Pueblo of Yerba Buena," &c. Here, if any such report was ever made, is a direct falsehood, a fraud attempted upon the Government, by which a grant is sought of lands which would not and could not be granted. It is apparent in every line of the Espediente that it was not the intention of the Governor (supposing that the papers are genuine) to grant one foot of land within the limits of the Pueblo. Yet by this false report, he is led to grant to a foreigner one half of the Pueblo lands. In a Court of Equity, if such fraud did not vitiate the whole transaction, the most that could be done would be to carry out the *bona fide* intentions of the grantor, and the parties at least would derive no benefit from the attempted fraud.

This Espediente is dated 10th of January, and is written on paper habiliated by the maritime Custom House of the Port of Monterey, for the year 1843. Benito Dias, an officer of the Custom House for that and the preceeding years, testifies that no such paper was in existence as early as any day in the month of January, 1843. If this be true, there is an end of this case. Such fraud would throw a fatal suspicion upon the whole case. The proof that this Espediente was forged, and that witnesses were suborned and corrupted in its support so taints the whole evidence on the part of the claimant, that unexplained to the satisfaction of the court, it is as fatal to the *grant itself* as though it bore directly on that instrument. "As the destruction or withholding of evidence creates a presumption against the party who has had recourse to such practice, so *a fortiori* does the *actual fabrication or corruption of evidence*." (1 Starkie Evidence, 490.)

And again, "when it appeared that on the one side there was *forgery* and *fraud* in some of the material parts of the evidence, and especially when that forgery could be traced up to its source, and discovered to be the contrivance of the very person whose guilt or innocence was the object of inquiry, in such a case I have always understood it to be an established rule that the whole of the evidence on that side of the question must be deeply affected by a deliberate falsehood of this nature."

"The natural and necessary effect of such a practice upon the minds of judges possessed of discernment and candor, is to make them extremely suspicious of all evidence tending to the same conclusion with the forged evidence, parole testimony in support of it will be little regarded; the forgery of the written evidence contaminates the testimony of witnesses in favor of the party who has made use of that forgery; and nothing will gain credit on that side but either clear and conclusive written evidence, free from suspicion, or the testimony of such a number of respectable, disinterested and consistent witnesses, speak to decisive and circumstantial facts as leaves no room to doubt of the certainty of their knowledge, and the truth of their assertions." (Ib. 490, note, §.)

But should it be said that so important a fact, as that no such paper existed as that upon which this Espediente was written, at the date upon which it purports to have been written, should not rest upon the evidence of a single witness, however honest or unimpeached; we answer that his testimony is so corroborated by circumstances as to repel the idea of mistake, or ignorance of the fact, on the part of the witness. Thomas O. Larkin, who resided at the time in Monterey, and whose business it was under the Government to show samples and instruct the citizens as to what class of paper was suitable to their various purposes, was compelled on the 15th day of February, 1843, to use the paper of 1841 and '42, "made good" for 1843, because, he thinks, no paper at that date had been issued for 1843 alone, and is confident, had it been issued, he never would have used the *old* and *rehabilated sheet* exhibited in his deposition and proved to be *genuine*. The evidence of Flemming and of Hopkins, that the archives of this Commission and those of the State in the possession of the Surveyor General of California, contain no document written upon such paper at dates earlier than March, 1843, is strongly corroborative of the testimony of Dias, and entitles his confident statement that no such paper existed in January, 1843, to full credit and belief.

The petition, beginning this Espediente, according to the evidence of Victor Prudon, (before referred to,) was written in French by Limantour, translated into Spanish by Prudon, and then transcribed in the handwriting of the claimant. The orthography and style of this document, independent of the direct evidence on the point, would trace its authorship to one whose mother's tongue was not the Spanish language. The words "*Estacado*" and "*fundadero*," used in this paper, are not proper, and hardly *idem sonans* with the words intended. In the letter of the 14th of January, written by Arce, the words "*Estacada*" and "*fondeadero*," for which the former quoted words were intended, occur correctly used. But when we come to the grant, we find the same peculiarities and blunders that characterize the petition.

How could this occur, if the grant had been written by Capt. Marcel, an educated and accomplished Spaniard? He could not have fallen into the same identical errors of Prudon and Limantour—nothing could be more improbable. Even Arce could not commit such blunders. This fact, taken in conection with the evidence of Diaz and Francisco Sanchez shows that Marcel could not have written the grant, and is equally conclusive to show that *it also was written by Limantour and Victor Prudon.* Other similar instances are to be observed in this grant, such as "podro" for podra, "Liñea" for Linea, and "Val*i*dero" for Val*e*dero. This last follows the *French* spelling of *Valide*. But in other respects this claim is also shown to be a fraud. It is shown by the direct admission of Limantour to Alfred Green, and by the fact, as proved by various witnesses, that many grants were made by the officials of the Mexican Government, within the limits of this claim, as of vacant land, both before and after the date of this pretended grant; and that Limantour himself, as late as the year 1844, was a petitioner to Alcalde Hinckley for a lot within the heart of this claim. All this is totally inconsistent with the genuineness of this grant, or any claim of ownership by Limantour till after the change of government.

The evidence of Halleck, Davidson, Bolton and Parrot, proving the admission of Jouan, as the agent and accomplice of Limantour, supported as they are by incontrovertible facts, as the existence of the note for $20,000, and the alteration of the grant in No. 549, apparent on its face, furnish us with a true history of this bold and audacious fraud; and if considered by the Court as admissible testimony, is sufficient in itself to defeat the pretentions of the claimant.

We hold that the note itself is evidence of Jouan's interest in this land, and establishes his complicity with Limantour. It is true, that the transcript from the Recorder's office, purporting to be a copy of this note, is not admissable in evidence, to prove the contents of the note, as there is no law requiring such an instrument to be recorded; but it is evidence of the fact, that such a note once existed, and was spread upon the records of that office. (Beall *vs.* Dearing, 7 Ala. Rep., 127 and 128); and Parrott proves that the record in that office was a true copy of the identical note placed in his hands by Jouan, and acknowledged by Limantour in conversation with him. Should the Court be of the opinion that this note is properly proved, and that it has the effect contended for, and establishes the agency and complicity of Jouan, then the admissibility of his admissions in evidence is based upon such well-established principles of law, that a reference to authority is hardly necessary. The cases of the American Fur Company *vs.* the United States, (2 Peters, 364 and 365,) and Harriman *vs.* Brown, (8 Leigh, 697,) are sufficient.

Before closing this review of the evidence, it may be proper to notice the deposition of Gonzales. We did not at first think it at all necessary to do so, because its weight is entirely destroyed by its own contradictions, and the conflict between it and all the other evidence in the case. He states that upon his own application for a grant of land, near the northwestern corner of what is now known as the Plaza or Portsmouth Square, it was refused, because as Micheltorena told him he had already granted it to Limantour.

It is difficult to ascertain from this deposition at what time this conversation took place; in one part of it the witness says it was shortly after Micheltorena went to Monterey, and in another, that it was just before he went out of office. Between these two periods there is a space of more than a year. Again he represents Jimeno as reporting upon his petition, and as delivering him the refusal of the Governor, based upon the fact that the land had been previously granted to Limantour. This is in direct conflict with the testimony of Jimeno, who never, either from the Governor or the records of his office, or from any source whatever, heard of this pretended grant to Limantour.

The whole story of this witness is badly concocted. It was necessary to show some inducement to this conversation, and nothing is more difficult than to lay a solid basis for an untruth, and harmonize a false statement in all its parts. The inducement in this case (which was the rejection of witness's petition) and the reason assigned for the refusal by the Governor, were most unfortunately selected. By reference to Whitcomb's map, and other evidence in this case, it is apparent that the land sought by Gonzales is not within the limits of this claim, and the ownership of it has never been pretended to by Limantour. The Governor therefore, could never have refused the petition, on any such ground. This deposition, independent of the above objection, is rendered suspicious by the fact that the documentary evidence of this proceeding, the witness glibly tells us, he himself destroyed, and that too without any apparent reason, unless it be to destroy the surest means of his detection.

No intelligent and candid mind can read the evidence in this case without perceiving that it rests mainly upon the support of Gomez, Prudon, Richardson and Abrego; and without inquiring what Richardson and Abrego were doing in Mexico, where Limantour resided in 1852, the time at which this title is supposed to have been fabricated? The fact that they were there, the nature of their evidence, in connection with the admissions of Jouan, arouse more than a suspicion that they are secretly interested in this claim, and are deeply implicated with Limantour in this whole transaction. If the evidence of Halleck and Davidson is admissible, it convicts them of this complicity; and the admissions of Jouan are entitled to the more credit because under all the circumstances detailed they are the best evidence the nature of the case will admit. Were Jouan here, under the evidence in this case, he could not be compelled to testify; no man can be required to prove his own guilt, or to subject himself, on his own testimony, to a criminal prosecution. His complicity in this fraud renders his admission not only the best, but the only, evidence that could be had.

Such is the view that we have taken of the evinence in this case, and we cannot think that this honorable Board can ever find in it the basis of a favorable decree.

There is a further view, which we now proceed to present, tending as we think to the same conclusion.

There exists in the whole transaction, from its very inception, intrinsic evidence of its fraudulent concoction, long after Micheltorena had left California, and long after both he and Bocanegra had gone into retire-ment. The foundation stone of this transaction, *i. e.*, the letter of the 8th of January, 1843, from Micheltorena to Limantour, is laid in the assertion of a power of Micheltorena, which he never possessed, and which he never would have dared to assert, whilst he was a subordinate officer of the Government under Santa Anna. Whatever he may have done since, in his old age, and in his poverty and obscurity in Mexico, his whole course of conduct as Governor, and that of all the Governors of California who succeeded him, prove that he did not have this power to sell the public domain to a foreigner. His own construction of his power in this regard, appears in the case of Pedro Sainsevain, No. 283, in the commission. This assumed right of Micheltorena lies at the foundation of the claim. An Espediente of it has no existence in the archives of Mexico, where alone it could have been originated, and completed, as an act of the power representing the sovereignty or the nation. It was impracticable to have foisted, at the late date of the concoction of this grant, any such proceedings into their proper place, the archives of Mexico. It became necessary, then, to establish such a power in Micheltorena. Hence, the letter purporting to be written by him, dated the 8th of January, 1843, is made to assert the ample power in him, to sell the public domain to a foreigner. Now we will enquire, where did he obtain that power? Not in his instructions of the 11th of February, 1842. They did, we admit, give him some extraordinary powers, as the removal of public officers and the appointment of others in their place, of which he is required to give a full account. As to the supply of his troops, which is the feigned pretext of this grant, those instructions provide the mode of such supply, which he, in fact, adopted, by drawing drafts in payment therefor, upon the treasury of the nation. As to the exercise of the high prerogative of sovereignty, a sale of the public domain of Mexico to a foreigner, it cannot be deduced by the most constrained interpretation, from those celebrated instructions. But, if it could, it is expressly taken away and committed by Santa Anna's decree of the 11th of March, 1842, promulgated before Micheltorena left Mexico for this department, to the exclusive action of the Supreme Government. In direct repugnance to this law, by this letter of the 8th of January, 1843, Micheltorena is not only made to assert this power in himself, but a license from Bocanegra, dated the 7th of Oct., 1843, is introduced, purporting to be made in accordance with the 9th article of the decree of the 11th of March, 1842, which is relied upon, and expressly made the basis of a batch of grants, filed by the present claimant before this Board, as made by Micheltorena; in which grants he recites this license, as giving him the authority to dispose of the public domain to this foreigner. Now, this attempt to sustain the grant by force of the letter above mentioned, and of the license to Limantour to purchase and hold lands in the Department, is a blundering device, founded in such a misconception of the true meaning of the instructions of the law, as to stamp the transaction with fraud and forgery. Who can believe that Micheltorena, acting as Governor under Santa Anna, would have been so ignorant as to make a mistake in the construction of the decree of Santa Anna in regard to the disposition of the public domain to foreigners. By an examination of the decree, on the 9th section of which this license is founded, it will be manifest that the section itself has reference only to the acquisition of *private property*, by purchase of *private individuals*, and has no relation to the public domain. Not one section in that decree, but the 12th, makes any mention of the public domain, and that expressly *forbids* its distribution, except by the Supreme Government, as the *representative of the sovereignty of the nation.* The law would be wholly inconsistent with itself, if any other construction were put upon it. As an authority to a foreigner to purchase and sell real estate in this Department, bordering on foreign nations, the 9th section is a sensible restriction upon the general authority, given in the 1st section; but if construed to authorize a grant by the Departmental Government of the public domain, it would be wholly inconsistent with the 12th section, which reserves the power to grant it to a foreigner, to the Supreme Government, in all the Departments of the Republic, whether bordering on foreign nations, or on the sea-coast, or not in either predicament. By examining all the sections of this act of the 11th of March, 1842, it will bear no other construction than this, that all its sections from 1 to 12 relate to the purchase of private property, and that the 12th alone refers to the public domain.

It must be borne in mind that, prior to that Decree, foreigners could not acquire, except as "Colonizadores," under the various Colonization Laws, any real estate in Mexico. This is expressly declared by the 13th section of the "Ley Constitutional," quoted on the 668th page of Escriche, title, "Estranjeros." In the same author, same page, that very law is declared to be repealed, and by reference to the title there referred to, it will be seen that the repealing law is that of the 11th of March, 1842. (See Escriche, title "Natural," page 1279, and paragraph commencing "Los estranjeros gozan en la republica," &c., and ending "En estas reglas no estan comprendidos los colonizadores.") If the law first above quoted from Escriche relates only to private property, that which repeals it can refer only, of course, to the same. The conditions and limitations of the property named in the various sections of the law of the 11th of March, 1842, as in the 3d and 4th, show conclusively that reference is only made therein to private property; and the 9th section, whatever it may have promised as to the future colonization laws, declares that nothing shall ever permit such acquisition of property by a foreigner, within the Departments therein mentioned, unless he be expressly licensed by the Supreme Government. At all events, the 12th section of said law, as it has always been understood and acted upon, prevents any foreigner from acquiring the Public Domain, except by *direct application to and contract with* the Supreme Government at Mexico.

This bungling and forced construction was never put upon the instructions nor the law of 1842, by Bocanegra and Micheltorena, nor would Micheltorena, whilst he was Governor of California, have ever ventured upon the disposition of the public domain of Mexico, under a license issued under the 9th section of the act of the

11th of March, 1842. But as much is done by the participators in this scheme, as could be done at the late period of its concoction, to avoid the difficulties in the way. This celebrated letter of license from Bocanegra to Limantour, of which no trace is found in the archives of California or Mexico, attempts to reach back and to go beyond its proper subject (which was a mere license to Limantour to buy private property), and to embrace the present claim now under consideration. This may have been considered a master-stroke in the concoction of this fraud. All, however, will not do. If the Departmental Governor had no power to grant or sell the public domain to a foreigner ; then the contract for the disposition of it, by the sovereign power, should be monumented among the archives of the Supreme Government at Mexico. The grant to Austin in Texas is there found. The grant to Garay, under the Provisional Government of Santa Anna, which is similar to this, is also there found, as the history of the country will show ; but this transaction has no trace of its existence in those Archives. If there was, it surely would have been, as it ought to have been, produced by the party whose rights depended upon it.

If the proceedings of Micheltorena, which are insisted upon as conferring a full and perfect title, as in form of language they do, were in truth ever adopted by the Supreme Government, as *its contract* with Limantour, still that contract, when so adopted, belonged to the archives of the Supreme Government, which alone could make the grant.

The document called the ratification of the grant of Micheltorena, which ratification or marginal decree, is dated the 18th of April, 1843, as I understand it, reaffirms the power of Micheltorena to make this grant, "as based upon pre-existing lawful provisions, and granted to the local authority of California." Now, Bocanegra, as he valued his political existence, nay, his natural life, would never during his official position, have made such an assertion. Indeed, it may be regarded as a kind of *semi-official* decree, as it wants the universal caption of its official execution. He may have asserted power in Santa Anna to do such an act, but never, that it existed in his subordinate officers. The power in this case to grant by Micheltorena, is claimed as a power derived to him, from Santa Anna. The futility of such a pretension we think is fully exposed. But we think that even Santa Anna himself could not have disposed, at the date of this pretended grant, of the public domain to a foreigner. Every Constitution of the Mexican Government, as that of the United States of America, prohibits any disposition of the public domain except by Congress, or, which is the same thing, in accordance with laws enacted by it. Congress in Mexico, is the representatives of sovereignty. The laws of nations alway attribute to that sovereignty the right of disposing of the public domain. See Vattel, 226, where the same language is used which is adopted in the 12th section of the Act of the 11th of March, 1842. That section declares that as to the public land of the whole Republic, it shall only be disposed of to foreigners by contract with the Supreme Government, as the representative of the Nation. So far as relates to the disposition of the public domain to foreigners, Santa Anna himself has thus limited that power to the Supreme Government.

We are warranted in declaring, that by the basis of Tacubaya of the 28th of September, 1841, Articles 6 and 7, and by the Convention of Estanzuela of the 6th of October, 1841, this grant should be now held void, even if made and signed as the grant made by Santa Anna was, in a case perfectly parallel with this, to wit, the grant to Garay. The interpretation of those fundamental laws of the Mexican Government, as made by themselves, ought to be regarded as the best exponent of this meaning. In the statement made by the Mexican Government with regard to the Garay grant, which was the subject of a National controversy between the United States and Mexico, that Government announced two propositions ; *first*, that the acts of the Provisional Government in force during the suspension of the Constitutional rule, although legitimate in their origin, were subject to the approval of Congress. *Second*, that those acts were void, at least those which disposed of the public domain without the ratification of Congress. See for the basis of Tacubaya, and Convention of Estanzuella, volume of Decrees and Orders of the Provisional Government for the years 1841 and 1842, pages 4 and 5. For the Decree of the 11th of March, 1843, see the same volume, page 374–6 ; also Rockwell, 611, for the translation of said Decree. (Instructions to Micheltorena, Wheeler's Land Titles in San Francisco, 118.)

This claim is relied upon as being a full and perfect grant by Micheltorena, under ample power to make it ; and also that it has been properly confirmed, by the Supreme Government of Mexico. Now, as a grant by Micheltorena, without any other intervention, it is a perfect nullity, being a grant of public domain (not under any colonization laws) to a foreigner. As to its confirmation by the marginal decree written upon it, as is pretended by Bocanegra, if Micheltorena had any power to make such a grant, it might be admitted that its *proper ratifications* would be good ; but in this case, as the law then stood, he could not take even *the initiative* of a grant, much less make a perfect one. The 12th section of thr above recited Act of the 11th of March, 1842, declares that the whole procedure in such a case is by *contract* with the Supreme Government. As remarked above, the archives of that Government is the proper depository of its own contracts. It has no place in the archives of the Departmental Government, because its subject is expressly withdrawn from its jurisdiction ; and if found there, has been foisted into them. As a contract between the Supreme Government and Limantour, its constituent part should, and would appear in the archives at Mexico. That marginal decree, if it be considered as connecting itself with the acts of Micheltorena, and thus forming a contract, ought, together with the entire negotiation, which are parts of one whole, to be found in the archives at Mexico, just as if it had been such a formal contract as is required by the 12th section of the Act of the 11th March, 1842.

We will notice, in conclusion, the general objection to the testimony taken on the part of the Goverment by the claimant, made at the taking of the depositions, and called to the attention of the Board at the submission of the case. We understand this objection to embrace the following enumerated heads of evidence: The statement of many of the old inhabitants of the Pueblo, that they never heard of this pretended claim until its submission to the Board in February, 1853; the acts of Limantour in not claiming the property for the space of ten years, whilst valuable improvements were being made upon it, under public grants to individuals, which improvements were made under his eyes; his application to an authorized public officer for a lot of ground within the bounds now claimed by him; his attempting to prove documents signed by Micheltorena, Bocanegra, and Jimeno, by other persons, instead of showing them to those parties, who were equally accessible as those to whom he resorted, especially in the case of Jimeno, who was examined as a witness. Now, the broad proposition that negative evidence cannot prevail over positive, is not tenable; (see 1 Starkie, 518; but furthermore, there is a wide distinction between what is commonly called negative, as opposed to positive evidence, and circumstantial evidence of positive facts, which conduce to establish the negative of a given proposition. The proposition alleged on the part of the claimant is, that his grant is a genuine one, made at the time and by the persons, as it purports. Our proposition is, on the contrary, that it is not genuine, but is either forged out and out, or written upon paper abstracted from the archives over genuine signatures and ante-dated, or concocted by a joint conspiracy in fraud of the Government. All the proofs of this character, which we rely upon to support our proposition, are proper, according to the rules of evidence as laid down and recognized in the following authorities: 12 Wheat., 585–6, particularly in the last paragraph of the opinion of the Court; 1 Starkie, 484, 486, 489, 490, and note. As to the statements and admissions made by Jouan, we have endeavored to lay the foundation for their introduction, by proving his complicity with the claimant. If that preliminary be established, then his admissions are competent, for he could not be compelled to testify if he were here, to his own infamy. 8 Leigh, 679, cited in 1st Supt. U. S. Digest, page 705, section 1124. The evidence of Parrott and others has already been commented upon, as laying the foundation for the introduction of Jouan's admissions. The principle of law authorizing the introduction of Jouan's admissions, is the same upon which Limantour's are received. That principle is, that confederates in an unlawful act constitute one individual, body or person, and his being an agent, is not at all incompatible with his being a conspirator. If he acted with the mind, in conjunction with Limantour, to accomplish the same end, which he was as here, interested in accomplishing, he is an accomplice to all intents and purposes, as well as an agent or tool of the chief beneficiary in the unlawful project. See 3d Greenleaf Evi., page 82, paragraph 89, for the definition of conspirator; as also 2 Peters, 365. The admissions are part of the *res gestæ* in this case; because the purpose was not the mere forgery, but through that as a means, to procure a confirmation of the claim; and the time, from the inception to that consummation, is the scope of the transaction, and embraced by the term *res gestæ*.

But even if the claim should be held to be valid, two questions arise in this case which will next be considered in connection, touching the construction of the grant, and the extent of its confirmation by this Board.

First. Is not the grant in this case by a just construction, clearly of property outside of what was called in this petition and grant the Pueblo of Yerba Buena, since called San Francisco. And, secondly, whether this *Board* will take jurisdiction, so as to confirm to the claimant in this case any parcel of land within the limits of San Francisco, as *it* has held them to have been established by the public acts of the former government.

On the first question, the claim as presented shows that there was a regularly established Pueblo of Yerba Buena at the commencement of the pretended Espediente on the 10th of January, 1843; and that the pretended grant is of nothing inside of that Pueblo. There must be conceded, according to the petition, concession, grant and authentication of it by Bocanegra, to have been at that time a well known established and recognized Pueblo of Yerba Buena; so known and recognized by the claimant, and by both governments, Supreme and Departmental. If such Pueblo existed, which must be considered as true, (if this whole matter is not a forgery,) then its southern boundary line constitues the northern line of this grant; and this Board, if it should declare the claim to be valid, must limit and confine the same in their confirmation, to such land as lies outside of and to the south of such Pueblo boundary. It cannot be a just and proper determination of the limits of the Pueblo, to measure four hundred varas from Richardson's old house, in any direction, and fix the Pueblo line east and west, or northeast and southwest from the end of said four hundred varas. For the Pueblo line is the controlling call in this grant, and the distance of it, from Richardson's house, is a mere matter of subordinate description. If the said four hundred varas fall short of the Pueblo line, or overgo it, still the Pueblo line must be the line of the grant. Is the line of the Pueblo to be considered as located by the call of four hundred varas from Richardson's house, or is the land granted to be located by the Pueblo boundary? The Pueblo boundary is supposed in the grant to have an independent existence, already created and established by such public decrees and action of public functionaries, theretofore put into requisition, according to the laws of the country; and the call of distance from Richardson's house must yield to that established Pueblo boundary wherever it may be. [7 Wheaton, 7. Peters, 218.]

The Pueblo of Yerba Buena (as all legal Pueblos) was laid off, if the nature of the ground would permit, so many leagues in each direction towards the cardinal points, from some actual point, as a plaza or custom-house, or chapel, or presidio; and the petition and grant in this case describe the northern line of the grant, as extending along the southern boundary line from northeast to southwest, the distance of two leagues.

But it may be asked, where is that boundary of the Pueblo? This I admit is an all important inquiry in considering the second question above stated; for if this Board cannot confirm to a private claimant any land within the city limits, as established by the Mexican Government prior to the 7th of July, 1846; then the jurisdiction of the Board, which must be determined by and for itself, must be settled by considering the public acts and decrees of a former government, regulating the matter. 1 Greenl. Ev. 8. 1 Strange, 469.

A Pueblo is a public, political, territorial demarkation, which must be judicially noticed by the Board, whenever the decrees and documents establishing it, are brought to its knowledge; just as a Common Law principal, found in books of recognized authority on the English Law; and once known, are not to be proved in every case where it may arise, like private facts, or matter in pais. The effect of the 14th section of the act of 1851, is to require the Board to fix the boundaries of towns in such manner as is satisfactory to themselves, upon the best lights of decrees, and authentic acts of the former government, which they will notice judicially, when brought to their knowledge; so that the question of jurisdiction, may not be fluctuating in each case and cause them to exclude from their consideration a claim to land in one case, as being within the Pueblo, and take cognizance of a claim for land adjoining it, although in fact in the same predicament with regard to the Pueblo limits. It is apparent that a large portion of the grant in this case is within the limits of the Pueblo, as established by the public decrees and records of the country, brought to the knowledge of this Board, and recognized as authentic in the *claim* filed by the city of San Francisco; the decree for which is filed in this case.

If however it should be considered by the Board that the true construction of the grant is not to embrace lands only outside of the Pueblo limits, but that it embraces land within its boundaries as above recognized, we think it can be demonstrated that this Board has no jurisdiction as to that portion of the land claimed, lying within the Pueblo limits, as thus recognized by this Board. This depends upon the construction of the 14th section of the act of 3d March, 1851. We will endeavor to maintain that the fact of the land being claimed by a grant from the *government*, and not from the *corporation*, does not alter the matter; but that all lands lying within the Pueblo, as established by the Mexican Government, are excluded from presentation to this Board, by the individual owner for a portion thereof.

It is enacted in the first part of said section 14th, that if a town be constituted in California with the powers and rights, and in the mode known to the former laws of the country prior to the 7th of July, 1846, no claim to lots derived from such corporation shall be presented to the Board. But it is apparent, if that were the extent of the enactment, it would leave a necessity to present by the individual owners, all claims to such lots within the limits of such town, which claims were not derived from the *corporation*, but from the government directly, either before or after the legal establishment of the city. This would lead to the inconvenience which was intended to be avoided, of incumbering the Board with such a vast multitude of claims. To obviate that great inconvenience in the same sentence of the section the necessity of the presentation of such claim is removed, by extending the exemption in the following words: "Nor to any city, or town, or village *lot*, which *city, town* or *village* existed on the 7th of July, 1846; but the claim for the *same* shall be presented by the corporate authorities of the said town." And here it may be remarked that the word *same* must mean the *same city*, &c.; for the construction that the word *same* relates to its more remote antecedent "lot," would let in all the inconvenience intended to be avoided, and only change the name of the claimant, without diminishing the number of cases.

This presentation by the corporate authorities was never intended to have the effect of taking away a right of property from a lot holder, derived to him from any competent authority, other than the city; but the presentation by the city, and proof of its existence as such, shall be *prima facie* evidence as against the United States of America, of all right; upon which she will release all claim within the city limits, leaving the rights of all persons claiming property within those established limits, to be tested and tried before the regular tribunals of justice. Not that a title to any lot within the city derived immediately from the Government of Spain or Mexico, is to be held void, or transferred to the corporation; but only that so far as the United States is concerned, the matter of individual right, is to be held, just as if the act of 1851 had never been enacted. It takes away the jurisdiction of the Board without taking away the rights of any parties. This view of Section 14 of the Act of 1851 is clearly manifested (as is humbly conceived,) by the provision made for the class of towns, situated on land originally granted to private individuals; in which case, the claim for the whole city is to be presented by the original grantee; though in this class *all the lot holders* may claim by deeds directly from the owner of the land, who is the founder of the town, and *none of them* from the corporation. Here, in this class, as *far as the city extends*, the United States requires no proof of the grant; it is to be taken *prima facie as valid.*

Outside of the city limits the claim must be held by the Board to be valid or not, according to the principles of decision laid down in Section 11th of the Act. The claim of Limantour so far as any portion of it is within the city, is not within jurisdiction of the Board. But if his claim is valid for any property in the city, he may bring suit in the ordinary tribunals of the county for lots within the city, just as if the Act of 3d March, 1851, nor any law like it had ever been passed. It surely never was intended to defeat any private right which existed to any property which lay within *the limits* of the city, but only to declare, that to *that extent* the United States would assert no claim; and to simplify the action of the Board by preventing the infinite number of town lots being presented. As regards the last class of towns mentioned in the 14th Section, which embraces only towns coming into existence after the 6th of July, 1846, and before the passage of the Act of 1851, no matter whether on public land or covering land, contained in one or more grants, the claim for all within the city limits is to be presented by the corporate authorities.

The 14th Section of this Act is not based upon the idea that all the lots in the towns of California were, at the date of the Act or at any time before, the property of the corporation. The object of that Section was: First, to prevent the presentation (as required by the 8th Section of that Act,) by every person claiming *any*, even the *smallest* town lot, as it would greatly encumber the proceedings of the Board and increase the costs of the claimants; Secondly, to declare that so far as the United States was concerned, she would *presume* a grant of the land *at least* to those towns which existed prior to 7th July, 1846. This liberal provision in favor of all her citizens thus congregated into a town is one familiar with our Government. It is for the benefit of the whole country that towns should be encouraged, as they make the public domain in their vicinity more valuable, and advance the interests of manufactures, and of agriculture, by furnishing a certain and regular market for their productions.

If the limits of the Pueblo have not been satisfactorily established as a matter of law, which the Board will judicially notice in every case by a *distinct* and *precise* location, at least, enough is established to see that a large portion of this claim is within what *they* have considered *without doubt* to be its limits; and the decree if they should consider the claim valid at all, should only confirm *that portion of it*, if any, which is *outside* of those limits.

Here is another legal point applicable to the facts of this case, which will now be considered. This pretended grant was made on the 27th of February 1843.—The neglect to take possession of, or even to make known to the community, the existance of a claim to land, which may well have been selected for its great prospective value, until within one month of its bar, for *non presentation*, viz: 3rd March 1853, is not only morrally incompatible with its genuiness; but even if genuine in its origin, ought to defeat the claim, on account of its *abaadonment*. The abandonment of anything, so as to authorize the belief of third parties that it has no owner; and being so derelict, may justify them in acquiring it, is a distinctive ground of law affecting property in all countries. The length of the time of disusage, necessary to lose a right once existing, is prescribed by the laws of some countries, and differs in extent; as there is also a differance in the manner of acquiring such property by third persons· The Supreme Court of the United States in many cases decided under acts of Congress carrying out former treaties for territory acquired from foreign governments and in the case of Fremont, have established the doctrine of abandonment. Their decisions related to the neglect in performing conditions precedent to the passing of the legal title, except in the case of Fremont, where it is recognized, as applying to property held by a full legal title. The length of time necessary in the opinion of the Supreme Court to constitute such abandonment, has not been definitely settled. Perhaps, length of time, ought not to be of itself,the sole criterion, but other attending circumstances ought to be taken into the account; and in many cases, those circumstances are more indicative of abandonment, than the lapse of time itself. It is not like the statute of limitation, where a specific time is prescribed, and made to bar aright. But its essence consists, in the intention, as deduced from the facts of the case, not to count the property, or care for it any longer,as his own. The definition of abandonment, as given in Leys 49 and 59 title 28 part id.3, is, as translated, in the following words: " If a proprietor abandon voluntarily anything whether real or personal property, with the mind of counting it no longer in the number of his goods, on account of its being useless, or troublesome, or from mere caprice, he shall lose his right,and it shall become the property of the first one, who may occupy it."—The circumstances in this case, the pretended grantee being, as the grant shows, a resident, furnish as strong grounds to declare the property abandoned, as exist in most of the decided cases, The proof shows every opportunity of exercising acts of ownership and declaring his right of property. He was on the ground at different times, in 1844 and 1847, and if ever he made known any claim, it was done in secret, and to two persons only, both of whom are long since dead, viz: Dr. Haro and Ridley, whose statements must be repudiated as mere hear-say now detailed by Richardson, who strange to say, was himself mute upon the matter, tho' residing all the while in the midst of those who were buying, and building on the very property, as they derived it from the City of San Francisco.

There is one matter connected with this grant, which ought not to be overlooked, that is, the want of the attestation of the Secretary of the State. By the law of 1837, it is required that the official acts of the Governor in this regard, should be attested by Secretary of State. Under this act, it is just as necessary for the Secretary to attest, as for the Govorner to sign. In the absence of that attestation, the grant is insufficient to transfer the legal title. The pretended ratification of Bocanegra, nor his license to Limantour (if it had any legal bearing upon this grant,) nor the celebrated instructions of Micheltorena did not create any *new granting power*, nor dispense with the prescribed mode of making a grant of the public domain. Under the colonization law or Ordinance of 1828, such omission might be sustained, by the letter of that Ordinance, which required the signature of the Govorner alone. But this grant is not pretended to be made under the colonization laws; and falls under the general law of 1837, prescribing the duties in this regard, of the Govorner and Secretary. If the grant is a nullity, as a transfer of the legal title, where will we look for those *Equities*, which would still, under the act of 3rd March, 1851, authorize its confirmation. As to Limantour's advances of money and goods to Micheltorena, if not paid for in the mode indicated in the instructions to him, nor in some other way by the Mexican government, which has been done long ago—the equity of such debt, may be good against Mexico; but does not attach to this *land*, transferred without any notice, to the U. S. and to her citizens, who long before this claim ever saw the light, purchased and improved it.

THE LIMANTOUR CLAIM CONFIRMED.

JUDGE FELCH'S OPINION.

Jose Y. Limantour vs. *the United States.*—For four square leagues of land in San Francisco county.—The petitioner claims two parcels of land situated in San Francisco county, each containing two square leagues, and described by metes and bounds.

In support of his claim he has given in evidence a document purporting to be a grant made to himself in consideration of money and goods furnished for the use of the Government, by Governor Michael Micheltorena, on the 27th day of February, 1843. On this docement, in the margin, is a written approval, by the Supreme Provincial Government, and of a confirmation to said Limantour of the granted premises. This decree or certificate is dated April 18, 1843, and is signed by Bocanegra, at that time Minister of Foreign Affairs of the Government.

The genuineness of the signature of Micheltorena is sworn to by W. E. P. Hartnell, Isaac D. Marks, Francisco Acre and Victor Prudon; that of Bocanegra is substantiated by the testimony of said Marks, Jose R. Gozales and Jose Abrigo.

In further support of his claim, and to show the making of the grant at the time it bears date, and for the consideration therein expressed, the petitioner has presented the following evidence:

First—Proof that Governor Micheltorena arrived at Los Angeles to assume the Government of California, with a force of some five hundred men, in August or September, 1842; that he continued there until the month of August following, when he went to Monterey, where he remained exercising the functions of Governor until he left the country, on the 26th day of March, 1845; that while at Los Angeles he was in want of means to support himself and his followers, and that he made many grants of public lands while he remained at Los Angeles. These facts are substantiated by the depositions of several witnesses.

Second—A letter from Governor Micheltorena to Jose Y. Limantour, dated Los Angeles, January 8, 1843, stating his want of resources, and that he has been informed of his arrival, and that he has in his possession money and merchandise, and he proposes to make an arrangement with him for a suppiy of such as he needed. "I will give," he writes, "in payment sight drafts payable at Mazatlan, by the house of Becher & Co. I further promise to secure to you the contracts of all that which the Department may require, and also that which you may want for your vessel to carry a profitable trade. I will use my best endeavors so that you may realize great advantage; should you prefer lands in this country, I can give you such as you may select, and which are vacant, as I have full powers to that effect in both the Californias; and that above all, it is necessary for my troops and myself to live and to extricate ourselves from this wretched condition." The signature of Micheltorena to the document is proved to be genuine by the testimony of W. E. P. Hartnell and Thomas O. Larkin, and Victor Prudon swears that he took the letter from Los Angeles and delivered it to Limantour at San Pedro, where his vessel was, at or about the time of its date; that Limantour understood the Spanish language but imperfectly, and at his request the witness read the letter to him, and Limantour returned with him to Los Angeles, and there completed arrangements with the Governor to furnish supplies.

Third—A certified copy of a communication from Bocanegra, Minister of Exterior Relations and Government at Mexico to Governor Micheltorena, stating that an official note of Micheltorena, inclosing the memorial of Don Jose P. Limantour, soliciting permission to acquire property in the Department of California, had been laid before the President, and the latter, "in consideration of the good deportment and services which this foreign individual has rendered to that very Department, and conformably with article 9th of the Decree of the 11th March of the year last past, whereby the Government reserved to itself the power of granting to foreigners that sort of permission, has been pleased to grant to him, the said Limantour, sufficient leave, that he may acquire, besides the property which he has already acquired and has been recognized by the Supreme Government, further country, town, or any other kind of property, conformably with the said Decree and the laws of Colonization." This order bears date October 7, 1843, and the copy thereof which is here produced prepared for the petitioner as evidence of his rights, (the original being retained in the archives,) is signed by the Governor Micheltorena, and by Jimino the Secretary, and bears the date of December 25, 1843. The genuineness of the signature to this certificate is proved by W. E. P. Hartnell.

Fourth—A copy of an Expediente, the original of which is proved to be in the office of the Recorder of Monterey county, consisting of a petition to the Governor by said Limantour, for a grant of the land claimed in this case, dated January 10, 1843, a marginal decree by Gov. Micheltorena, made on the next day, referring it for information to the competent Justice, and a decree reciting that, by the proper investigation by the Judge, the land appears to be vacant, and directing title for the same to be issued to the petitioner. This decree of concession is dated February 25, 1843, two days before the date of the grant to Limantour, which is given in evidence. In his petition to the Governor, Limantour proposes to purchase the land described, and offers as a consideration therefor, to deliver to the Departmental Treasury a receipt for the sum of four thousand dollars, on account of "a larger amount due to me from the Public Hacienda;" and the grant is accordingly made "in consideration of the good services which he has rendered to the Department."

The original Espediente in the Recorder's Office, was examined by the witness Hartnell, who testifies to the genuineness of the signatures thereto, and further says that the body of the two decrees, as well as the signatures thereto, are without doubt in the proper handwriting of Gov. Micheltorena.

Fifth—An official communication from Manuel Jimeno written by order of the Governor, to William A. Richardson, Captain of the Port of San Francisco, dated Jan. 14th, 1843, requiring information relative to the lands bordering on the Bay of San Francisco and those pertaining to the Pueblo of Yerba Buena, and requesting that he furnish a map thereof. This document proceeds as follows: "Capt. Don Jose Y. Limantour has asked by way of payment to be granted a tract of two leagues long by one wide, a little more or less, in the lands that he says do not appertain to the Pueblo de la Yerba Buena, its boundaries commencing about four hundred varas from your house, beginning from the side of the same beach, where it turns the whole side to two hundred varas distant from the Mission; and besides, Capt. Limantour asks one league of land wide and one and a half long, commencing from 'La Estacada' or 'Fondcadero Antique;' taking along the beach to the northwest, turning to the 'Punta de Lobos,' and following to the northeast along the beach of the Castle, leaving the tract which said Castle occupies distant two hundred varas, and following the beach to the 'Estacada,' where it began." The genuineness of Jimeno's signature to this document is testified to by said Richardson, who also testifies that he received it in the same month in which it is dated, that Francisco de Haro received one of the same tenor at the same time; that he (Richardson) wrote the Governor in answer to the communication, and forwarded to him therewith a map of the place, which was a copy of an original map here presented and made evidence.

Sixth—Jose Abrigo swears that all the accounts of receipts and disbursements by Governor Micheltorena, passed through his hands, as the Commissary of the Department in 1845; that a list of such receipts and disbursements was put into his hands and examined by him, and among them was the account with Limantour; that by it, it appeared that Limantour had advanced to the Government some sixty or seventy thousand dollars, and had received in drafts on Mazatlan either $56,000 or $66,000; that there was an item of credit in Limantour's account for a certificate for lands in Upper and Lower California, for upwards of $6000. The witness further states that, on the written order of the Governor, he gave to Limantour a certificate that he (Limantour) had received a specified sum, upwards of six thousand dollars, in money, for certain lands which had been granted to Limantour, and for which titles had been issued by the Departmental Government. This certificate was given about a year before Micheltorena left the country. The witness further states it was given to enable Limantour, who was about to leave for Mexico, to obtain the approval of his grants by the Supreme Government.

Seventh—Testimony tending to show that Limantour in fact did advance to Governor Micheltorena money and goods at Los Angeles, at or about the time the grant bears date, as indicated by the documents and evidence above mentioned. Victor Prudon and Vicente Perfecto Gomez swear to the delivery of money and goods by the claimant for the use of the troops, in the latter part of 1842 or beginning of 1843. Rafael Sanchez, who was Clerk to the Military Secretary at the time, testifies that the money and goods were so furnished in January, February, March and April, of 1843, and that Limantour himself came to Los Angeles when these supplies were furnished. Manuel Jimeno states that Micheltorena and Limantour were at Los Angeles, negotiating together, in the last of the year 1842 and the beginning of 1843; that Limantour sold goods on credit to Micheltorena, for which he received drafts on the Custom House at Mazatlan, and on the Government of Mexico; that he understood that he was also soliciting from Micheltorena grants of land, but that he (witness) left Los Angeles before the negotiation closed, and does not know whether the grants were made or not. This witness also states that as secretary he asked for information relative to the lands petitioned for by Limantour, but does not recollect to what authority the order for a report was addressed. Francisco Arce testifies that Limantour was at Los Angeles at the time before mentioned, and that he furnished goods, provisions, and money for the use of the troops.

Eighth—Testimony tending to show that the grant now presented was known at or about the time it bears date to have been made, and that it cannot therefore be a recent fabrication.

Jose Rafael Gonzales testifies that on his arrival in the country Micheltorena proposed to give the witness a grant of lands at Yerba Buena, which he declined to receive; that subsequently the Custom House, of which he was the chief officer, was ordered to be removed to Yerba Buena, and that he made an application in writing for a grant of land at that place, and that Micheltorena answered in a letter "that he could not grant to me the lands at Yerba Buena because he had already granted them to Jose Y. Limantour." This was a short time before Micheltorena left the country, which occurred in March, 1845; and he says further, that Micheltorena subsequently told him that the "grant of the lands at Yerba Buena had been made to Limantour by him in virtue of the Government's indebtedness to said Limantour and for the purpose of paying that indebtedness, and that said grant or sale had been approved by the Supreme Government at Mexico." Jose Castro swears that Limantour told him in 1845 that he had a grant of land near San Francisco by purchase of Governor Micheltorena. Juan B. Alvarado says that he heard at Monterey, previous to the conquest of the country by the Americans, that Limantour had lands granted or sold to him at the North, without naming the place. William A. Richardson testifies that he was informed of the grant to Limantour in 1844 by Robert Ridley and Francisco de Hare. Prudon swears that Limantour told him at the time of the negotiation at Los Angeles that he intended to apply for all the vacant land between Yerba Buena and the Mission Dolores; that after that, at the request of Limantour, he translated into Spanish a petition for the land which he had written in the French language; that it was then prescribed by Limantour and so presented to Micheltorena, and that he saw it some time afterwards in the Secretary's office, with a decree of Micheltorena granting the land and ordering the title to be issued written thereon. He says, moreover, that it was known at the time to the principal men that the grant was made. Gomez says that it was a subject of conversation at the time at Los Angeles among the officers, and that he heard Micheltorena say that he was going to raise revenues or procure resources by granting lands at Yerba Buena to said Limantour.

There is also filed a letter from Manuel Jimino to Limantour, dated Angeles, February 2, 1843, stating that his letter has been laid before the Governor, and recommending that he call on the Governor after a few days—the delay being necessary because the Governor had asked certain information on the subject-matter of the communication. This letter does not specify the subject on which the information had been ordered, but the date and general tenor of it are such as to connect it with the negotiation at Los Angeles developed in the testimony above cited.

The genuineness of the signatures to all the documents above mentioned seems to be proved beyond cavil, each being substantiated by the testimony of persons well acquainted with the handwriting of the signer, and no witness has been called on either side who expresses even a doubt to any of them.

In regard to the creditably of the witnesses who have testified on behalf of the claimant, an impeachment has been made, except in relation to two of them, Victor Prudon and Vicente Perfecto Gomez.

The effort to impeach Prudon is found in the statement of the witness Larkin, who swears that Prudon told him in 1853 that the grant under which Limantour claims was a manufactured paper.

It is a legitimate method of impeaching the creditibility of a witness to show that he has made statements out of Court, in relation to the subject-matter of the controversy, different from his statements as a witness under oath, but in order to give evidence of the former the rule is well settled that the witness sought to be impeached must himself be first asked whether he did or did not make such previous statement. This rule is founded on the plainest principles of justice to the witness, and a disregard of it would, in the words of Abbott, C. J., in the Queen's case, [2 Brod. and Bing, 313,] have "an unfair effect upon him and his credit, and would deprive him of that reasonable protection which it is the duty of every Court to afford to every person who appears as a witness on one side or the other." Mr. Greenleaf adds also as the reason of the rule [General Ev. §462] that "common justice requires that by first calling his attention to the subject he should have an apportunity to recollect the facts, and, if necessary, to correct the statement already given, as well as by re-examination to explain the nature and design of what he is proved elsewhere to have said." And the rule in this respect is the same where depositions are used as where the witness appears before the Court on the hearing of the case. Unless the foundation be first laid by asking the witness whether he made such statements, proof that he did make them out of Court cannot be admitted to impeach him.

In the examination of Prudon as a witness, the counsel for the Government did not see fit to interrogate him in regard to such statements. They were not, therefore, entitled to the evidence which is presented on the subject, and it cannot be available for the purpose of impeachment. The proof of the declaration of Prudon is also subject to another objection. It is given by the witness Larkin, who is shown by his own testimony to be largely interested in defeating this claim.

The witness Gomez is sought to be impeached by the testimony of Larkin and Johnson. Johnson swears that in 1852 Gomez told him that this was a fraudulent claim, &c., and Gomez denies that he ever told him so. Larkin swears that Gomez told him that he expected to derive great benefit from finding the papers (expediente) in this case; that Limantour had promised to give him a two hundred vara lot on his claim in San Francisco, and desired witness to select it for him; that he afterwards said that Limantour would not give him the land, but had given him money. This statement is denied by Gomez. The testimony of Larkin on this point is subject to the same objection above mentioned, but that of Johnson seems entitled to its full weight.

We will now refer to some of the points and proof relied on by the government as stamping this claim with the character of a gross fraud.

1. It is claimed that the expediente proved in the case is fraudulent in its character, and the testimony of Gomez of its being found in the County Recorder's office in Monterey, a fabrication.

Gomez testified that he found the document, of which that presented is a certified and sworn copy, among some old documents, chiefly relating to Mexican land titles, in the Recorder's office, in June, 1853. Gleason, the Recorder, testifies that he was present when Gomez took it from among these papers. There appears to have been a large quantity of these ancient Spanish documents belonging to the archives of the former government, which after various changes had finally come into the Recorder's office. They seem to have been miscellaneous in their character, and were evidently in a state of great irregularity and confusion. Gomez says he discovered the document accidentally, while searching among them for another document; that he returned it immediately to its place, and took advice of Jose Abrigo about it before he made known to the Recorder that he had discovered it; that he returned again to the office with a friend, and disclosed it to the Recorder, and procured a certified copy, which is filed in the case. Evidence is given, on the part of the government, tending to show that these papers had been repeatedly examined, and no such paper found among them. This testimony, negative although it is in its character, certainly tends to establish a presumption that it came recently among the papers, but the confused state of these documents, the want of filing their miscellaneous character, and the evident carelessness with which they had been treated, detracts greatly from the strength of such a presumption.

In regard to the Expediente, it should be observed that it was not a paper belonging to the Recorder's Office, and therefore would derive no additional weight as evidence, from the circumstance of its being found there. That it was not untimely, however, to be there at the time referred to, is clear from the fact developed in the proof that the Mexican archives were, at the time of the conquest, scattered abroad, and that many of them, from the same office to which the Expediente belonged, came into the possession of the Recorder.

The production or proof of the Expediente has never been deemed necessary in order to sustain a claim substantiated by the production and proof of the grant itself. It is, however, a document exhibiting the proceedings preliminary to the grant, and when produced from the archives to which it belongs, affords the most convincing evidence that the grant was made. The distribution of many of the old archives and the dispersion of many others, sufficiently accounts for their absence from the present official depository of such papers as have escaped the misfortune. If the expediente presented be a genuine document, we have no difficulty in accounting for its being found in the Recorder's Office. Even if it were found in the hands of Gomez or any other individual, it would not be surprising from what we know of the dispersion of these papers, nor even if it were recently and surreptitiously placed by him among the documents in the Recorder's Office, provided it were proved to be a genuine original Expediente, would this circumstance so stamp it with the character of fraud as to destroy its effect as evidence.

The genuineness of this Expediente does not rest on the testimony of Gomez alone. Mr. Hartnell, who examined the original at the Recorder's office, and whose testimony is entitled to the most explicit reliance, states that he believes the body and the signature to the petition, which constitutes a part of the Expediente, is in the handwriting of said Limantour, and as to both the body and the signature to the two decrees therein written, he knows them to be in the handwriting of Governor Micheltorena; and the witness Florencio Serrano testifies that he was Judge of the First Instance of Monterey, in 1848, and until April, 1849, under Col. Mason, and had in his charge papers from the archives of the former Government, and among them was an Expediente answering precisely the description of this, and of which the document filed in the case he believes to be a copy. The papers spoken of by the other witnesses, a part or the whole of which were in the Recorder's office when this Expediente was found, were evidently the same spoken of by Serrano, and if his testimony is not utterly false, the original Expediente was among them in the latter part of 1848, or the early part of 1849.

2. In the expediente, a reference is made by marginal decree to the "proper Judge" for information, and in the decree of concession it is stated that the proper Judge had taken the necessary information, and it resulted that the land was vacant; and in the grant it is stated that, having instituted suitable proceedings and investigations, it resulted that the land was vacant. The law agent for the Government claims that he has proved that no reference was in fact made to such Judge, or information given by him, and the depositions of Francisco Sanchez and Jose de Jesus Noe, who swear that they were at the time First and Second Alcalde of San Francisco, are relied on to sustain the proposition. Both deny any knowledge of the matter.

The manner of obtaining information on application for a grant of land alleged to be vacant, was confided very much to the discretion of the Governor. He did not ussually designate the particular person by name to whom the reference for a report should be made; and if he had done so, it would have been fully competent for the Governor at any time to have received the requisite information from another source, and to have made the confession without waiting for the report. This was within his discretionary powers, and the recital in the decree of concession and in the grant, if these be established as genuine, are conclusive evidence that the proper reports were received. Its truth could not be successfully controverted or the grant defeated by the negative testimony of the Judge, given years afterwards, that he did not recollect being applied to for confirmation on the subject. But there is other evidence in the case tending to show that the Governor did in fact seek and obtain information from another source besides the Alcalde. A letter from Jimeno, Secretary of the Government, to W. A. Richardson, then, or shortly before, Captain of the Port of San Francisco, is given in evidence, requiring information relative to the vacant lands on the Bay of San Francisco, and stating expressly that Limantour had made application for a grant of the premises now claimed in payment for advances made, and describing the lands fully by metes and bounds. He is required to send a map of the place, and to act in the matter in conjunction with the Judge of that jurisdiction.

This communication from Jimeno is dated Jan. 14th, 1843, and its genuineness seems unquestionable. It is probably the same referred to by Jimeno in his deposition, where he states that he, as Secretary, asked for information as to some lands for which Limantour had petitioned, although he does not recollect of what authority it was asked. Richardson also testifies that the communication from Jimeno was received by him about the latter part of January, 1843, by the hand of Franco de Haro who was the former magistrate, and who is proved by other witnesses to have been at that time Clerk of the two Alcaldes, Sanchez and Noe. Richardson further swears that he replied to this communication, giving to Gov. Micheltorena the required information, and forwarding therewith a copy of a map which is here presented. If this testimony be true, the Governor was in possession of the knowledge sought by him in reference to these lands through this channel.

But the testimony of Richardson shows that de Haro had a similar communication on the subject when he handed Jimeno's letter to him. If the information was sought of de Haro, the former magistrate, and who was one of the most competent business men of the country, it is probable that he made a report which was received by the Governor before the grant was made.

If the information was in fact sought of Sanchez or Noe, the Alcaldes, as de Haro was their clerk, and as such the proper person to prepare, under their direction, the necessary reports, it is easy to perceive why the communication on the subject should be in his hands. Whether this paper was ever laid before either of them, or, if so, whether the corresponding report was made, does not appear by direct proof; they recollect nothing of it; but if a report was made the records of the Alcalde's office ought to show it. The proof shows no search among these records where better evidence should be found than in the negative proof of the Alcalde that he does not recollect making such report.

The proof above referred to thus directly shows that a reference for information was made to Richardson, and a report forwarded by him to the Governor before the date of the grant; and, secondly, it raises a strong presumption that a similar reference was made either to De Haro individually, or to the Jusgado of which he was clerk, and the papers requiring a report received by him. If it was addressed to De Haro, the proof that Sanchez and Noe do not recollect it, does not impair the presumption that DeHaro made the proper report, as stated in the Governor's decree of concession; and if directed to Sanchez or Noe, their negative evidence of the want of recollection on the subject, without a recourse to the archives of the Jusgado, cannot be sufficient to overthrow the official certificate of the Governor, or to outweigh the presumption raised by the other proofs in the case of the receipt by the Governor of the information required by him from a satisfactory source.

3. It is claimed that the approval written on the grant signed by Bocanegra, and the document recited in the certificate of Micheltorena, purporting to have received from the Supreme Government at Mexico, in the fall of 1843, authorising Limantour to receive grants of land, cannot be genuine, because no record or other evidence of them is found in the archives of Mexico. From the depositions of the witnesses who testify relative to the course of business in the public offices of the Supreme Government, it will be seen that the entry on the grant being a mere marginal decree, is not of such a character as under the practice would be recorded or note made of it at those departments. The absence of a record or note would consequently raise no presumption against the genuineness of the document. But as to the document purporting to be issued October 7, 1843, the witnesses agree that if genuine, there should be evidence of it in the archives of Mexico. The Law Agent claims that he has proved that it does not exist there, and consequently that the document is false and fabricated. The proof offered consists of two letters purporting to be written by the Minister of Foreign Relations in Mexico, to J. S. Cripps, Charge d'Affaires *ad interim*, of the United States, enclosing to him three documents purporting to be copies of letters, one from the Minister of Agriculture, etc., the second from the Minister of War and Marine, and the third from the General and Public Archives of the Nation. In the three last mentioned letters it is stated that on search in the respective archives, nothing is found relative to the grants of land to Limantour. The letters from the Minister of Foreign Relations to Mr. Cripps, transmitting the copies last mentioned, communicate no information of value on the subject, unless, indeed, his statement that these were the proper departments for evidence of the character sought to be obtained, be so regarded; and as to this fact, I apprehend the letter of this officer is not the proper evidence It is a fact to be proved like any other, by legal evidence which, if documentary, must be verified by the authentication; and if parol, must be given under the sanction of an oath.

The copies of the letters from the three departments addressed to the Minister of Relations, two of which are dated in March, and the other in April, 1854, which are offered in evidence, are objected to by the claimant, who insists upon their inadmissibility as proof, and their legal insufficiency to establish the fact sought to be established by them. We must therefore decide this preliminary question.

The documents offered do not purport to be the original letters written by the persons having charge, respectively of the three Departments mentioned, but copies of them, the originals being of course in the Department of the Minister of Relations, to whom they were addressed. As a portion of the archives of that Department of the Government, they must, in order to be available as evidence, be proved like any other document belonging to a public office. The usual manner of making such proof from a foreign office is either by sworn copies, or by exemplifications under the great seal of the State or Nation. These papers are not so authenticated. The attestation is the brief certificate. "Es copia," signed J. Miguel Arroyo. To this is attached the certificate of John Black, the United States Consul for the City of Mexico, verifying the signature of Arroyo, and stating that he is chief Clerk of the Department of Foreign Relations. This certificate of the Consul adds nothing in the anthentication of this document. It is not within the scope of his Consular functions. If he is conversant of facts pertinent to the issue he must give his testimony in the same manner as other witnesses; his mere certificate is not evidence. [Church *v.* Hubbard, 2 Cranch 187; Stein *v.* Bowman, 13 Pet. R. 209.] Prefixed to the signature of Arroyo is the impression of a seal, perhaps that of the particular branch of service to which the signee was attached, but it is clearly not the great seal of the Mexican Republic. In the case above cited from 2d Cranch, a certificate was given by a person describing himself as "the Secretary of State of the Foregn Affairs and War Department," etc., of Portugal, and authenticated with the seal of his arms; but the Court held that this could authenticate nothing, and was not therefore competent evidence. The seal of a subordinate Department could be of no more avail than this, and could prove nothing. The document offered rests, then, entirely on the more certificate that it is a copy, to which the name of Arroyo is attached, with no legal proof of the genuineness of the signature, or evidence that he held any official position, or had any charge or custody of the originals of which the papers pretended are copies.

But if no objection were made to this proof of the original documents in the office of the Minister of Relations in Mexico, the evidence would still be insufficient. The originals are but letters from the Departments of Agriculture, of War, and from the general and public archives of the Nation, unaccompanied by evidence of the official character of the signers, and having none of those solemn guarantees of truth which make them evidence in a court. Moreover, the facts stated in them are not of that character which are the subject of certificate by any mere certifying officer, having the highest known authority as such, in charge of archives of a public officer. The power of such an officer is confined to the authentification of copies of the records of documents under his charge, and unless some statutory or other special prevision of law makes a different dispossstion in the case, he can certify nothing else. As to independent facts, his certificate is no evidence. Thus the fact that a certain grant had not been recorded in his office, although certified by the officer having legal charge of the records, was held in Tennessee not to be proved by his certificate. [Ayres v. Stewart, 1 Overton Tenn. R., 291, and the same principle has been recognized in numerous cases in other courts. Barry's Lessee vs. Rhea, ib., 345; Wilcox vs. Ray, 1 Hayn R., 410; Robinson vs. Clifford, 1 Wash. C. C. R., 1; Coit vs. Wells, 1 Varm. R., 318; Governor vs. McAffee, 2 Dev., 75; Oakes vs. Hill, 14 Pick. R., 442; Wolfe vs. Wasnburn, 6 Cow. R., 261; 1 Wright's Ohio R., 51.] Neither courtesy among nations nor any rule of practice adopted here have gone further than to recognize as evidence the due and formal exemplifications or copy of suçh public writing duly certified by the proper officer in charge of the originals, As to inpependent facts, such as the unsuccessful search among the archives for papers not found, the unsworn certificate of the officer is not evidence. He may be called like any other witness, and under the solemnity of an oath and subject to coss-examination, may give his testimony to the facts.

The papers offered in evidence are, therefore, unavailable as proof, and the Government has consequently failed to show an examination of the archives, or to establish the proposition that they do not contain evidence of the issuing of these papers to Limantour.

4. It is claimed that Limantour, after the alleged grant purports to be made to him, applied to the local authorities here for the grant of a small lot within the limits of the land now claimed by him. The claimant objects to the admission of the testimony by which this is sought to be proved. Four witnesses are called to speak on this subject. Two of them testify to what was told them by third persons, which of course is mere hearsay and not evidence. Of the other two, one testifies that Limantour asked or petitioned for the grant of a lot at the place called "Los Canulales" while Hinckley was Alcalde, and that it was refused because he was not a Mexican citizen; and the other states that Limantour told him that he had petitioned the Justice of the Peace, Hinckley, for a lot at the place called "Canutal Grande," and it was refused him. The first witness does not state the source of his knowledge. The last witness says that the conversation with Limantour took place at the building then occupied by Limantour for a store, and where he was then selling goods. The testimony shows that he (Limantour) was at Yerba Buena in 1841, 1844, and again in 1847; that in 1841 his vessel was wrecked at Punta de Reyes, and the goods which were saved from the wreck were taken to the place described by witness and there sold, but that he closed his business and left in 1842. If the conversation mentioned by the witness was in fact had at Limantour's store, it must have been in 1841 or 1842, and consequently before the date of the grant here presented, and of course before Limantour pretended to have a grant to the land. The witness, however, states the date of the conversation to be in the year 1844. In one or the other of these particulars it is clear that the witness is at least mistaken.

If Limantour had in fact a grant of the land claimed in the case, his right to it could not be defeated by showing that he made application subsequently to the local authorities for the possession or concession of a building lot which constituted a part of it. A good title would not be defeated by the grantees' mere admission, express or implied, adverse to its validity. But the testimony here offered is presented for a different purpose. It is offered not to defeat a grant then existing, but as evidence of an act so inconsistent with the possession of a title at that time, as to show that the claimant then pretended to no interest in the property, and to establish a presumption that the grant under which he now claims is either a sheer fabrication or bears a false and fraudulent date. The act proposed to be proved would be in the nature of an admission by Limantour that at that time he had no title to the land.

I greatly doubt whether the proof here offered is legal evidence to establish the fact that Limantour did apply to Hinckley for a grant of land within the limits now claimed by him. The act of Limantour was the presenting of his petition to the Alcalde for the grant, and as the witnesses state the application was refused, this was the only act of his so far as it is developed in the testimony which raises any presumption against the claim. One of the witnesses states that Limantour presented such a petition, but he does not state where the document is, or that he ever saw it, nor does he or any one else state its contents. The best evidence of what he asked and what he admitted as to the title, is the petition itself, which must be presumed to be in the archives of the Justice's office, or if that cannot be produced, then proof of its loss or destruction and evidence of its contents. Without this the statement of the witness was incompetent evidence. The other witness swears that Limantour told him that he had petitioned for the lot. Parol admissions of a party, made *en pais*, are competent evidence only of those facts which may lawfully be established by parol evidence, and it is not competent to prove the contents of a record or a document, unless the foundation be first laid for giving secondary evidence thereof. But this rule does not go to the utter exclusion of proof of admission of this nature, but only to their effect. [Greenl. Ev. §96, 97, 203.] On this principle the evidence of the admissions was properly received, but it is greatly weakened in its effect by the absence of the petition itself, and still more by the vague terms in which the admission is stated, and the want of an effort to obtain the written document, which must be presumed, to disclose the character of his application and to show whether it implies an admission inconsistent with the claim now set up under his grant.

But did such an application, if proved, necessarily imply that Limantour had no claim to the larger tract of land at the time it was made? Was such an application so inconsistent with the existence of a prior grant, so irreconcileable with that fact, as to prove that he claimed no such rights? The Justices of the Peace did not pretend to have authority to do more than assign to persons desiring to make themselves residences, small lots of fifty or one hundred varas square, and these grants were always accompanied with the condition that the lot should be enclosed and a house built upon it within one year, and that the grantee should subject himself to the police regulations of the place. The distribution of these lots by the justices, and the authority exercised by them over the subject, seemed to partake very much of the character of a police arrangement, having for its object regularity in bringing up the new settlement, and a supervision over its welfare. Hence it is not improbable that for the purpose of erecting buildings, it was the general, if not uniform custom to make application to the local justice, and receive his sanction. Such concessions were made as a matter of course, and Limantour might have regarded it as a matter of safety at least, to obtain the sanction of the authorities before erecting buildings on the land. It seems, moreover, always to have been supposed that a municipal organization, formed or to be formed at Yerba Buena or the Mission Dolores, would eventually have some rights in the land in the immediate vicinity, and many of the grants by the Governor were made subject to such tax (cañon) as might subsequently be imposed by the local authorities. The justices could concede land only in small lots; he could assign them for building purposes only, and if Limantour made such application it must have been for the purpose of erecting buildings thereon; and as the value of buildings might be very large, the shrewdness of the business man might have suggested the expediency of obtaining the additional sanction of the local authorities to the premises on which he proposed to make his investment, and thus by a double sanction place his title beyond controversy. Whether this was his motive or not, the very vague statement of the character of his petition does not enable us to know. A party is never precluded from strengthening his title by acquiring a conveyance of any outstanding pretended interest in the premises. Such acquisition cannot destroy rights previously acquired, nor does an effort to obtain such a title necessarily imply that the applicant has no title by prior acquisition. I will not say that the testimony adduced on this subject could have no weight as evidence, but the presumption raised by it, if any, is of so slight a character as to need corroborative evidence to make it of value in the case.

5. It is claimed that Limantour admitted to the witness, Alfred A. Green, that this claim was a fraudulent one The witness swears that he was engaged in procuring proofs in support of the claim of the city of San Francisco to lands supposed to cover a part or the whole of the premises in question, when the present claimant solicited him to aid in support of his pretensions to it, adversely to the city. The witness proceeds in his statement as follows :—"I told him his claim was fraudulent, which he admitted, but remarked that it was so well executed and supported that he had no doubt of it. I asked him why it was that he had not done something with it previous to that time; he remarked that he had been deceived by his agent. Jouan, who should have attended to it. When I first told him about its being fraudulent, he put on airs and wanted to know my reason for thinking so." The witness stated as his reason that the land belonged to the Pueblo, and, besides, that wherever a genuine grant existed, evidence would be found in the record (borrador) kept by the local authorities, showing a reference for information, and a report thereon to the Governor. The witness proceeds:—"He intimated to me that by joining with him we could prevent the Pueblo claim from being established, by keeping back documents that would establish the claim ; and as for the connecting link of his own, if it was necessary, (but he did not think it was) it would be very easy to have it on the *borrador*. He was under the impression that I would join with him, but when he ascertained that I would not, he swore considerable about his title being the most perfect in the country, and was in a great passion He said he knew all about the archives, and there was nothing there that could hurt him."

All the authorities concur in saying that the verbal admissions of a party ought to be received with great caution Being the mere repetition of oral statements, such testimony is subject to much imperfection and mistake; the party himself either being misinformed, or not having clearly expressed his meaning, or the witness having misunderstood him. It frequently happens also that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party did say. [1 Greenl. Ev §200.] To give force to it as evidence, the admission should be deliberately made and the conversation accurately narrated, so that the Court may know what was and what was not intended by the party speaking.

Two remarks are at once suggested upon the statement of the conversation as given by Green. The first is, that the witness does not pretend to narrate what Limantour said in admitting the fraudulent character of the claim. He admitted the charge that it was fraudulent; he intimated a method of giving it appearance of honesty which it did not possess. The witness fails to state what the admissions of the party really were, and, substituting inferences of his own, gives his construction of the language in place of the statement of the party. It is for the tribunal adjudicating the case, and not the witness, to weigh the purport of what the witness said, and to give a construction to his language. In a case reported in 3d Sergt. and Rawle, 267, similar language was used by a witness in relating a conversation with a party, and the Court very properly held that it did not amount to the proof of an admission of anything material or relevant. The deductions of an ignorant, an excited, a prejudiced or a corrupt hearer might otherwise be substituted for the statement of the party in the first place, and in the second for the calm and dispassionate judgment of the court in giving its legal effect.

It is observable, secondly, that so far as the witness does state the declarations made by Limantour in the conversation, he appears to have repudiated, in his words, at least, the idea that the claim was not a valid one. From the narrative it is evident that when Green first stated that it was fraudulent, he indignantly repelled the imputation, and at the close of the conversatton, he again warmly asserted the validity of his title. When in the intermediate portion of this conversation the admission was made, under what circumstances of remark or reply, in what terms, with what qualifications, and under what hypothesis, the witness does not delare. Under the rule which requires the whole of a conversation to be taken together, it is difficult to infer from the imperfect statement here given, that a deliberate admission of fraud in the claim was made. If such was the character of it, the duty devolved on the Government, in taking the testimony. to elicit the details of the conversation, so that we might know what it was, and be able to judge of its character as an admission.

6. The petition which constitutes a part of the expediente dated January 10. 1843, and the grant bearing date February 29th, of the same year, are written on the paper bearing the certificato of habitation for the year 1843, with the names and rubrics of Micheltorena, and Cartanares who was then the Administrator to the Customhouse at Monterey. It is alleged that no paper with this certificate of habilitation was used so early in that year, and therefore these documents must be fraudulent. In order to judge correctly of the form of this objection, we must advert to the posture of things relating to the Departmental Government at that time.

Micheltorena, appointed Governor of Califonia to succeed Alvarado, arrived at Los Angeles in August or September, 1842. Alvarado was at Monterey, the capital *de facto* of the Department, where he continued to officiate as Governor until the end of the year. Micheltorena assumed and exercised the duties of that office at Los Angeles from the first of the year 1843 until about the month of August following, when he removed to Monterey. The paper in question, habilitated for 1843, was used, according to the date of the instrument, during the time while Micheltorena was at Los Angelea, and before he had ever been to Monterey. During that entire space of time the archieves were kept at Monterey, the Secretary of the Government resided there, and the printing press belonging to the Government, the only one in California, was kept there.

It is certain that during the entire period while Governor Micheltorena remained at Los Angeles, paper habilitated for 1843 was not in common use Both at Monterey and Los Angeles, the paper then chiefly used was neither stamped nor habilitated. A small quantity of paper habilitated for previous years and rehabilitated by Governor Alvarado before he went out of office, was used, but none was rehabilitated by Governor Micheltorena. The reason why the country was not supplied with habilitated paper during the time that elapsed between Micheltorena's induction into office at Los Angelcs and his removal to Monterey, is obvious. The habilitation of paper consisted of a printed certificate at the head of each sheet, with the signature of the Governor and the Administrator of the Customs, either in writing or printed, and having underneath the name the genuine rubric of the party, and authenticated by the official seal of the Customhouse. In order to procure such paper at the time referred to, it must have been prepared at Monteroy, so far as the printing, the impress of the seal, and the signature of Castaneros was concerned, and must have received the signature or rubric of the Governor at Los Angeles. Thus, paper duly habilitated could not be had at Monterey until it had first been prepared at that place and sent to the Governor at Los Angeles, and again returned to Monterey; nor could it be supplied at any other place until it had been prepaced both at Los Angeles and Monterey. The great inconvenience of this transportation, a distance many hundred miles, where no convenient or safe means of conveyance existed, rendered it almost impossible to prepare and supply the quantity necessary for common use, and it was not supplied. But while no such paper was brought into common use, it is also evident from an examination of the paper in the archives, which are referred to by the witnesses, that occasionally a sheet duly habilitated by Micheltorena and Castaneros, is found to have been used during that time.

It is thus apparent that before Micheltorens went to Monterey, paper was habilitated so far as the printing, impressing the Custom House seal, and adding the signature of Castanerés was concerned ; and it is also certain that occasionally a sheet of this paper received the Governor's rubric, and was used. We have no means of knowing the precise time when this paper was prepared at Monterey. It was probably early enough to be ready for use at the commencement of 1843, the year for which it was habilitated. The law as to the value of stamps had just been changed, and this required a corresponding modification of the certificate of habilitation. The new law appears by the documents in the case to have been recrived at the Custom House on the 3d day of December, 1842, and as this habilitation is in accordance with the new law, the printing could not have been done prior to that time, but probably it was done very soon after. That some of these sheets received the rubric of Micheltorena at Los Angeles, is certain, but it is also true that the quantity forwarded to him was small, and probably it was sent rather as a specimen than for use. For a transaction like that now under consideration, purporting to have taken place with Micheltorena in person, and where the papers were probably prepared at the Governor's office, it might well happen that a sheet of this paper should be used at an early period after the habilitation was printed. If the Government had shown that no such paper was printed or sealed at Monterey until after the date of these documents, the necessary implication would arise of their want of genuineness, at least in the dates. But none of the witnesses state this, and none appear to know the time when such paper was first prepared; and, as we know that some sheets of the same habilitation were used for documents unquestionably genuine not far from the time these bear date, and long before it came into common use, (which was not until after Micheltorena removed to Monterey,) we can see no necessary implication that these sheets were not then in existence, duly habilitated, or that the documents written upon them must have been executed after their date. The few sheets of paper habilitated for 1843, which were used between the first of January and the removal of Micheltorena to Monterey, all stand upon the same state of facts, and their use a few days earlier or later, during that time, raises no necessary implication against the genuineness of the document written thereon. We know that some such paper was used while this state of facts existed, and having no proof of the time when it was prepared at Monterey, I see no reason to infer that it was not done as early as the dates of these instruments.

7. It is claimed, further, that the archives in the Surveyor General's office, show no evidence of such grant. The proof on this subject is from Mr Jones and Mr Halleck, both of whom testify that they have examined the archives and found neither the grent nor the espediente, nor any memorandum of them. These examinations were all made after the disturbance and dispersion of the archives at the time of the conquest. The grant itself, if made, would of course be in the hands of the grantee, and did not therefore belong to the archives. The Espediente should have remained there, but the dispersion of these documents, and the fact that a large portion of them were never recovered, or if preserved, never came to their proper place of deposit, renders the loss of such documents not surprising. So numerous are the cases of this kind, that the absence of an Espediente cannot be regarded as raising a strong presumption against the genuineness of a grant. Besides, if the document found at Monterey be genuine, the absence of the original from the archives is fully explained

There is another portion of this testimony which deserves a word of remark. The witness, Capt. Halleck, states that there was a book in the archives containing an index or memorandum of grants issued for some years, closing at the end of December, 1843, which book was accidentally destroyed by fire in May, 1851. The witness examined it often, and does not recollect seeing any note of grants to Limantour. There is no proof tending to show how complete or incomplete this book was as a record of grants issued during the time when it was used for that purpose, but from the testimony of B. C. Hopkins, it appears that the book used next in order of time for the same purpose contains but a small portion of the grants actually issued. The presumption against the grant arising from this proof is greatly diminished by the probable defect of the book in not containing memoranda of all the grants which were in fact issued, and from the negative character of the proof, showing only that the witness does not recollect that it contained such a memorandum.

8. The Government has presented certain letters and documants signed by Auguste Jouan, and has proved his recent declarations tending to stamp this claim as a fraud, and to implicate the claimant in its connection. Jouan is proved to have once acted as Limantour's agent, but ceased to be such in 1853, and the most hostile feelings are shown to exist between them. There is no principle of law which makes sayings of an agent, uttered long after his agency ceased, evidence against his principal. The declarations of a participator in a conspiracy to defraud may be evidence against his co-conspirator, but independent proof of the existence of said conspiracy must first be established, before such declarations are competent proof. No testimony is here given to establish such conspiracy, so as to admit Jouan's statement or writings.

Besides, if such conspiracy were proved, the declarations and writing of Jouan here offered would not be admissable as evidence. The rule is that the declarations and writing of a co-conspirator which are a part of the *res-gertæ* is evidence against all; but a subsequent relation, verbal or written, of one is not evidence against the others. Such a statement depends on the mere credit of the narrator, and his mere declaration cannot be evidence. He must be called to testify to the facts, and cannot affect the rights of others. [1 Phil. Ev. 201; Hardy, Case 24; Howell St. Tr. 452; I Greenleaf Ev., § 111.]

The above embraces the chief points, both of evidence and argument, urged against the genuineness of the grant. Some other matters of minor importance are presented to our consideration, but on examination they do not change the aspect of the case, and it is not necessary to discuss them at length.

Reviewing the testimony in support of this claim, we think this proof fully establishes the fact, in the first place, that the grant which is given in evidence, and other documents presented by the claimants, were signed by the several persons whose names appear thereto. The signatures are all proved in the usual manner by competent and unimpeached witnesses, whose statements are contradicted, doubted or impeached by no one. Thus established, these papers must have the full effect of a genuine title, unless it can be shown that they are a recent fabrication, executed since the several signers retired from office, and fraudulently antedated.

And secondly, the collateral evidence in support of the grant, establishes it so directly and positively by concurrent facts and circumstances, that it leaves scarcely a doubt that it was made at or about the time it bears date.

The arrival of Limantour at San Pedro with merchandise; the needy condition of Micheltorena at Los Angeles; the application of the latter to the former for goods and money; the negotiations between them, including the proposition to grant and receive lands in payment; the advance of the goods and money immediately after, and the contemporaneous understanding at Los Angeles among Micheltorena's officers that such a concession had been made, are proved by the direct statement of witnesses whom no attempt is made to impeach. It entered into the account of Micheltorena, where the government was credited by Limantour for lands granted The Governor at the time spoke both of the negotiation and the grant, and afterwards refused to Gonzales a concession of land at Yerba Buena, because he had granted it to Limantour. The evidence of the documents proved in the case is equally pertinent in the establishment of the grant. It is not possible, without violating every rule of evidence, to pronounce all these to be forgeries; nor can we gratuitously believe that such men as Micheltorena, Bocanegra, and Jimeno—men who have held the most important offices in the government—could be induced to sign these documents long after they retired from office, with the intent to aid in gross fraud. We cannot presume such an act, and there is no proof in the case to substantiate such a charge. And if these documents be not of this false and fradulent character, the grant is sustained by evidence the most conclusive.

We have already referred to the main features of the proofs adduced to impeach those title papers. It is at most testimony of a negative character, and not sufficient to counterbalance the mass of concurring proofs by which the title papers are sustained. If the testimony of Gomez, and even the expediente found by him at Monterey were thrown out of the case, the weight of evidence would still, in our opinion, be in favor of the grant.

These title papers issued by the Governor, and approved by the Supreme Government, we have no doubt were effective under the Mexican law to convey a right to the land to Limantour, and the proof does not show any forfeiture or abandonment of his titles. The description is shown to be sufficiently definite to enable a survey to be made according to its terms. The northern limits of the parcel of land which is situated nearest the heart of the present city, was unquestionably fixed in reference to Richardson's map, and at the distance of four hundred varas from the original settlement house of W. A. Richardson. We do not think that anything connected with the rights of the city to these premises is shown to invalidate the grant, nor is there anything in the 14th section of the act of March 3, 1851, which prevents an adjudication by this Commission on the claim. On the contrary, if a town, previous to the conquest, had grown up on the land, then rightfully held by Limantour under a previous grant, by express provision of the section referred to, the claim must be presented in his name, and not in the name of the lot holders.

We have examined this case with that patience and careful attention which its importance demands. We are not at liberty substitute conjecture for proof, or to postpone direct evidence, both written and oral, to that which is of a negative and inconclusive character. The weight of evidence in our opinion, is decidedly with the claimant; and as w find upon the whole proofs in the case, so it is our duty t declare the result.

A decree will consequently be issued in favor of the Petitioner.

v.6

Cal Laird

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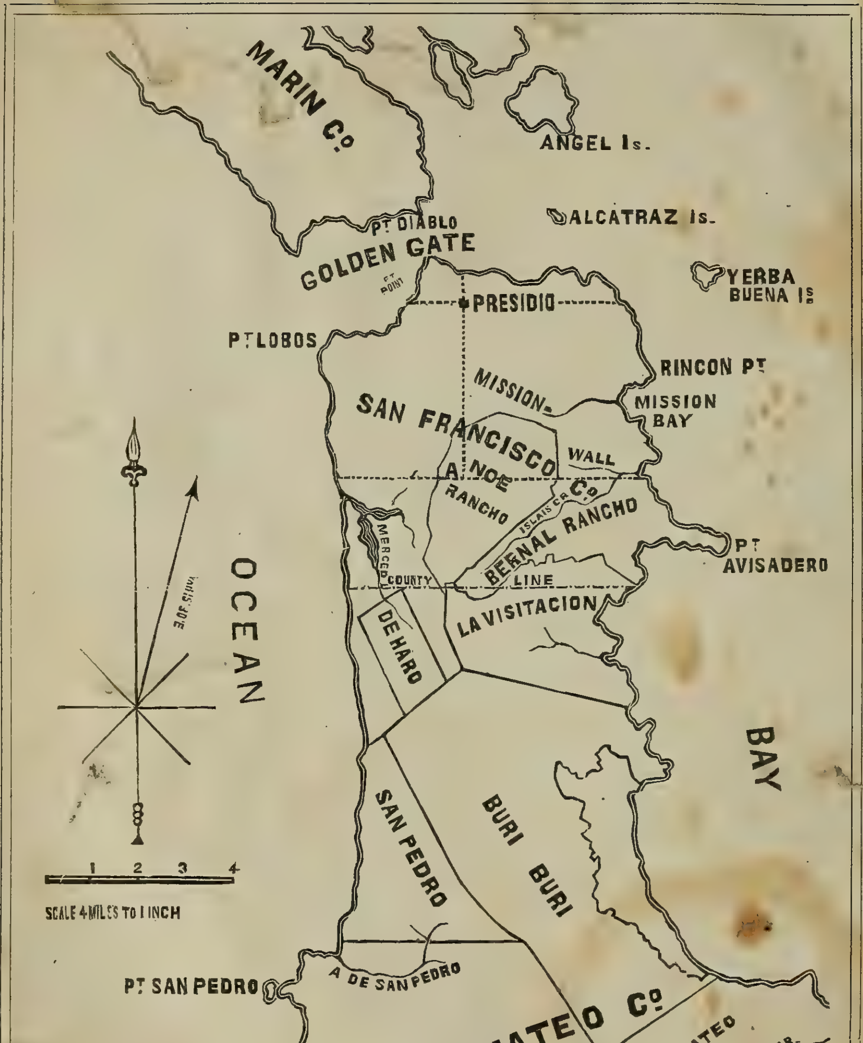
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Sonoma Co. Journal
Petaluma Oct. 13/60

Land Titles in San Francisco.

DECISIONS

OF THE

SUPREME COURT

OF THE

STATE OF CALIFORNIA,

IN THE CASES OF

HART vs. BURNETT, Et Al.

AND

HOLLIDAY vs. FRISBIE,

With Notes and Comments.

BY A MEMBER OF THE CALIFORNIA BAR.
[Halleck Henry Wager]

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PUBLISHERS' PREFACE.

The following Decisions of the Supreme Court of this State will, in all probability, settle forever the title to Real Estate in the City and County of San Francisco. There may, and probably will be litigation between individuals, respecting the validity of deeds of transfer from the original grantees under the Pueblo and City—such disputes being common in every city and town in the world—but there will be no further dispute, so long as these decisions stand, respecting the *source* of title. A basis is now established, upon which every intelligent man may determine whether or not he has a valid title to the land which he occupies, having first ascertained the *genuineness* of the original grant under which he holds.

This is a consummation which has long been most devoutly prayed for by all citizens of San Francisco. It is true, that these decisions change no rule of property heretofore established, except in the matter of Sheriffs' sales to uplands; but they go the foundation of all City titles, and put them upon such a basis that they can never hereafter be disturbed. Many of the former decisions on the questions here involved, were entirely contradictory and unsatisfactory in their reasoning, and therefore failed to receive the confidence of community, or the acquiescence of the bar. One Court and one set of Judges based the Pueblo and City title upon a Mexican grant, while another Court and another set of Judges based it upon the Act of 1851; some *presumed* title under Mexican law, while others *presumed* it under the Act of Congress: some contended that the old Pueblo had a title in fee simple absolute, while others contended that the title to the Pueblo lands remained in the Mexican government till it was transferred to the government of the United States, and by it to the City: some claimed only to the Vallejo line, while others contended for the full extent of four square leagues. In fine, while the Courts have generally sustained the City's title, there has been no agreement as to the source or character of that title, nor have any good and satisfactory reasons been given for the decisions rendered. The Mexican laws relating to this matter have not heretofore been thoroughly examined and considered by the Courts, and consequently, the conclusions arrived at did not satisfy the bar; especially as the Judges have always been divided in opinion as to the source and character of the title. But in this case the subject seems to have been thoroughly and carefully investigated, and, so far as the question of original title is concerned, the Judges are unanimous in their decision upon its character and validity: for, although Justice Cope sustains the Sheriffs' sales, on the ground of *stare decisis*, he agrees in all other respects with the reasoning and conclusions of the other Judges.

From the importance of these decisions, and the great interest taken in them by the community, and the fact that a long time will probably elapse before they will be published officially among the judicial reports, we have determined to give them to the public in a more readable form than that in which they have appeared in the newspapers.

As that portion of Judge Baldwin's opinion which relates to the origin and character of Pueblo titles under Spanish and Mexican law, refers to some important matters connected with the jurisprudence and history of California, not fully set forth in the opinion itself, we have deemed it advisable to add some Notes, illustrative and explanatory of these points. For this purpose, we have procured the services of a member of the bar, who is familiar with the subject; and we think the reader will find these Notes, not only of interest, but valuable for future reference.

It is hoped that the public will duly appreciate the efforts of the Publishers to supply them with these Decisions in a permanent form, and at the earliest possible moment.

San Francisco, June 30th, 1860.

STATE OF CALIFORNIA.

Supreme Court, April Term, 1860.

WILLIAM HART, Appellee,
vs.
BURNETT, BEIDEMAN Et Al., Appellants.

Opinion of the Court by Justice Baldwin.

The immense interests involved in the decision of this case have drawn to it a laborious and careful examination by numerous and able counsel, of the various points and considerations connected with the controversy. Probably no cause ever submitted to this Court has been more thoroughly and learnedly discussed, both at the bar and in written and printed arguments. We have postponed the decision from time to time for further examination and argument; for we were unwilling to pass upon the question until all attainable sources of correct and reliable information had been exhausted. To that end we have extended a latitude to the debates which we have not allowed in any other case; and we have postponed attention to much important and pressing business, that we might fully consider this record, unembarrassed by other engagements.

This is an appeal from the late Superior Court of the city of San Francisco. It involves the title to a number of fifty vara lots, levied upon and sold by the Sheriff of San Francisco county, under judgment and execution in a suit of Jesse D. Carr v. The City. Although the property actually involved in this case is not very large, the question really to be decided affects property of immense value, and the right and title of the city of San Francisco to what is termed its municipal lands, the construction of the Act of Congress, approved March 3d, 1851, and the liability of such lands to forced sale under execution.

I. In discussing this case, the first question to which we shall direct our attention is this: Was there any law authorizing the establishment of a *pueblo* at San Francisco, and was any such *pueblo* ever established?

It appears from the history of Spanish jurisprudence that special attention was given in very early times to the establishment of cities, (*ciudades*) towns, (*pueblos*) and villages, (*villas*) and that particular laws were enacted for their foundation and government. Title VII, Book IV of the Recopilacion de Indias, refers especially to this subject, and contains numerous laws and provisions relating to the different classes of land belonging to such municipalities. Some of these laws will be more particularly referred to hereafter. Title V of the same book relates especially to the formation of settlements of a municipal character, and their subsequent organization into municipal bodies. Law six of this title authorizes contracts to be made for the founding of towns, and prescribes the conditions to be imposed upon the contractors. Law ten authorizes the founding of towns by the voluntary union of families, without contract with any *poblador particular*. These laws constitute a part of the system of Spain for the settlement of Spanish America. They contemplate two modes of founding towns or municipal settlements: one by contract with a particular individual or *poblador*, who undertook to bring together a certain number of families or settlers, and build a town; the other by the voluntary union of a certain number of families or settlers, who were to act in concert for the same object. [1.]

We find among the printed Mexican laws and orders, and the numerous documents made evidence in this case, and referred to in the briefs of counsel, various official documents relating to this same system, and illustrative of the policy of the Spanish Government with respect to the establishment of such municipal settlements in California. We refer more particularly to the "Regulations of Presidios," of September 10, 1772; the "Instructions" of August 17, 1773; the "Regulations" of June 1, 1779; the "Opinion" of October 27, 1785; and the "Order" of June 21, 1786. (Cong. Doc., 31st Cong., 1st Sess., H. of R., Ex. Doc. No. 17, pp. 133 et seq.; Arrillaga's Recopilacion de Leyes, 1828, p. 121; Limantour Land Com. Ex. "O.") [2.]

The opinion of the Fiscal, dated October 27, 1785, and the order of the Commandant General, dated June 21, 1786, fully recognize the right of the Governor of California to form and mark out pueblos, and the right of such pueblos to four leagues of land. (Lim. Land Com., Ex. "O," p. 60.) In 1789, November 14th, a plan was formed for the town of Pitic, in Sonora, which by the direction of the King was to be taken as a model for all other towns formed in that commandancy, which commandancy then included California. This plan is of record in the archives of California now under the charge of the United States Surveyor General. It dedicates four square leagues to the town for various municipal purposes, and directs that if they cannot be had in a square, they may be taken in some other form. This plan will be again referred to hereafter.

In an order from the Commandant General of this commandancy to the Governor of California, dated October 22, 1791, authority is given to form pueblos out of the existing presidios, and an extent of four square leagues of land is designated for each of such *new* pueblos. (Ex. Doc. No. 17, p. 139; Limantour Land Com., Ex. "O," pp. 66 et seq.)

A decree of the Spanish Cortes, May 23, 1812, provides for the municipal organization of pueblos, and the election of Ayuntamientos, consisting of Alcaldes, Regidores and Syndicos. Another decree, of August 9th of the same year, confers upon the Alcaldes of pueblos certain political and judicial powers. These decrees continued in force in Mexico after its separation from Spain. (Leyes Vigentes, pp. 28, 50.) [3.]

Such is a brief outline of the laws relating to pueblos in California prior to the Colonization Law of 1824, and the Executive Ordinance or Regulation of 1828.

The first of these—the law of August 18, 1824—makes no new provisions for pueblos, but in section two it recognizes the fact that pueblos have a right of property in land. The Executive Regulation of November 21, 1828, section ten, provides for the formation of new pueblos of at least twelve families each, by *capitulantes* or contractors.

No change, however, is made in the laws respecting pueblos formed in the usual way, by the union of families or settlers for that purpose, or by the conversion of presidios into pueblos.

It was also stated in these Regulations that the Missions of California were not "for the present" to be colonized. Although the Spanish Cortes, by decree of September 13, 1813, had claimed the Catholic Missions as Government property, and exercised the right to secularize them and convert them into secular and municipal organizations under the name of pueblos, the Executive of Mexico, in forming the Regulations of 1828, seemed to prefer reserving this subject for the further action of the Mexican Congress. That body, on the seventeenth of August, 1833, passed a law secularizing all the Missions of Upper and Lower California, thus bringing them within the general operation of the laws, and especially of the Colonization Law of 1824, and the Regulation of 1828. A number of departmental laws and regulations were subsequently issued by the Governor and Legislature of California, for converting these Missions into pueblos, for the government of such pueblos, and for the use and disposition of the lands and other property pertaining to them. (Ex. Doc. No. 17, pp. 148 et seq., Gov. Figueroa's Manifesto; U. S. Printed Mission Exhibits; Leyes Vigentes, p. 106.) [4.]

This brings us to the period when it is claimed that the *pueblo of San Francisco* was first founded. We will now consider the evidence adduced to show the *fact* of the establishment of a pueblo, without reference to its boundaries or to its title or right to any lands. We shall make no reference to the Zamorano document, or to what is called the Vallejo line, but only to documents whose genuineness is entirely undisputed.

On the third of November, 1834, the Territorial Deputation authorized the election of an Ayuntamiento to reside at the presidio of San Francisco, to be composed of an Alcalde, two Regidores or Councilmen, and a Sindico-Procurador. This Ayuntamiento, when organized, was to exercise the political functions pertaining to such office, and the Alcalde was also to perform the judicial functions which the laws conferred upon him. This decree was communicated to the Military Commandant by the Governor, on the fourth of November, 1834. An election was accordingly held on the seventh of December, 1834, at the presidio of San Francisco, and the Ayuntamiento duly installed. A similar election was held on the thirteenth of December of the following year, (1835) at the same place, which was then officially designated as the pueblo of San Francisco. Other elections of the same character were subsequently held; and there are numerous official documents of undisputed authenticity, which refer to the "Ayuntamiento of San Francisco," the "Alcalde of San Francisco," and to the "Pueblo of San Francisco," proving, as we think, beyond a doubt, that there was at that place, in 1834, 1835, 1836, and subsequently, a pueblo of some kind, with an Ayuntamiento composed of Alcaldes, Regidores and other municipal officers. What were the rights of this municipality, and what the powers of its officers, and the extent of its territory and jurisdiction, we shall not now inquire. We here refer merely to the *fact* of the existence, at that time, and at that place, of such an organization, whether corporate or incorporate. And that fact is proved by the official returns of elections, by the official acts of the Governor and of the Territorial or Departmental Legislature, by the official correspondence of government officers, and by the acts, proceedings, records, and correspondence of the officers of the pueblo itself. As a part of the evidence of this *fact*, we refer to the election returns of December 7th, 1834, December 13th, 1835, December 3d, 1837, and December 8th, 1838; to the Governor's letters of January 31st, 1835, October 26th, 1835, January 19th, 1836, January 17th, 1839, and November 14th, 1843; to the expediente of proceedings between May and November, 1835, with respect to certain persons obliged to serve as municipal officers of that pueblo; and to the official correspondence between the Alcaldes of that pueblo and the various officers of the Territorial or Departmental Government of California. [5.]

II. Had this pueblo a right or title to any lands? and if so, to what lands?

In examining these questions, it will be necessary to recur to the laws and authorities already referred to. All the old Spanish laws relating to the foundation and government of pueblos in the Indies, seem to admit the fact that such municipal organizations possess *some* right to, and some control over the lands upon which they are established, and which are included within their limits. In this respect there does not seem to be any essential difference between pueblos founded by an individual *poblador* or *capitulante*, and those founded by the actual settlement of a number of families, voluntarily uniting together without any contract or capitulation. A pueblo, when once established, (no matter how or by whom composed) and officially and legally recognized as such, came immediately within the provisions of the general laws relating to pueblos, and was entitled to all the rights and privileges, whether political, municipal, or of property, which the laws conferred upon such organizations or corporations. Sometimes, however, special laws and regulations were made for particular places. Such seems to have been done in very early times, with respect to the infant establishments of Monterey and San Diego, and the pueblos of San Jose and Los Angeles, and the villa of Branceforte in California. (Recop. de Indies, B. 4, Tits. 5 and 7; Regulations of Presidios of 1772; Bucareli's Instructions of 1773; Neve's Regulations of 1779, etc.; Ex. Doc. No. 17, pp. 134 et seq.; Navarro's Opinion, October 27th, 1785; Ugarte y Loyola's Order, June 21st, 1786; Nava's Order, October 22d, 1791; Limantour Land Com., Ex. "O.")

By Law 6, Title 5, of Book IV, of the Recopilacion, a new town, containing at least thirty inhabitants and the other requisites for a municipal organization, was entitled to four square leagues of land, to be laid off in a square or prolonged form, as the nature or circumstances of the land might require. This right of a town, when duly organized, to this extent of land, is particularly referred to and repeated in the Royal Instruction of 1789 for the plan of Pitic, which plan was made applicable to all new towns that should thereafter be established in California, as a part of that General Commandancia. The particular municipal organization of such new towns was to depend, under the laws, upon the name or title given to them, as ciudad, pueblo, villa, etc. It will be noticed that the town of Pitic was organized out of the Presidio of San Miguel, which was removed to that locality for the purpose of forming, guarding and protecting the new settlement. In the order of 1791, by the Commandant General to the Governor of California, for the formation of pueblos out of presidios, it is also specially directed that the extent of land for each of these pueblos should be four common leagues, measured from the center of the presidio plaza, or square, viz: two leagues in each direction.

Of course, under the law and royal instruction above referred to, and upon which this order was based, this form and these dimensions were to be changed according to the nature and circumstances of the land; as when the presidio was adjacent to the sea, or on a bay, or where any portion of the land within such general limits had become private property, or had been devoted to some other special object.

It does not appear that any formal grants of land were made to the new pueblos in such cases; but their right or title, whatever it was, to land, to the extent of four square leagues or less, as the case might be, seems to have vested, *ipso facto*, on the formation or official recognition of such town, and that the powers of the municipal officers over such land resulted from the general laws, immediately on the municipal organization, and their election and entry upon the duties of their respective offices, and that these powers might be restricted or enlarged by the political authority of the State.

It is true, that in the case of Pitic, and in some other towns, an officer was appointed to mark off the boundaries of the four square leagues, and to designate the particular kinds of land, and the uses to which they were to be applied, within such limits; but the right or title, whatever that might be, "to the land so marked out," could not result from the act of measurement or survey. And as no subsequent grant was made, or seems to have been contemplated, the title, if any passed at all, must have vested *ipso facto* upon the organization of the pueblo. Such seems to have been the intention of the laws themselves, and the construction put upon them by the officers by whom they were administered.

It follows, from what has been already stated, that when near the close of 1834 a municipality was erected at the presidio of San Francisco, by the orders of the Governor and Territorial Deputation of California, and that place was officially recognized as a pueblo, and its organization completed by the election of the municipal officers provided for by law, such pueblo became, *ipso facto*, vested with some right or title to four square leagues of land, measured either in a square or prolonged form, from the presidio square as a general central point; excepting so much of the space within such general limits as might not be susceptible of grant, on account of its being water, the private property of individuals or corporations, or lands dedicated to, or reserved for other purposes.

Before proceeding to investigate the character of this right or title, we will premise a few remarks upon the character of the land embraced within the limits described, in order to give a general idea of the claim of the new pueblo and its boundaries.

It appears from official maps made under the direction of the United States Surveyor-General and the Superintendent of the United States Coast Survey, that the old presidio of San Francisco was situated near the middle of the northern extremity of the peninsula formed by the ocean and the bay of that name; that the width of this peninsula, as far south as the Mission creek, is less than two leagues, and that still further south, to the Buri-Buri or Sanchez Rancho, the average width is just about two leagues; although two or three points, as Lobos and Avisadero, project somewhat beyond these points very nearly corresponding with indentations, as Mission bay and Merced lake, on the opposite sides. Of course, the pueblo could acquire no right or title to the ocean or bay; and, consequently, according to the law of its foundation, the four square or common leagues would be taken in a prolonged instead of a square form.

Again, it appears from the documentary evidence and from other authentic sources, that at the time of the formation of this pueblo, there was a fort or battery, with its buildings and appendages, at the entrance of the bay of San Francisco; it would seem that the fort and the land pertaining thereto and necessary for its service, would be excepted out of the pueblo claim, for it is understood that such establishments were not, under the Spanish laws, susceptible of acquisition by town settlements or by colonization. (Mitchell et al. v. the United States, 15 Peter's Rep., pp. 86, et seq.) [6.]

Again, it also appears that long prior to the organization of this pueblo, there existed within the limits of the four square leagues, an establishment called the "Mission of San Francisco" or "of Dolores," with some sort of claim or right to the lands in that immediate vicinity. Perhaps some of these lands were also so dedicated or reserved as to exempt them from any right or title which the pueblo acquired by its organization. If so, what was the extent of the land so reserved or excepted? It appears that, in very early times, some disputes arose with respect to the lands which the inhabitants of the presidio and Mission were respectively entitled to occupy and use, and that some line of division was established between them corresponding to, or near to Mission creek, and to what is now called the Vallejo line. The lands north of that line, wherever it may have been, were generally called "presidio lands," and those on the south, as far as San Mateo creek or the northern boundary of the Pulgas rancho, were called "Mission lands." It also appears that the ordinance or regulation of 1828 exempted the lands actually occupied by the Mission from colonization "at present," and until it was determined what right the Mission establishments had in these lands. The secularization law passed in 1833, and various measures were subsequently taken by the authorities of California to organize the Missions into pueblos, and to reduce their lands to colonization. It further appears that, on the 3d of November, 1834, a curacy was authorized for the Mission of Dolores, which was one step in the operation of secularization; but that, at a later period, it still retained some of the characteristics of a "Mission," although portions of the land which it had formerly occupied in the direction of San Mateo and across the bay had already been disposed of by grants to private individuals. The Land Commission and the United States Supreme Court have decided that these titles were valid, and that the lands previously occupied by the Mission establishments were subject to grant in colonization. Moreover, the Commissioners and the law officers of the Government have decided that the Mission church, cemetery, buildings occupied by the priest, and a small piece of land pertaining to these as curtileges, were dedicated to the use of the Catholic church, and consequently were not susceptible of grant in private ownership.

It would seem, from these facts, that in December, 1834, when the pueblo was organized, this pueblo could not acquire any title to these "church lands," which were occupied by that establishment, although lying within the general limits of the four square leagues designated by the laws. Perhaps, however, when the occupation by the Mission ceased, such of these lands as had not been granted in private ownership, or dedicated to pious uses, became subject to the general right of the pueblo as pueblo lands. There are certain facts shown by the evidence in this case which confirm this view. At first, the municipal authorities of the pueblo made no grants at the Mission, but subsequently, under the orders of the Governor, the same Alcalde granted *solares* alike at the place called "Yerba Buena" and at the old "establishment of Dolores," the latter being limited to fifty varas square. [7.]

But it is unnecessary to investigate or decide this question here, for it is admitted that the land now in dispute is north of Mission creek and within the tract confirmed to the city of San Francisco under the act of March 3, 1851.

We have thus far considered the question of the establishment of the pueblo of San Francisco, and its limits, without any reference to what is commonly called the "Zamorano document," the genuineness of which has been strongly contested in the arguments of counsel. The only tribunal which has judicially investigated the character of that document, seems to have considered its genuineness sufficiently established. But, even admitting its genuineness to be beyond all doubt, we attach to it very little importance for the purposes of this investigation. The more important facts mentioned in it—the order of the Governor and Territorial Deputation of 1834, for the election, at the presidio of San Francisco, of an Ayuntamiento, and the official recognition of the change of that presidio into the pueblo of San Francisco—are also abundantly proved by other documentary evidence, the genuineness of which has never been called in question. The only effect of the Zamorano document would be to restrict at that particular time the possession of the pueblo to a space less than the four square leagues to which it was entitled under the law. And there is much evidence outside of the document to show that such was the fact. But, as already stated, it is unnecessary, for the purposes of this case, to determine that question, and we therefore have left that document entirely out of consideration. [8.]

Nor do we deem it necessary to follow counsel through their elaborate discussion respecting the history of the Missions, and the numerous acts and regulations of the Governors and Legislatures of California, under the law of 1833, respecting the secularization and conversion of the establishments themselves into pueblos, and the colonization of the land which they had previously occupied. According to our view, the pueblo of San Francisco was first formed out of the Presidio of that name, and not out of the Mission; and consequently, the question of its original formation was in no way dependent upon the law of secularization. There are, however, some things connected with the execution of that law, which serve to explain certain facts in the subsequent history of this pueblo. It would be very natural, upon the partial or entire secularization of the Mission, considering its advantageous position, and the superior quality of the land at that establishment, the location of the church, the residence of the parish curate, etc., that a portion of the pueblo settlers and of its municipal officers would establish themselves in that place. We accordingly find that, in the infancy of the pueblo, or, in 1837, according to the testimony of Sanchez, the Secretary of the Ayuntamiento, most of the inhabitants, not engaged in commerce, did reside there, and also that several of such residents at the old Mission were, at different times, members of the Ayuntamiento. There is, too, some evidence to show that in 1837 or 1838, permission was asked of the Governor to hold the sessions of that body at the old Mission, and, as they were so held, it is to be presumed that the request was granted. A few of the inhabitants who were engaged in commerce located themselves at the place called "Yerba Buena," on account of the advantageous anchorage for shipping in the cove of that name. And, as commerce increased, that little settlement, notwithstanding the nature of the soil, but with the larger element of foreign population which is shown to have been introduced there, very soon outstripped the settlement at the old Mission, which was mostly composed of a less enterprising population of Mexicans. Moreover, it was natural that foreigners, who were mostly engaged in trade, should call that place the "pueblo of Yerba Buena," while the old inhabitants of the country should apply to it, and to the old Mission, the general terms "pueblo of San Francisco," or "pueblo of Dolores," as is testified to by various witnesses. It was also very natural that, in the course of time, the names "pueblo of San Francisco, "Yerba Buena," "port of San Francisco," "Mission of Dolores," "pueblo of Dolores," etc., should by different persons be applied indiscriminately, either to the entire northern portion of the peninsula, or to particular parts thereof. This, it seems to us, fully explains and reconciles some apparent contradictions in the parol and documentary evidence. Again, it should be observed that the term " de Assis," which is sometimes affixed to the name " San Francisco," although, perhaps, more usually applied to the Mission, was a part of the appellation of the saint whose name was given to the bay when it was first discovered, which appellation belonged alike to the bay, the fort, the presidio, the Mission, and the pueblo—all of which took their name from the same saint. That these words should be more often added in speaking of the Mission is very natural, because there were other Missions in California called after other saints by the name of Francis, as the Mission at Sonoma, which took its name from " San Francisco de Solano ;" the Mission below San Diego, which took its name from " San Francisco de Borja," and the Mission further south, which took its name from " San Francisco Xavier." (Butler's Lives of the Saints, *verbo* Saint Francis ; Life of Padre Ugarte ; Vanega's History of California ; Life of Padre Junipero Serra ; Garcia y Cubas' Carta de Baja California.) [9.]

It may be proper in this connection to allude to some of the objections made by counsel to the view we have taken respecting the organization and character of the pueblo of San Francisco.

It is said that the first order calling for the election of an Ayuntamiento at the presidio, was for the " partido of San Francisco ;" that many of the voters and some of the persons elected to office, in 1834 and subsequently, did not then reside at that place ; that the military commandant of San Francisco, who was superseded in authority by the Ayuntamiento so elected, exercised jurisdiction as far south as the Pulgas rancho ; that the Ayuntamientos and Alcaldes of San Francisco exercised authority, both political and judicial, not only over the four leagues claimed as constituting the pueblo, but also south to San Mateo or Francisquito creek, and across the bay to the north and east, in fine, over the whole " partido " of that name.

It was very natural that in founding the new pueblo, the inhabitants of the adjacent country should be called upon to assist in commencing the new settlement, and forming its municipal organization. Where else were settlers to be looked for or obtained ? We hear of no recent arrival of emigrants or colonists who were to build up the new town. Nor was it for such persons, or for the purpose of colonization, that this pueblo was established. It was rather for the purpose of carrying out the general policy which had been pursued by Spain in her American dominions, and which is often alluded to in the instructions issued to the Governors of California, of inducing the scattered inhabitants of the country to unite and build up towns, as being more conducive to civilization, and as forming a better protection against the incursions of hostile Indians. [10.] Moreover, the persons entitled to elect Ayuntamientos of pueblos, were not merely those who actually resided within the limits of the lands which pertained to such pueblos. The Alcaldes, who were the principal officers of the Ayuntamientos of pueblos, sometimes exercised political and judicial authority over much larger geographical districts, and the inhabitants of such districts were entitled to vote at the primary elections which were held to fill such offices. It is shown in official documents, that the Alcaldes of San Jose at one time exercised political and judicial jurisdiction upon the Contra Costa, and over the whole extent of country from the Pulgas Rancho to San Juan Bautista, and that the officers of the pueblo of Los Angeles at one time exercised such jurisdiction from the Conejo Rancho to San Juan Capistrano. Are we to infer from these circumstances that no pueblos had been founded at either of the above named places? Such an inference would not only be unauthorized, but would be entirely contradicted by well established and indisputable facts. [11.]

Again, it is said that the Governors of California made grants of land to private persons within the limits of the four square leagues of the so called pueblo of San Francisco, which fact precludes the idea that this pueblo had any title to the land within such limits. Admitting the fact to be as stated, we do not think the inference logical. Suppose the municipal officers of the pueblo had been precluded from exercising any authority whatever over such lands, and that the right to distribute or grant them to the settlers had been retained by the Governor in his own hands, or had been conferred upon a commissioner or some other officer in no way connected with the Ayuntamiento; would that fact constitute any argument against the supposition that the pueblo or its inhabitants had a vested right or interest in such lands? We think not. As will be more particularly stated hereafter, the inhabitants of the pueblo may have had a vested right, interest, or use in such lands, and they may have been set apart and dedicated to some special object and purpose, and yet the legal title, subject to such purposes and uses, may have been vested for the purpose of grant in some one else, and the trust may have been executed by the Governor himself, or by some other person duly appointed for that purpose. The ownership of property may be in the sovereign, and the use private or public; or the ownership may be public and the use private. This depends upon the character of the ownership and dedication, and the circumstances of the use. (Bouvier, Law Dictionary, *verb* Dedication; Town of Pawlet v. Clark, 9 Cranch Rep., p. 292; McConnell v. Town of Lexington, 12 Wheaton Rep., p. 582; Hawkins v. Arthur, 2 Bay's Rep., p. 195; Barclay v. Howell, 6 Peters' Rep., p. 498; City of Cincinnati v. White, 6 Peters' Rep., p. 431; New Orleans v. The United States, 10 Peters, p. 712.)

If Governors of California have granted lands within the general limits of pueblos, it will be presumed, unless the contrary be shown, that such grants were made in accordance with the objects and uses for which such lands had been assigned and dedicated by the laws to the pueblos. The whole matter was subject to the control and direction of the Governor and Territorial Deputation, and the official acts of such officers within the general scope of their powers are presumed to have been done by lawful authority. (United States v. Perchman, 7 Peters R., p. 95.)

So far as we have examined the grants made by the different Governors within pueblo limits, they seem to have been in conformity with such general object of building up a town by encouraging settlement and cultivation, and with the uses to which such lands had been dedicated. If the tract granted was of a larger size than that usually given for a building lot or for gardening purposes, the Governor generally first consulted the Ayuntamiento or Alcalde, to ascertain whether there was any objection to the grant, or sent the grant to them for their action prior to its being delivered to the grantee. Moreover, the tracts so granted were usually at a considerable distance from the principal settlement, or upon the very outskirts of the pueblo lands, and a special clause was generally introduced making the lands so granted subject to the regulations and tax or *canon* of the respective pueblo. [We shall hereafter examine more particularly the meaning of this word *canon*.]

These facts are highly significant, and tend to confirm the view we have taken of the Spanish and Mexican laws relating to pueblos. The power of the Political Chief and Territorial Deputation, as well as that of the Ayuntamiento and Alcaldes, over the lands assigned to pueblos as pueblo lands, existed prior to the Colonization Law of 1824, and did not result from that law, nor from the Executive Regulation of 1828, which was based upon it. In fact, the law of 1824 expressly excludes from its provisions all lands pertaining to pueblos. And this view, we think, is fully sustained by the very able and interesting reports of the Junta appointed by the Supreme Government of Mexico to propose measures for the settlement and colonization of Upper and Lower California. These reports were printed in a collective form in 1827, and gave rise to the Executive Regulation of November 21st, 1828. This Junta or commission was composed of the most distinguished statesmen and lawyers of Mexico, and among them was Don Pablo Vicente de Sola, who had for some years been Governor of California. The opinions of these men are well worthy of consideration. (Dictamen y Planes de la Junta, pp. 11, etc.; Navarro's Opinion, cited above.) [12.]

But it is said that regular grants in colonization and of undoubted authenticity were made by the Governor, after 1834, to lands south of Mission creek, and within or partly within the general limits of the four leagues claimed to have been assigned by law to the pueblo of San Francisco; and it is contended that we must adopt one of two alternatives—either that the pueblo had no title to *any* lands within the four square leagues, or that such grants in colonization are utterly null and void. We do not feel compelled to adopt either of these conclusions, nor do we see any reasons to justify us in doing so. That the pueblo had a right or interest in *some* of the lands within the general limits, we believe to be beyond a reasonable doubt, and we think the circumstances we have already alluded to as connected with the secularization of the Mission may fully account for the grants in colonization, which are alleged to have been made by the Governors, of lands which were occupied by the Mission in 1834, when the pueblo of San Francisco was first founded. [13.]

Again, we have been referred to the proceedings of juridical possession in October, 1835, of the Buri-Buri, or Sanchez Rancho, in which the "Pueblo of Dolores" was represented as a *colindante*, or adjacent landholder, as showing that the pueblo there referred to must have been the unorganized town intended by the secularization laws and regulations to be formed out of the Mission, and not to that which is claimed to have been formed in 1834 at the presidio; because the distance between the presidio square and the northern boundary of the Buri-Buri rancho is greater than the limits which the law assigned to that pretended pueblo, and because there is no evidence whatever that any additional land was ever assigned or dedicated to it. In the first place, we do not think the fact that the pueblo was represented as a *colindante*, shows that such municipality had any claim to the land *next to* the northern boundary which was, in that juridical act of possession, assigned to the Buri-Buri rancho. It seems to have been customary in such proceedings to summon all the neighboring landholders, in order that they might witness the act of possession, and see that their own claims were not infringed. We are told that there are cases among the records of the Surveyor General's office where landholders were summoned as *colindantes*, although their lands were many miles distant from the tract to which the juridical possession was to be given. Moreover, there is no evidence to show that a separate pueblo was ever founded at the Mission. There could have been no object in forming one within the general or natural limits which had already been, by law, assigned to another. As already stated, it is much more reasonable to suppose, in the absence of positive evidence to the contrary, that on the final extinction of the Mission, its ungranted lands, which were susceptible of becoming town lands, were regarded as pertaining to the municipality which had been previously established. Moreover, there is abundant evidence to show that the municipal organization at the Mission was the same as that which had previously been established at the presidio, and that both constituted *one and the same pueblo*. While, therefore, we regard the Buri-Buri documents as in no way conflicting with our view of this case, we find in them strong evidence that a *pueblo was at that time in existence, and that it was officially recognized as having some right or title to land.* [14.]

But it is objected, that if such pueblo had existed since 1834, and it had any title to land, there ought to be found in the archives of the city, or of the Surveyor General, the strongest possible evidence of these facts. Considering that nearly all the old pueblo archives, where such evidence would naturally be looked for, were burned or lost in 1851, and the very imperfect condition of the archives in charge of the Surveyor General, we are only surprised that so much evidence of these facts is still preserved. [15.] Of course, those who have sought for a special grant, with boundaries particularly designated by natural or artificial objects, have been disappointed. We think there was no good reason to look for such a grant, as none was required; nor, so far as we can learn, was it usual to issue one. Moreover, the law so expressly designates the manner in which the four leagues were to be laid off, that there could have been no particular necessity of marking them out upon the ground in order to segregate the land from the public domain. If a larger tract had been assigned or granted, some act of grant ought to be shown; or if the four leagues had been located in a manner different from the usual form, we might expect to find some special designation of boundaries. Again, if a part of the four leagues had been private property, or otherwise exempted from becoming pueblo lands, it may have been desirable to mark out the dividing line between such lands, although such marking out of boundaries was by no means necessary in order to vest a right or title in the pueblo. And again, although not requisite to vest title, it may have been considered important in making other grants, that the exact boundaries of the four square leagues should be marked out as stated in the Report of 1840. The Mexican laws relating to the survey of the four square leagues which the laws assigned to the pueblo (found in Chap. 11, p. 96, of the "Ordenanzas de Tierras y Aguas") are so very plain and specific that there could have been no possible difficulty in determining the exact boundaries. They are precisely fixed by the law itself. [16.]

But it is urged that the "statement" or report to the Departmental Junta on the 16th of January, signed by Jimeno and Arguello, negatives the idea that any lands had been assigned or granted to this or any other pueblo in California. Upon a careful examination of the original "statement," we find that the only part of it relating to pueblo lands is a single paragraph, under the head of *ejidos*, or *commons*, in which it is stated that none of the pueblos, except Monterey, *have their ejidos and propios marked out*, ("tienen demarcadas los ejidos y tierras de propios," etc). These words are susceptible of several interpretations. They may mean that the two classes of pueblo lands there mentioned had never been specially designated, as they ought to have been, in order to separate them from the other lands of such municipalities and to dedicate them to the objects implied by the names *ejidos* and *propios*, which are used ; or they may mean that the four square leagues which properly belonged to such pueblo had never been actually marked out on the ground, and "that, therefore, the Governor, in making concessions of land in the vicinity thereof, had granted the same temporarily, waiting for such regulation, or definitive designation, of town boundaries, before issuing definitive titles." Again, they may refer to lands outside of the four leagues, and which the old laws say may also be assigned to pueblos, in case it should be deemed advantageous and proper. But neither of these interpretations conflicts, in the slightest degree, with the view which we have taken. On the contrary, they are most strongly confirmatory of that view. If none of the pueblos, except Monterey, had any right or title to land, why mark out their boundaries, or why separate the *ejidos* and *propios?* Moreover, if they had none, why was it not proposed to grant lands to such pueblos ? But nothing of that kind is recommended, and the only grants spoken of were those already made to individuals *in the vicinity* of the lands of such municipalities, and which were made as mere temporary concessions in order to avoid any infringement of the rights or limits of the pueblos. [17.]

Again, it is said that the very terms of the Acts of the Governor and Territorial Deputation, in August and November, 1834, giving to Ayuntamientos a right to grant (*dar*) lands pertaining to pueblos, and the forming of such municipality at the presidio of San Francisco, show that they had no authority so to do, because article twenty of the former requires report of it to be made for the approbation of the General Congress, and article second of the latter requires it to be reported for the approbation of the Supreme Executive. We do not so understand these articles. That the Act for the election of the Ayuntamiento was immediately carried into effect, there can be no question. It seems that the Governor did not think any precedent approval of the Supreme Executive requisite to give it validity. But this, as well as many other Acts of the Governor and Deputation, was, by the laws, required to be submitted to the President for such measures as he might see fit to take thereon. If approved, it remained as it was; but if disapproved, orders would have been issued to annul and revoke the Act. The same remark applies to so much of the Act of August 6th as relates to pueblo lands. But article twelve of that Act contemplated a change of the revenue laws, which could be made only with the sanction of Congress. Hence the references of the Act to that body for approval. So far as the establishment of the pueblo of San Francisco and its organization and powers were concerned, we think that the existing laws conferred abundant authority upon the Governor and Deputation. But if the approval of the Supreme Executive were really necessary to give validity to that part of these Acts, it will presumed. (The United States vs. Clarke, 8 Peters' Rep., pp. 452, 463; Delassus vs. The United States, 9 Peters' Rep., p. 134; Patterson vs. Jenks et al., 2 Peters' Rep., pp. 225, 237; Polk's Lessee vs. Wendell, 5 Wheat. Rep., p. 295; The United States vs. Perchman, 7 Peters' Rep., pp. 95, 96; Strother vs. Lucas, 12 Peters' Rep., p. 437.) [18.]

Counsel have raised various other objections, which we think may be readily answered, and the facts upon which they are founded may be easily reconciled with the view which we have taken; but our limits will prevent us from discussing them, and even from referring to all the laws and authorities from which our opinion has been formed.

III. We will next consider the general character of the right or title which a pueblo acquired to the lands, which, within the limits of four square leagues, were susceptible of such acquisition.

In doing this, we will refer very briefly to the different kinds or classes of pueblo lands, and to the powers of the municipal officers over them. The right or title by which the pueblos held these lands was, of course, in no way dependent upon the powers which the political authority of the State might at any time confer upon the officers of such municipalities. If counsel had observed this distinction, they might probably have been saved much time and labor in their arguments and voluminous briefs. Nevertheless, as the character of the powers which such officers were authorized to exercise over such lands may tend to throw some light upon the nature of the title by which they were held, we briefly notice the authorities on this point.

The Spanish laws give different names to different portions of land within the limits of a city, pueblo or town, according to the various uses to which they are applied. Thus, there are *solares* or house lots of a small size, upon which dwellings, shops, stores, etc., are to be built. There are *suertes* or sowing grounds, of a larger size, for cultivation or planting, as gardens, vineyards, orchards, etc. There are *ejidos*, which are quite well described by our word *commons*, and are lands used in common by the inhabitants of the place for pasture, wood, threshing ground, etc.; and particular names are assigned to each, according to its particular use. Sometimes additional *ejidos* were allowed to be taken outside of the town limits. There are also *propios* or municipal lands, from which revenues are derived to defray the expenses of the municipal administration. There were also other names, such as *terminos*, *concejiles*, *tierras communes*, *tierras de labor*, *tierras de regadio*, *abrevaderos*, *dehesas*, *pastos*, *montes*, *plazas*, etc., etc.

Such were the principal divisions of the land included within the limits of a town and devoted to the use of its inhabitants. And these divisions, when once made, were not merely nominal, for there were numerous laws relating to each, and having respect to the management, disposition and use of each; and the provisions which were made for one class were usually very different from those relating to another class. (Escriche Dic., verbo Ejidos, propios, etc. Febrero Mexicano; Sala Mexicano; Recopilacion de Indias, book 4, tit. 7.)

The right of the municipal authorities of pueblos to make grants or distributions, in *solares* and *suertes*, to individuals and settlers of lands within the limits of such pueblos, seems to have been conferred in very early times, and is very often referred to in the more recent laws and orders as a subsisting right. But certain classes of such lands, as *ejidos*, etc., could not, in general, be so granted or distributed to individuals for their exclusive use or occupation. Sometimes municipal officers were prohibited from making grants or distributions of any town lands of any class or description without the royal license; and at others, special officers were appointed by the Crown for that purpose.

It has been doubted by some if the grants or distributions of the pueblo lands to individuals, made under the earlier Spanish laws, were intended to be grants in full ownership. But we think this question was definitively settled by the law of January 4th, 1813, which makes numerous provisions for distributing or granting in *suertes* the lands of the pueblos which were not required for *ejidos* or commons, and declares that, in whatever mode such lands are distributed or granted, it shall be in full ownership—*en plena propiedad.* (Leyes Vigentes, pp. 57, 59.)

There seems to be some difference in the various laws and orders which were issued at different periods with respect to what particular officers were to make such distributions of lots for building and other purposes. In the cities and larger towns this duty, at least in early times, devolved upon the *cabildos* and *corrigedores* of such cities and towns. By Neve's Regulations of 1775, for the establishment of the new pueblos of San Jose and Los Angeles, the right of distributing the lots was, at least in the beginning, to be exercised by the Governor himself, or by a person commissioned by him for that purpose. But these pueblos were not, for the first two years, to elect any municipal officers, and even after that time, only for such offices as should in the meantime be established. The ordinary Alcaldes, for judicial and police purposes, were to be furnished by the Governor. By the plan of Pitic in 1789, the lands were to be divided up, and the first distribution made by the Engineer and Commissioner, who were also to issue the certificates of title. By Nava's order of 1791, for changing presidios into pueblos, the first distribution of house lots and lands within the limits of the four square leagues, was to be made by the commandants of the presidios; but when a sufficient settlement was made to authorize the municipal organization in place of the military, it is presumed that these duties were to devolve upon the Ayuntamientos, as in other cases. By the law of 1813, the expedientes of titles were to be made by the Ayuntamientos and referred to the Provincial Deputations for approval. By the law, act or decree of August 6th, 1834, relating to pueblos in California, the Ayuntamientos were to ask that there be marked out or assigned *propios* and *ejidos* for each town; and provision was made for granting, *en censo enfiteutico*, building lots for the erection of houses or dwellings at a fixed price, and for the leasing of the *propios* from which the towns were to derive revenues for the support of the municipal administration. The granting of such house lots and the leasing of such *propios* were evidently to be made by the Ayuntamientos. The meaning of the phrase *en censo enfiteutico* and of *el canon* which, by the order of October 26th, 1835, the grantees of such house lots were to pay to the Ayuntamiento of San Francisco for such grants, will be alluded to and explained hereafter.

Concessions of house lots were made by the several Alcaldes of San Francisco soon after the formation of that Ayuntamiento; these grants were either fifty or one hundred varas square. In the year 1835, Jose Joaquin Estudillo applied to the Governor for a grant of two hundred varas square. This petition was referred to the Territorial Deputation, and the Committee of that body on Municipal Lands reported, that grants of house lots ought to be limited to one hundred varas square. Accordingly, the Governor, on the 26th of October, 1835, wrote to the Alcalde, "that the Ayuntamiento of that pueblo (*ese pueblo*) may grant lots which do not exceed one hundred varas, for the building of houses in the place called Yerba Buena;" and "that you may make it known to the inhabitants of that pueblo, in order that they may not apply with their memorials to this political Government, as it is one of the favors which the Ayuntamiento can grant.

This order of the Governor leads us immediately back to the law or plan of *Propios y Arbitrios*, of August 6th, 1834. Now, if according to this order the Ayuntamiento of that pueblo (*ese pueblo*) could grant lots of land to settlers, and the law of August 6th authorized such Ayuntamiento to impose, at its discretion, a ground rent or *canon* on such grantees, the right of such pueblo to such lands must have been something more than that of mere temporary occupation and use. According to Escriche, "*El canon*" means "the annual charge or rent which is paid in recognition of the *dominium directum* by the person who holds the *dominium utile.* (Vide Escriche, verba *canon* and *pension.* And for the meaning of the phrase "*perteneciente a los propios*," vide Escriche, verba *propios* and *pertinencia.*) The meaning of the former has already been explained, and the latter, according to that authority, is "that which is necessary to, or consequent upon the principal, and enters with it into the ownership; as when it is said that any one purchased such an estate with all its appurtenances." Here, the lands which the Ayuntamientos had a right to grant in lots constituted the principal, and the "*canon perteneciente a los propios*" of "*ese pueblo*," which the Ayuntamiento was authorized to require to be paid as a consideration for such concessions or grants, or an annual rent therefor, was an acknowledgment of the direct dominion which the pueblo, as the owner of such *propios*, had in the land which was conceded, granted or rented.

Again, article two of the law of August 6th, says that these *propios*, which may be designated to each pueblo, may be rented or granted *en censo enfiteutico*. Escriche says that "*censo enfiteutico*" is the right which we retain to require of another a certain annual charge or rent, by reason of having transferred to him forever, or for a great length of time, the useful ownership of some real estate, reserving to ourself the direct dominion. Again, the same author says: "the direct owner or imposer of the *censo* is he who transfers the useful dominion of the real estate; while the grantee or *enfiteutico* is he who acquires the useful ownership of the thing charged." Moreover, it is said that such owner of the *dominio utile* cannot be ejected from such real estate by the *dominio directo*, except in case of neglect for several consecutive years to pay the ground tax according to the terms of the grant; that he may impose upon it, without notice to or consent of the *dueno directo*, any servitude, rent or other charge, and pledge, mortgage or sell it.

It would seem from these definitions that pueblos held the direct dominion of these lands, subject to certain trusts and uses, and that the moderate and small portions which they were authorized to grant to individuals, were to be held by the latter as subject to such municipal tax, but in all other respects, in absolute ownership with full right of disposition. These inferences would seem to result from the very words used in these documents.

But be this as it may, the right of such municipal officers of this particular pueblo to make such concessions or grants in lots of one hundred varas square was, in 1835, fully recognized by the highest authority in California — the Governor and Territorial Deputation.

It appears that the Mexican law of March 20th, 1837, provided that in pueblos having a population under a certain specified standard, Jueces de Paz were to be elected, and were to exercise the powers of

Ayuntamientos. But it also appears from the archives that this law was not carried into effect in California until some time in 1839, and that the system was again changed at the end of 1843. By the Governor's proclamation of November 14th, 1843, which in some respects modifies this organization, Monterey and Los Angeles were to elect Ayuntamientos, composed each of two Alcaldes, four Regidores and one Syndico, and that in the other pueblos, *among which San Francisco is named*, elections were to be held for the appointment of "two Alcaldes of first and second nomination." These new "Alcaldes de nominacion," or Jueces, were to enter upon their duties the first of the following January, and in addition to the judicial powers of the ordinary Alcaldes and the political powers of the Prefects, they were to exercise "the powers and obligations which the Ayuntamientos have." (Limantour Land Com., Ex. "O," pp. 45, et seq.; Wheeler's Land Titles; Int. and Schedules.) [19.]

We think that the documents and authorities to which we have referred are sufficient to show that pueblos had such a right and interest in the lands within their limits that they could distribute, concede, or grant them in lots to individual settlers, subject in this as in all other matters to the instructions and orders which might be given them by the superior authorities, and that the lots so distributed, conceded or granted, were, at least after the law of 1813, passed to the grantees and their heirs and successors in full property and ownership, subject only to the municipal tax, or *censo*.

It is said that this Court, in the case of Woodworth v. Fulton, (1 Cal. Rep., p. 295) virtually decided: First, that San Francisco never was a pueblo. Second, that it had no right or title to land which it could transfer or convey to others. Third, that if it had any title, Alcaldes, acting under American authority after the military occupation and conquest of the country, could not convey without authority from the American Government.

It is also said that the first two of these grounds were virtually abandoned and overruled by the same Judges in the subsequent case of Reynolds v. West, (1 Cal. Rep., p. 323) in which they sustained the validity of a grant in San Francisco made by a Mexican Alcalde before the war; and that in Cohas v. Raisin (3 Cal. Rep., p. 443) this Court overruled the third ground of the decision of Woodworth

v. Fulton, by sustaining a grant made by an American Alcalde during the war with Mexico, and while California was in the military occupation of the United States.

Without examining here the opinions of the individual Judges in the last case, with respect to the character of the right or title which the pueblo of San Francisco held to the lands within its limits, we will suppose the question which the Court undertook to decide was simply this: Conceding that the pueblo had such a right or title to the lands within its limits that, as held in Reynolds v. West, its Alcalde or municipal officer could convey such land to others in full property, did such power of conveyance continue in such municipal officers during the military occupation of California by the United States, without special authority from the conquering power? Supposing this to be the only question which was actually passed upon by the Court in that case, we will now proceed to examine the correctness of the conclusions to which the Court arrived.

It is a well established principle of international law, that the military occupation of a conquered territory does not, in general, effect any change in the laws of that territory. The political connection between its inhabitants and their former sovereign or State is interrupted or suspended so long as the occupation continues, and is entirely severed on the completion or confirmation of the conquest, whether by treaty of cession or otherwise. The right of the conqueror to govern the enemy's territory which he may occupy, is not derived from the Constitution or political institutions of his own State, but flows directly from the laws of war, as established by the usage of the world, and confirmed by the writing of publicists and the decisions of Courts; in fine, from *the law of nations*. It is held by the same code, that, although the conqueror *may* suspend the laws and entirely displace the former local and civil authorities, or limit or change their powers, this is not usually done; and consequently, that such changes are not to be presumed, but must be proved. Even where the conquest is completed by cession or treaty of peace, although the laws political which bound the country and its inhabitants to the former sovereign are thereby completely abrogated, the municipal laws of the country continue in force until changed by the proper authority; and the existing government and its officers continue to exercise the powers and authority conferred by such laws, so far as they are not inconsistent with the will, expressed or necessarily implied, of the new sovereign. Neither military occupation or complete conquest produces, as a general rule, any change in private property, no matter whether belonging to individuals or municipalities, or by what kind of title it may be held. These veiws are sustained by the best authorities. (Fleming v. Page, 9 How. Rep., p. 603 ; Cross v. Harrison, 16 How. Rep., p. 164 ; Heffter, Droit International, secs. 131, 186 ; Isambert, Annales Pol. et Dip. Int., p. 115 ; Schwartz, De Jure Victoria, ch. 27 ; Vattel, Droit des Gens, liv. 3, ch. 13, sec. 197, et seq ; Wildman, International Law, vol. 1, pp. 163 et seq.; Ortolan, Diplomatie de la Mer., liv. 2, ch. 13 ; Campbell v. Hall, 1 Cowper's Rep., p. 204 ; Kent, Com. on Am. Law, vol. 1, p. 92 ; Wheaton Elem. Int. Law, p. 4, ch. 2, secs. 5, 6 ; Riquelme, Derecho Pub. Int., lib. 1, tit. 1, cap. 12 ; Am. Ins. Co. v. Canter, 1 Peters' Rep., p. 542 ; Burge, Commentaries, vol. 1, pp. 31, 32.) [20.]

Again, suppose it to be admitted that pueblos had no absolute right of property in any part of the four leagues of land within their general limits, and that the legal title still remained in the Mexican Government, subject only to the uses of the towns for the purposes and under the restrictions imposed by the laws and regulations ; it by no means follows, that, upon the complete conquest and cession of California, this land became a part of the public domain of the United States.

In the case of the City of New Orleans v. the United States, it was held by the United States Supreme Court, that property may be dedicated to the public use without vesting the legal title, and that, when such use had once been created, it could be destroyed only by an exercise of the right of eminent domain. In that case, France had permitted a certain part of the city of New Orleans to be used as a quay. The same use had been continued under the Spanish sovereignty, and after its retrocession by Spain to France, and its cession by the latter to the United States. Neither of these Governments had ever conveyed any legal title to these lands, either to the city of New Orleans or to the public ; it was therefore contended that, by the last cession, the title or right of property in this land had passed, with all other public rights, to the United States. But the

Court said that, admitting the legal title to have been in the King of Spain, if he held the land in trust for the use of the public, the title in him was subject to such uses, and the act of cession could not destroy them ; that the United States acquired no right to dispose of such land as other public lands of the United States; moreover, that the right to regulate this use and to carry out the trust belonged to the State of Louisiana and the people, such a right never having been delegated to the Federal Government. (10 Peters' Rep., pp. 736, 737.)

If such a rule was applicable to the lands of this quay, so held, *a fortiori* must it apply to the pueblo lands of San Francisco, which, as already shown, were held by that pueblo by a much stronger right or title. (See 7 Texas R. 288.)

It has been stated by counsel for plaintiffs, and the correctness of the statement was not denied, but has been virtually admitted in some of the briefs of defendants' counsel on file in this case, that there are very few, if any, royal charters, for the incorporation of cities or towns, since the reign of Ferdinand and Isabella, in Spain or the Indies; and that not a single instance of such a charter can be found in any of the collections of the Mexican laws and decrees. Cadiz has a royal charter of nobility, with the title of "Noble and Heroic ;" and the same may be said of Saragosa and some other cities. But these are very different from charters of incorporation, and contain no titles, grants or rights to land, or control over land. The cities themselves had existed hundreds of years before these royal charters were issued. The royal order of August 19th, 1833, cited by counsel, changing the pueblo of Port Royal, of Manzanillo, into the villa of that name, forms no exception to this view. This is no charter of incorporation, nor does it contain any grant of land. It provides for the demarcation and designation of *propios*, *ejidos* and *dehesas*, and the assignment of jurisdictional limits (*terreno jurisdiccional ;*) but we have searched it in vain for any grant, or any intention to subsequently make a grant of any land to that municipality. Probably here, as in most other cases, the only charter of incorporation or grant of land made or contemplated, was the license to establish an Ayuntamiento in such pueblo or villa, and the pueblo, villa and Ayuntamiento, when established and organized, immediately became invested with all the rights and powers which were conferred by the general laws or particular act. Again, it is said that the city of Lima, in Peru, never had a royal charter of incorporation, or a grant of land; and yet that city and its inhabitants have enjoyed the lands within its municipal limits for more than three hundred years. Suppose that city should be ceded to the United States; would all such lands not held by royal grant become a part of the domain of the United States? Suppose it be true, as admitted in the briefs of counsel, that but few, if any, of the cities or towns of Mexico have ever received any special grant, and that, as here contended, the laws gave them no title, without special grant, to the lands which they have distributed to the inhabitants and settlers; does it follow that if the United States should acquire that country, by conquest or cession, such lands would become a part of the public domain, and consequently, that the holders thereof could have no title except by an Act of the political power of the new State? [21.]

If this be really the law, we think that such a change of sovereignty would be infinitely more disastrous to the United States than to the land-holders, who might thereby be despoiled and ruined. The power which the Federal Government would acquire over the property of individuals would be greater than that held by any monarch of modern days; and very soon it would utterly corrupt our Federal Administration and destroy our Federal organization.

But we cannot think that this is a correct view of the law in these cases. On the contrary, we are of the opinion that Spanish and Mexican towns had, under the general laws, such a right or title to lands within their limits as will enable and require the courts to protect them and those holding under them, in the enjoyment of those lands; that the determination and regulation of these rights belong to the States and not to the Federal Government, for the reason that neither conquest nor cession could confer upon that Government any such power, and because, as held by the United States Supreme Court, the Constitution prohibits it from exercising any such power in the States.

But counsel have referred us to the *fueros* (franchises) and *cartas pueblas y forales* (town charters and franchises) granted by the sovereigns and lords in Biscay, Navarre, etc., in opposition to the view we have taken, and as showing the necessity of such grants to confer any right of property upon towns. It is a sufficient answer to this argument to remark that these *fueros*, etc., never extended to Spain or to the Indies, and form no part of the Spanish law. The King of Spain was merely Lord of Biscay, and President of the Junta of the other Lords of Biscay. There were separate and distinct *fueros municipales* in Leon, Castile, Navarre, Arragon and Catalona. These received particular names from the persons or places to which they were granted; as the *fuero of Najera*, the *fuero of Sepulveda*, the *fuero of Logrono*, the *fuero of Sahagun*, *of Toledo*, *of San Sebastian*, *of Cuenca*, *of Caceres*, etc., etc. The privileges thus conceded in early ages to particular cities and towns, or to the Lords of those places, still subsist, at least to a certain extent, and are therefore alluded to and discussed by modern commentators of Spanish jurisprudence; but they have no relation whatever to the Spanish and Mexican laws applicable to towns and pueblos in California. (Esriche, verbo *Fuero Municipal.*) [22.]

But suppose an actual allotment or demarcation of land was requisite under Mexican law in order to vest a title in the pueblo, as has been so strenuously urged by counsel. The mere failure of the Mexican Government to assign these lands, if that was necessary, would not under the circumstances, destroy the right of the pueblo to them. We have shown that the pueblo existed, and exercised a certain right of ownership in these lands, and that it was entitled to do so by the laws of Mexico. Under the broad and liberal terms of the Act of Congress of 1851, the claim of the city would be an equitable claim on the Federal Government, which her officers would be bound to recognize and perfect, and which, indeed, has been done, so far as her Courts are concerned, at least with respect to so much of the claim as has been confirmed.

The evidence in favor of the existence of a pueblo in San Francisco prior to July 7, 1846, and of its general right, for pueblo purposes, to four square leagues of land, to be measured, according to the ordinanzas, from the center of the plaza at the presidio, is, to our minds, irresistible.

1st. We have the general laws of Spain and the Indies authorizing the formation of pueblos, assigning their general boundaries, directing how they were to be surveyed out, designating the uses to which such lands were to be devoted, and defining the character of the right which the pueblo acquired in them, and the control which its municipal authorities, as well as the King and his officers, were to exercise over them.

2d. We have the special orders of the King and the highest officers of his Government with respect to the establishment of pueblos in California, and more particularly for the conversion of presidios into pueblos, and the extent of land assigned to the pueblos so formed.

3d. We have documentary evidence showing that at a very early period, and almost immediately after the discovery of the bay of San Francisco, the Viceroy and Governor of California contemplated the establishment of a pueblo at this identical point, and that the foundation of the presidio and Mission of San Francisco, in 1776, was then considered and so announced as merely preliminary to the organization of a great town, into which they were to be converted as soon as a sufficient number of settlers could be procured for that purpose.

4th. We have documentary evidence of unquestionable authenticity, showing that the Governor and Territorial Deputation, in 1834, ordered an election at the presidio of an Ayuntamiento, consisting of an Alcalde, two Regidores and a Syndico—officers recognized by law as belonging only to pueblos; that this and subsequent elections of the same kind were held at the same place; and that such municipal organization was then, and has been ever since, recognized in numerous official documents signed by the different Governors, Secretaries of State, and other Government officers, as the "pueblo of San Francisco," or the "pueblo of San Francisco de Assis."

5th. We have documentary evidence showing that the Political Chiefs, Deputations and other Government officers recognized, in numerous official papers, that this pueblo had some interest in, and its municipal authorities some control over, the lands within the general limits of four square leagues; and that, at different periods, they were authorized to grant, in particular localities within such limits, small parcels of these lands to private persons in full ownership.

And 6th. We have documentary evidence showing that the municipal officers of this pueblo did, for a long term of years, both before and since the conquest, exercise this authority by granting small lots of land to numerous individuals, and that their power was recognized, both by the Mexican Government in California and by the Government of Military Occupation which succeeded it.

IV. In pursuing this discussion thus far, we have not deemed it necessary to determine the precise character of the right or title by which the pueblo of San Francisco held its pueblo lands, nor the precise boundaries by which such lands were limited and defined. It was sufficient for our purpose that it had some right or title to lands, and that these lands were defined by the law, and that their boundaries *could be* ascertained and fixed. We now, however, must consider the question whether the pueblo of San Francisco, or the City of San Francisco as its successor, had such a title to the lands within its limits which had not been conceded or granted in the manner we have indicated, as to subject them to be levied upon and sold under execution.

This question has been most elaborately discussed, numerous points have been raised, and a multitude of authorities have been referred to. It would be impossible in this opinion, to discuss all of these points and authorities, nor shall we attempt to do so; for the view we have taken of this question renders it unnecessary to consider many of those upon which counsel have argued with great zeal and ability.

It has been argued with much force, that while cities, pueblos and towns, under Spanish and Mexican law, had certain uses in the lands within their limits, the title to such lands, although subject to such uses, still remained in the Crown or Government, and numerous authorities have been referred to, to sustain this position. Thus, in Book 4, Tittle 12, Law 8, of the Recopilacion de Indias, it is said: "Our pleasure is that the Viceroys and President-Governors shall have power to *revoke* and *annul* the gifts (*gracias*) which the councils (*cabildos*) of cities have made, or shall make, of lands in their districts, *if they have not been confirmed by us;* and, if they belonged to Indians, they shall be ordered to be returned to them, and the vacant lands (*valdios*) shall remain such," etc. Again: Book 7, Tit. 5, Law 2, Recop., says: "Our will and pleasure is, that the cities, towns and villages shall retain their rights, revenues and *propios*, and that no gifts (*gracias*) of them be made; wherefore, we command that any gifts or gift which we shall make of the same, or any part thereof, to any person, shall be *of no value*." Again: Book 7, Tit. 7, Law 10: "The king prohibits any one from making gifts (*gra-*

cias) in the royal name, of any commons and pastures (*terminos y pastos*) of the cities, towns and places of the kingdom;" and in Law 11, of the same Book and Title, it is commanded that the Justices and Councilmen (*Justicias y Regidores*) shall not grant any lands (*dar tierras algunas*) without a previous license for that purpose. Again: Perez, in commenting upon the settlement of the Indies by Ferdinand and Isabella, says: "Their Majesties esteemed it proper to cede to the towns of America and to their Councils, *en clase de dote o privilego de problacion*, a certain portion of lands, in order that they might have recourse to them for their support and improvement (*usufructandolos*) for pastures, cultivation, or in the manner directed in their municipal ordinances." (Perez, Comp., pp. 334, 335.) Elisondo says: "The Kings, the fountains of jurisdiction, are the owners (*duenos*) of all the *terminos* situated in their kingdoms, and as such, can donate them, divide or restrict them; the same being true of their *pastos*, although the pueblos enjoy them—it being presumed that they are granted only so far as respects their use and administration, the dominion remaining in the sovereigns themselves, so that they may afterwads limit, enlarge or restrict them, and give any new form to the possession and enjoyment thereof (*sus goce y aprovechamiento*). And hence it is that pueblos cannot alienate their *terminos* and *pastos* without precedent royal license and authority. The ancient limits (*terminos*) are never presumed to be altered or changed, but, on the contrary, to remain in their primitive condition; especially being assigned by a royal commissioner in whom no power is vested to give and assign *terminos* to one town to the prejudice of others, but to mark out those inclosed and private, to which the letter of the commission refers, and which must be considered as such after being marked out, so that each town (*poblacion*) and its inhabitants may use them, their *pastos* and *ejidos*, as the endowment (*dote*) of the *ciudad*, *villa* or *lugar* to which they belong. From the foregoing it is inferred that any city, village or pueblo has an established right to the lands adjacent to it; consequently, the inhabitants of another *lugar* cannot pasture in the same, nor enjoy their other uses (*aprovechamientos*) without showing a legitimate title authorizing them to do so." (Practica Un. Forense, tomo 3, pp. 107, 108.)

Again, the same author says: "There is assigned (*diputada*) by law, as *pertenencia* of pueblos, nothing more than that which, by privilege of the Princes (*privilegio de los Principes*), by custom, or by disposition of men one to another, is conceded to them; so that, although there is assigned to the towns, at the time of their establishment, a *territorio* and *pertenencias*, which may be common to all the inhabitants, without the right to each one separately to use them exclusively (*por si*) there is reserved to the Princes the prerogative (*regalia*) to decide the *terminos* of their provinces and villas, prescribing to them the use and enjoyment, but leaving the *dominio* in the sovereigns themselves." (Idem, tomo 5, p. 226.)

In order to fully understand the preceding extracts from Elizondo's Commentaries, it is necessary to examine the technical meaning of the words used. Thus, *dote* means *dowry*, when applied to the patrimony of the wife, but when applied to towns it means a *gift* or *endowment*. *Aprovechamiento*, when applied to pueblo lands, has particular reference to the commons, as the *dehesas* and *montes*, and implies not only the enjoyment, but a *right* to the enjoyment of them. *Dominio* does not necessarily imply ownership; it may mean simply the *dominio alto*, (right of eminent domain, which belongs to every sovereign State over private property) or the *dominio directo*, or the *dominio utile*, which have already been explained. So of the word *propiedad;* it does not necessarily imply a full right of disposition, for the *dominio utile* may be in one and the *nuda propiedad* in another. And again: the word *regalia* may, in Spanish law, simply mean a right which the sovereign has *over* anything *in* which a subject has a right of property or *propiedad.* (Vide the words indicated in the dictionaries of Escriche, of Salva, of Velasquez, of the Academy, etc.)

But our limits will not permit us to pursue this critical investigation; and we therefore resume our examination of the other more important authorities referred to by counsel for defendants.

Book IV, Tit. 7, Law 11, of the Recopilacion de Indias, in reference to laying out new towns, says: "Let solares be distributed by lot to the settlers (*pobladores*) continuing from those at the principal square (*plaza mayor*) and leave the others for us to give to those who may afterwards come to settle, (*poblar*) or what may be our pleasure." "Propios," says Febrero, "are that species of property which, *by some title*, pertains to the commonalty of each pueblo, and the revenues whereof are dedicated to the conservation of the civil organization and municipal establishment of the councils, comprehending likewise under this name all those things declared to be such in virtue of any legal dispositions. (Feb. Mex., tom. 1, pp. 304–309.) The law of March 20th, 1837, says: (Art. 8) "On the previous report of the Prefects and having heard the opinion (*dictatem*) of the Departmental Junta, they (the Governors) may grant license to the Ayuntamientos or authorities charged with the administration and expenditure of the municipal funds, for the extraordinary expenses which may be directed to objects of necessity or common utility." And (Art. 9) "In cases of necessity or for motives of public convenience, they may grant license to the same authorities, on previous consent (*anuencia*) of the Departmental Junta, to alienate (*enagenar*) any of the property (*algunos de los bienes*) of the propios and arbitros; and any cession, donation or contract, made without this requisite shall be null and of no value." Col. de Decretos, 1836 y 1837, p. 180. "Among the attributes of gratuitous administration (*administration graciosa*) *id est*, for making gifts or grants without claim," says Lares, "are included the acts of tutelage (*tutela*) which the Executive (*Gobierno*) exercises over corporations and establishments which are considered in society as moral persons, and with the privileges of minors. This state of tutelage and protection has been the object of the critical examination of publicists, who are divided in opinion," etc. * * "According to the importance and nature of the object which the act of tutelage has to secure, so will be the different manners in which this act will be exercised. If it relates to a subject of small interest, the administration will proceed by orders or decrees, or by means of its respective agents; if the matters are of weight, it will issue formal regulations. But in whatever mode it may be done, the contentious appeal against these acts of administrative tutelage, whether superior or inferior, would be repugnant to its nature. * * * The acts of administrative tutelage are acts of inferior administration which do not admit of any appeal. This tutelage of administration is applicable to all acts of alienations, sales, exchanges, rentings, acceptance of trusts or legacies, compromises and suits of Ayuntamientos and other Corporations which are under the Executive. The approval or disapproval of a sale, or of a compromise, are acts of tutelage which, like all acts of that nature, do not admit of appeal." (Derecho Admin., pp. 120, 122.) [25.]

The above are the most important authorities referred to by counsel against the pueblo title. The quotations which they have made are, in most instances, but brief extracts from long laws which contain numerous provisions, and sometimes these extracts are not fully expressive of the sense and object of the law. We have carefully examined their references to laws and text-books, and it seems to us, that taken together, they show that, under the old Spanish system, the lands assigned to towns, whether by general law or special act, were in the sense of endowments, to be held in trust for the purposes and objects specified in the laws or in the particular grant; or, as expressed by *Perez*, *en clase de dote o privilegio de poblacion*, (in class of endowment or town privilege) but not in absolute ownership, with full right of disposition. The lands so assigned were for the general object of building up and sustaining the town and its population, and were to be applied to that object in the manner which might be directed by the laws or by royal orders. The Government, or its authorized agents, were, therefore, to designate the portions of such lands which were to be used for particular purposes, as those which were to be given to individuals in *solares* and *suertes;* those which were to remain common for the use of all alike, as the pastures, woods, public squares, watering places, etc., and those from which the municipal officers were to derive revenues for their support and the expenses of the municipal government. The lands so assigned to these special objects could not all be used or disposed of in the same manner. Thus, the building lots were to be given to the settlers for their individual and exclusive benefit; but the *commons* were for the common use of all, and could not, in general, be reduced to individual ownership except by common consent, or an exercise of the right of eminent domain. There were numerous laws enacted at different times which relate to each class of land belonging to towns, and much misunderstanding has resulted from not observing to what particular class the provisions of a law refer. And this conclusion is greatly increased by the ordinary English translations, where, for the want of corresponding English words, these various classes are usually translated by the general terms "municipal lands" or "town lands." [23.]

It also appears from these authorities that neither the King nor any of his officers were to grant away to others the lands which had been, by law or otherwise, assigned to any town, and that, if such grants should inadvertently be made, they were to be considered as void. And it further appears that the municipal officers of any town were not, without superior authority, to alienate any town lands, and if they did so without previous license or subsequent confirmation their acts were to be considered as void. [24.]

But we see nothing in these laws opposed to the views we have already expressed, that the towns had such a right, title and interest in these lands as to enable them to use and dispose of them in the manner authorized by law or by special orders, and consonant with the object of the endowment and trust. Undoubtedly the right of control remained in the sovereign, who might authorize or forbid any municipal or other officer to grant or dispose of such lands, even for the purposes of the endowment or trust. Such general right, with respect to a public corporation, exists in any sovereign State, and must, of course, have existed in the absolute monarchy of Spain, where the property of private corporations and individuals was to a great degree, subject to the royal will and pleasure. [25.]

In justice to one of our predecessors, it is proper to remark, that we have here quoted only such laws as were referred to by counsel, and, for that reason, have not alluded to laws 1 and 2, Title XVI, Book V, of the Novisima Recopilacion, relied upon by Justice Heydenfelt in his opinion in Cohas vs. Rasin, 3 Cal. Rep., p. 446. Some of the counsel have denied that the laws so relied upon were of any force or authority in Mexico. There seems to be a misunderstanding or misapprehension in this matter. The laws referred to were, beyond all question or peradventure, in force in Mexico. It is true that some Mexican writers have doubted whether the new laws introduced into that Recopilacion, which had never been transmitted to the Indies prior to 1811, and which refer particularly to old Spain, are of binding authority there. But the laws referred to by Justice Heydenfeldt, are, according to every Mexican writer whom we have consulted, in force in Mexico. In the first place, these laws are copied *verbatim* from laws 1 and 2, Title V, Book 7, of the Recopilacion, which, by royal decree, was of binding authority in the Indies. In the second place they are copied in full in the "Pandectas Hispano Mexicanas" or General Code of Laws in force (*vivas*) in the Republic of Mexico, published in 1840, by the Licentiate, Juan H. Rodriguez de San Miguel. *Vide* Nos. 2430, 2431. Moreover, they are quoted and referred to as laws in force (*leyes vigentes*) by numerous Mexican text writers. With respect to the binding character of the Novisima Recopilacion generally, in Mexico, we refer to Sala Mexicana, vol. 1, pp. 140–144; Febrero Mexicana, vol. 1, Caps. 3 and 4, pp. 96–160; Schmidt's Civil Law of Spain and Mexico, p. 98; Rockwell's Spanish and Mexican Law, vol. 1, p. 16.

The question has been raised whether the character of this title in towns was not enlarged and became a title in absolute property, with full power of disposition under the Constitution of 1812, the laws of 1813, and the Constitution and laws of the Mexican Republic after its independence.

We have already noticed the law of the Cortez in 1813, with respect to the nature of the grants by the Ayuntamientos of town lands to individuals, making them in full property, and explained the meaning of the words used with respect to such grants by the Governor and Territorial Deputation in their acts of August 6th, 1834, and October 26th, 1835, but we have not been referred to any law either of the Cortez, of Mexico, or of California, changing the character of the right or title by which the towns themselves held these lands. If they before held them in trust for certain objects and uses, subject, in this matter, to superior control and authority, we must infer, unless the contrary be shown, that the same continued, except so far as such control by superior authorities might be modified by the change from an absolute monarchy to a government of constitutions and laws.

It has been contended on the one hand, that, inasmuch as the Regulation of November 21st, 1828, authorized the Governor of California to grant *solares* of one hundred varas, and as the law of March 20th, 1837, prescribes it as one of the duties of a Prefect to regulate the distribution of the *common lands* of the pueblos of his district, it must follow as a necessary consequence, that the full title to such pueblo lands remained in the Mexican Government; while, on the other hand, it is contended that inasmuch as the law of August 18th, 1824, exempts from colonization the lands of pueblos, and as the Governor and Territorial Deputation in 1835 recognized the right of Ayuntamientos to grant pueblo lands in lots of one hundred varas, it must follow as a necessary consequence, that such pueblos were the owners of an absolute title to such lands. We are of opinion that neither of these inferences is correct, but that both are opposed to the entire tenor and purport of the laws and proceedings of the Spanish and Mexican Governments respecting pueblos, and other municipal organizations.

In the first place, the Executive regulations of 1828, respecting grants of *solares* could not have had exclusive reference to lands held by pueblos; for these by the law of 1824, which authorized the regulation of 1828, were exempted from such colonization. It was probably designed, at least in part, to authorize the Governor to grant such house lots to individual settlers in places where there were no pueblos, and for the purpose of forming a nucleus from which, when the number of inhabitants became sufficiently large, a pueblo might be organized, precisely as seems to have been contemplated by Nava's order of 1791, respecting the captains and commandants of presidios, preparatory to their change into pueblos. Again, it is not certain that the law of 1837 has reference to grants of lands; it is argued that it authorizes only the forming of regulations for the distribution of the *common* lands of pueblos, which it is said were lands dedicated to the common use of all the inhabitants, and not susceptible of being granted in private ownership. If Prefects were authorized to grant lands in private ownership — a point we do not decide — that power is not expressly given by the Act of March 20th, 1837. [26.]

The Regulation of 1828 authorized the Governor or Political Chief, subject to certain control by the Territorial Legislature and supreme Executive, to grant the public domain in colonization; but no authority was given to him to delegate that power to another, and such authority is not implied under any system of laws with which we are acquainted. It follows, therefore, that if the full and absolute title to pueblo lands remained in the Mexican Government, and subject only to the law of 1824, and the regulation of 1828, as has been contended, any attempt of the Governor or Territorial Legislature to confer upon the Ayuntamientos and Alcaldes power to grant such national domain, was nugatory, and the grants made by such municipal officers were void, for the want of legal authority. [27.]

But we have seen that the Governor and Legislature *did* authorize such officers to grant lots in pueblos to private persons, and it is shown by the records in this case that these officers *did* exercise that power for a long term of years, not only in San Francisco, but in other pueblos of California, without any doubt being expressed, or any question raised with respect to it's legality, and many millions of property are now held under the grants so issued. Can it be that the highest officers of the Government, for so long a term of years, entirely misunderstood their duties and powers under their own laws, and that their acts were mere usurpations and utterly null and void, as assuredly they must have been, if the lands which they authorized such municipal officers to grant away belonged absolutely to the State as a part of the national domain? And are we now, with our imperfect knowledge of their laws, customs and institutions, called upon to declare, by deciding that such lands were, before the conquest, wholly vested in the Mexican Government, and since that time, in the United States — that such grants conferred no right of property, and thus spread universal dismay and ruin? As already stated, such a decision would be opposed, not only to common justice and common sense, but to the entire tenor and purport of Spanish and Mexican laws. But conceding, for the sake of the argument, the right of Prefects and of the Governor to grant these lands, there is no necessary inconsistency in holding the title of the pueblos, for we have shown these grants to be in the nature of a public trust, and the exercise of this power by one agent of the Government or another, implies nothing decisive as to the general title, any more than the Act of the Legislature allowing Commissioners to sell lots in San Francisco prove that city had no title.

On the other hand, if the pueblos held the lands within their limits by an absolute title of ownership, with full right of disposition, why were such lands to be divided into classes and dedicated to and used for special objects, with so many laws and regulations respecting each class and object; and why were so many restrictions placed upon their disposition, the power to alienate being sometimes entirely taken away, and at others limited only with respect to the size of the lots to be granted? And how are we to reconcile the opinions of learned publicists and commentators on the laws, who say that the sovereign retained the *prerogative* of regulating the uses, enjoyment and disposition of the lands assigned to towns for the use of their inhabitants, and that without his license the respective Ayuntamientos, Alcaldes, Regidores, etc., could not *alienate or burthen with charges* the lands of the community? If the pueblos held such lands under an absolute title of full property, the same as an individual held his *solar*, what would it have availed to restrict their power of granting to lots of one hundred varas square? Could they not have granted all these lots to a single person, or have contracted debts, as in this case, and by conniving with some creditor, permit him to purchase it all in under an execution for the payment of such debt, and thus defeat the entire object had in view in assigning these lands to the pueblo?

There is but one sensible answer to these questions, and we think that answer is given in the laws themselves, and in the recorded proceedings of the officers who administered them, and who must be presumed to have interpreted them correctly. It is, that the lands assigned to pueblos, whether by general law regulating their limits to four square leagues, or by a specific designation of boundaries, were not given to them in absolute property, with full right of disposition and alienation, but to be held by them *in trust* for the benefit of the entire community, with such powers of use, disposition and alienation as had been already, or might afterwards be conferred for the due execution of such trust, upon such pueblos, or upon their officers. And this view of the question, we think, fully reconciles the apparently conflicting dispositions of the laws, and the commentaries of publicists respecting the relative rights of the crown and of the municipalities, to which the opposing counsel have referred, and the most important of which we have already noticed. [28.]

V. But it has been most strenuously urged by counsel that, even admitting that the pueblo of San Francisco held its lands merely in trust for a specific object, or that its title was inchoate or otherwise imperfect—that it had a perpetual usufruct only in the four leagues of land measured from the center of the presidio square—such right or title was merely a mode of expressing, in the civil law, a right of perpetual enjoyment of property, or title of ownership by the pueblo in its lands, and that the change of government and laws converted such civil law title into a common law title of fee simple absolute; or, at least, that the Act of March 3d, 1851, conferred such title upon the city of San Francisco, and that therefore, these lands were subject to be levied upon and sold to pay the debts of the city.

We have examined the law of 1851 with due care and attention, but we have not been able to find in it any provision which confers upon San Francisco any title to land. The fourteenth section of that law raises the presumption that any city, town or village of California, which existed on the 7th day of July, 1846, had a grant of land. But what kind of a grant?

According to the view which we have taken of the Spanish and Mexican law relating to pueblos, this presumption existed without this Act, and we doubt not that Congress was of the same opinion when it passed the law. That law simply reaffirmed a legal presumption which already existed, so far as pueblos were concerned, merely requiring them to prove that they existed on the 7th day of July, 1846, without going back to the period of their first organization as such municipal corporation. So far as their claim to four square leagues of land was concerned, they were not required to produce any title, the fact of their corporate existence being *prima facie* evidence of such title. But we have searched the law in vain to find any *granting* clause, and we are of opinion that it contains none.

This is the language of the fourteenth section: "The provisions of this Act shall not extend to any town lot, farm lot or pasture lot, held under a grant from any corporation or town to which land may have been granted for the establishment of a town by the Spanish or Mexican Government, or the lawful authorities thereof, nor to any city, or town, or village lot, which city, town or village existed on the 7th day of July, 1846; but the claim for the same shall be presented by the corporate authorities of the said town; or, where the land on which the said city, town or village was originally granted to an individual, the claim shall be presented by or in the name of such individual, and the fact of the existence of the said city, town or village on the said 7th of July, shall be *prima facie* evidence of a grant to such corporation, or to the individual under whom the said lot-holders claim; and where any city, town or village shall be in existence at the time of passing this Act, the claim for the land embraced within the limits of the same may be made by the corporate authority of said city, town or village."

There are no apt or usual words of grant. No land is described either by general or particurlar description. The Act was drawn by able lawyers, who are not to be supposed to use language so inaptly as to attempt to create a grant by words implying a presumption of its preexistence. The words do not import a grant. They have another and more natural meaning, and imply a different purpose. The *Senate debates* show an express disclaimer of an intention to grant lands; and there was a rejection of the grant to the towns, when the proposition in the form of an amendment was directly made after the bill was reported; and for the reason given by the Chairman of the Judiciary Committee, Mr. Berrien, that it was not expedient to grant lands, and the bill did not so design.

When was there ever a grant made by giving to the grantee, on proving a certain fact, *prima facie* evidence of its having been made before; and this embodied, too, in a provision defining the mode of presenting claims to a tribunal for *confirmation?* Besides, the context extends the presumption to the grantor of the lot-holders, when such grantor is a private individual. Can it be supposed that Congress meant to grant land to such grantor? If so, how much, and for what reason?

Moreover, if such lands had been granted, assigned or dedicated to the pueblo of San Francisco, or if the people of that municipality had acquired an interest or use in such lands under the Mexican Government, they were withdrawn from commerce, and Mexico could not have transferred to the United States any title, under and by virtue of which the latter could change such uses, except, possibly, by an exercise of the right of eminent domain. And, as held by the Supreme Court in the case of the City of New Orleans v. the United States, no right to regulate such uses could be acquired by the Federal Government, that right being, by the Constitution, given to the State of California and the people. Congress, therefore, could not change the trust under which San Francisco held these lands, nor could it destroy, or in any way modify, the uses to which they had been dedicated. Such power could be exercised only by the State sovereignty. If Congress could have changed this trust by a direct grant to the city, could it not have done so by a grant to any one else? That Congress could have granted to the city of San Francisco any lands belonging to the public domain, upon any conditions and by any title it pleased, is not doubted; nor is it doubted that it could have surrendered to such municipality any right or title in the United States to the lands of the pueblo; but it could neither change an existing trust, nor destroy existing uses.

While we do not accord to the Act of Congress the force or the character of a present grant, yet we attach to it, in practical effect, an operation which confirms the title of the city; for it cannot be denied that when the Federal Government makes a *prima facie* case against itself of a grant to the city of land, from the fact of the existence of the town in July, 1846, and when it does this, for the purpose, or as connected with the object of the city's presenting before its own tribunals a claim for such land, it is not to be presumed that it meant to dispute that presumption or to deny effect to it. To say nothing of the almost absolute impossibility of disproving the negative of the proposition of fact which the Government thus assumes, and to say nothing of the bad faith which would be involved in its permitting numerous claimants of property to present their claims in the name of such city, as under a primitive source of valid title, and then, after such presumption, denying such source of title, apart from these things, we suppose no candid mind could possibly arrive at the conclusion, that the case we have made in our statement, when added to the presumption afforded by the law of the actual fact of a grant duly made, could be so overcome. We know that, in point of fact, the Government does not mean, and has never designed, to make such a contestation. On the contrary, the claim has, so far, been recognized by all departments of the Federal Government, and the only appeal pending from the decisions of the courts is that made by the city itself.

Now, this presumption of a grant being, as we have seen, equivalent, in practical effect, to a grant, so far as the city is concerned, let us inquire of what grant is the existence of a pueblo in 1846 a presumption? Plainly, not of a grant by the Federal Government, but of a grant by the Mexican Government; and of what sort of a grant? The answer is, of that species of grant which Mexico, by her laws, was in the habit of making to pueblos, with all the qualities, conditions and restrictions which characterized such grants. It is true there is no practical difference, so far as affects the Federal Government, between furnishing such a presumption against herself, and making a grant in the usual form of the property; but there is a very great difference so far as the pueblo is concerned. It is the difference between proof of an old title and and a grant of a new one; between the Federal Government giving the town a right, and acknowledging the right as having been given by Mexico; all the difference, in short, between proof of title and title itself. By raising this presumption, the Federal Government affirms the title not to be in the Government, but just the contrary; it affirms the title to be against and out of the Government and in the pueblo, and furnishes proof of this fact to the pueblo, whereby as against the Government she may maintain the claim.

Similar reasoning is applicable to another phase of this case. If, as has been contended, the decision of the Board of Land Commissioners and the dismissal of the appeal by the Government be conclusive of the title of the city, the same result follows. The city presented this title, basing her claim upon a Mexican grant, express or presumed. That claim is affirmed. It matters not whether this affirmance was upon proof independent of the Act of Congress, or upon proof given by the Act. In either case the affirmance was of the pueblo claim, and the effect of it is not at all altered by the kind of evidence used on the trial, or the source from which the testimony was obtained. Nor was the effect of the decree of affirmance to create a title from that date. It took effect upon the title at its inception, or, at the latest, from the date of the treaty of cession, and the title became validated and adjudged such a title as was claimed and asserted in the petition to the Board of Commissioners.

The result of this reasoning is, that upon this hypothesis, independently of all original claims of the city to the grant of lands to the old pueblo, her predecessor, she has the title to them, not by a concession of the lands by the Federal Government, but by a concession by that Government of such a state of proofs of an anterior title, as establishes such title against that Government, the only other claimant. But she stands on this title, not as a title *granted* by the Federal Government, but as a title acknowledged by that Government.

With respect to the other point mentioned above, viz: that the change of government and laws from Mexico to the United States converted the civil law title, by which the pueblo held these lands, into a common law title of fee simple absolute, counsel have referred us to no authorities to sustain the proposition, and we presume none could be found.

VI. But reference has been made to the several Acts of the Legislature of California incorporating the city of San Francisco, and regulating the powers and responsibilities of such incorporation, and also to various decisions under the English common law with respect to the question, whether property of such towns or municipal corporations is subject to levy and sale under execution for debts contracted by the municipal government of such towns or corporations. It remains for us to examine these laws and authorities.

The first charter of San Francisco, April 15th, 1850, gives to that city a right to " grant, purchase, hold and receive property, real and personal, within said city," and to "lease, sell and dispose of the same for the benefit of the city." But we find nothing in these words which changes, or is intended to change the tenure by which such property was then held, or to destroy or alter any existing trust or use. The same may be said of the corresponding words in the charter of April 15th, 1851. But article third of that Act provides for funding the debts of said city, and the payment of such debts from " the net proceeds of all sales of real estate belonging, or that may hereafter belong to the city," and the Commissioners of said sinking fund were " prohibited from permanently disposing of any property belonging to the city by sale, lease or otherwise," etc. And by a previous Act, passed April 1st, 1851, it was declared that " the city of San Francisco shall not have power either to sell, lease, or in any manner convey any lands situated within the corporate limits of said city, from and after the passage of this Act until the tenth day of May next or thereafter," and that " every sale made by said city, its officers, agents or Commissioners contrary to the provisions of this Act, shall be null and void." The Act of May 1st, 1851, created the Commissioners of the Funded Debt, and declared that " all property of the city of San Francisco which is necessary to be retained for all or any of the municipal purposes of the city, shall forever be exempt from sale by execution." The judgment under which the lands involved in this case were sold was rendered September 18th, 1851; the execution was issued November 1st, 1851, and the sale by the Sheriff was made November

26th, 1851, and the purchase price of four hundred and eighty fifty vara lots was the sum of fifty dollars.

VII. Having referred to the different Acts of the Legislature with respect to these municipal lands and the dates of the judgment, execution and sale in this case, we will proceed to examine the argument of counsel on the validity of this sale under the laws in force at the time.

In discussing this question, it will be necessary to consider the character of the title by which these lands were held prior to the cession, as well as its character under existing laws. It is true that the question whether these lands were subject to execution depends upon the laws of the forum *rei sitae* in force at the time of the sale; but while those laws define what property is so subject, we must look to the former system to ascertain the nature and qualities of this species of property, in order to determine whether it be within the definition.

As a general rule, trust property is not subject to the debts of the trustee. Thus, property held by a guardian as such, though it be in his own name, is not subject to his debts; neither is the property held by an executor as such; and so with other fiduciaries. Nor, as we shall show more fully as we proceed, is property held like this by trustees for the use of the public, subject to forced sale for the debts they may create. Especially is this true with respect to property held by a public body by grant made for purposes of Government, or any branch or department of Government. We suppose if Girard or McDonough had given to the cities of Philadelphia or New Orleans large sums of money or valuable real estate, to be held by those cities for founding and sustaining public schools or supporting the poor, it would not be contended that this property could be seized or sold for the debts contracted by those municipalities, even if contracted in connection with the matters of the trust; and we can see no substantial difference, so far as the principle of exemption is concerned, between these cases of grant for these two purposes of Government, and a grant of the same property for general purposes of Government. The reason of the rule of exemption is easily seen. A man or a Government may, as a general rule, devote his property to any lawful purposes, and courts of justice will usually give effect to the appropriation. The grant made is to be construed according to the intent of the grantor, and this intent is to be ascertained by the language employed, and by surrounding circumstances. The purpose for which a grant is made, not unfrequently gives construction and limitation to the grant. The property, in this case, came from the Government stamped with the will of the Government that it should be used and disposed of, in a particular way, for public use and benefit; that use, and that use alone, being the policy of the Government declared by its public law. There is no legal obstacle to the carrying out of this will and this policy. It was no part of the intention of the grantor that this property should be sacrificed at public forced sale; the contrary *was* the intent. A trust was given these municipal agents to keep, preserve and administer, but no power to destroy the estate. Hence this property was not subject to forced sale, because such was not the law of the land, the intent of the grantor, or the policy of the Government. Such was the condition of this land under Mexican rule. Whether the original trusts were precisely the same after the Act of incorporation of San Francisco is not material. The general nature of them was the same. It is true that, by the charter, the Common Council have the right to sell, lease, etc., this property; but the terms upon which this may be done are cautiously and carefully defined. It is in the nature of an express power clearly defined and to be strictly pursued; it is provided that it shall be done as a legislative Act passed in solemn form. As under the old system, there was no power of sale except for limited purposes and to particular portions of this property, and as this was a public trust, we cannot see why the Legislature had not the power to prescribe a given and an exclusive mode of alienation or disposition of the public property to these public agents.

We have already shown that under the Mexican system, the pueblo held these lands in *trust* for the use and benefit of the people thereof. Let us suppose that, under the Mexican laws, there existed the same remedial process of enforcing judgments, as exists under our laws; would these lands have been subject to levy and sale to satisfy judgments against the pueblo or its municipal officers. The ready answer to this question would have been, these lands are held for the inhabitants in perpetuity for their use and benefit; to be used in building up, sustaining and supporting a town whose interests and rights are lodged in the hands of certain agents, acting under defined and expressly limited powers, given for the carrying out of the objects and uses prescribed; but with no power to alienate or change, much less to destroy the trust. That those agents were clothed with the power to make grants to settlers, or others, of limited quantities of this land, or to dispose of portions of it for the support of the municipality, implies no power to sell it out in gross, or even to mortgage it; for, if this were the case, the prosperity, if not the existence of the town, would depend, not on the laws, but on the will of these agents acting in violation of their spirit and letter. If it be true, as seems clear from the citations we have given, that the municipal officers could not mortgage or sell these lands to pay a debt created by them, we do not see how it can be contended that they could accomplish the same result by borrowing money, and then confessing judgment, or suffering it to be entered, or submitting to suit, and thus indirectly doing through the Sheriff, what they could not do by their direct action. Not only is there nothing in the legislation of the State of California up to the date of this sale, to change this general trust or to enlarge these powers, but there is much, as we have shown, to limit and restrain these municipal agents who succeeded the old pueblo in the control and direction of this property. We see nothing which changes the substance of the trust. The property remained afterwards as it had been before, subservient to the public uses and purposes for which it was given; the land of the pueblo, now the city of San Francisco, dedicated by law to its public municipal purposes, to be kept and disposed of for the benefit of all, with no power of disposition except that given by law, to be exercised by those agents and officers appointed by law, and in the mode which is prescribed by law. If a grant had been made in the language which gives the true history and nature of this trust, all doubt would vanish. Suppose a donor had thus devised: "All my tract of land A to the city of San Francisco, the said land to be granted in lots to actual settlers paying a tax thereon for revenue, except so much to be used as commons for pasturage, etc., for the use and benefit of the inhabitants of said city in perpetuity; said grant being made that the said city may be built up and settled, and its government supported." Suppose after this a judgment is obtained against the city, and the whole land sold at a cent a lot; would any man contend that the sale passed the title? Would not the toleration of this be a complete perversion and destruction of the trust; the giving to one what was designed to be a benefaction to many—turning a great public endowment into a private speculation, and making a monopoly in the hands of a few, of what before was the right of all? Would any one make such a donation knowing this to be the effect of it? Would the Government do it if it supposed its own laws so disappointed its own will? Is the case less strong when we see expressions in the old ordinances, forbidding expressly these municipal officers to make other alienations than those before described and characterized, and declaring such interdicted alienations void? And could it be supposed that *any* Government had such a system as gave to its subordinate agents the right, at pleasure, to thwart its will and practically nullify its laws?

If this trust, thus impressed upon these lands, has ever been changed, it rests with the respondents to show how, and when, and where, and in what respect this change has been effected. That this property came from the Mexican Government stamped with this trust, we think we have abundantly demonstrated. We do not dispute the proposition that the Legislature, perhaps without the consent of the city of San Francisco—certainly with it—could, by virtue of its paramount political sovereignty, change the trusts upon which these lands were held. It might undoubtedly authorize another and different mode of disposing of them, and by other and different agents. But we have assumed and will further show that, originally, these lands were not subject to sale under execution. It rests with respondents to show that, under California laws, they became so subject. Under what laws? It is said that the Constitution provides that municipal corporations may be sued as private persons; but the Constitution does *not* say that the lands of a corporation held in trust for public purposes, and which were not at the time of the adoption of the Constitution subject to forced sale, shall now be so subject. The Constitution never meant to provide that property before exempt from forced sale, because such forced sale would be in violation of the trust under which it was held, should now be liable to forced sale, and to be sacrificed at such sale, in utter destruction of the purposes for which it was granted. We do not seek an exemption of property from the general law making it subject to execution; but we deny that property never before subject to execution has been made so subject by the Constitution. Nor is there anything in the original charter of the city which gives countenance to this pretension. On the contrary, we have shown by it a publicly declared policy opposed to this notion.

We see no reasons of policy for such a doctrine as that contended for. If the corporation owes money, undoubtedly it ought to pay it; and if itself unwilling, it ought to be forced to pay it. A city is entitled to no more immunity in respect to its honest engagements, than a private person. But the creditor was not without remedy. He had the same means of redress which existed against all other municipalities—the compulsory process of *mandamus* to compel the levy of a tax if no money was voluntarily provided, or an appeal to the Legislature. The history of the litigation, of which this case, voluminous as it is, is only one chapter, sufficiently attests the impolicy of granting this forced process of sale as to this property—a process which has led to a sacrifice unparalleled in the annals of judicature.

It is impossible for us to see why these municipal lands should be any more subject to sale than the quay of New Orleans, or the commons of Cincinnati, or the levees and fronts of other cities, dedicated as easements to the public use. All these lands were of great pecuniary value; they were held and used for profit, or upon the same general trusts and uses as were these municipal lands. If the criterion of the question of *their* leviable character was the trust for the public—*their* necessity or utility for the growth of the municipality or the comfort, or advantage or support of the inhabitants, we cannot perceive that the same reasons do not exist for holding *these* lands of the city exempt from legal process.

Nor can we see that the principle, always recognized, that the revenues of a municipal corporation, *necessary* for its government, such as taxes, etc., cannot be seized by execution, does not apply to the sources expressly provided for that revenue; why it should apply to the money and not to the land out of which the money is to proceed.

But even if we are mistaken in this suggestion, we think we cannot be mistaken in these propositions—that property, whether of a corporation or natural person, is only subject to forced sale, *because* the law so provides; that the agents of a corporation have only the powers given them by law; that those of this corporation had no power to sell these lands in gross either under the old system or the new, nor did they ever attempt to exercise such power; that they could not give any authority to sell them, either by their action or non-action, by contracting debts whereby they might be sold, or by direct contract with these purchasers to sell, but that they could act only in the mode prescribed and in pursuance of the trust created by the law; that the Sheriff pretending to act for the city had no higher power than these agents, and could not, any more than they, sell these lands in this way at public sale to pay the debt of the city; that the property was the property of the city for the use of its inhabitants for all time, subject only to the alienation by such agents and in such mode as given by law; and that a sale of it by the Sheriff has never been authorized by law, and is an act utterly void, because directly destructive of the trust upon which, and for which alone, the property was given.

The argument which opposes this view proceeds upon the assumption, that when property is shown in a municipal body, that property is shown to be subject to execution for its debts. But this is a mere begging of the question. It is subject, not from the fact that it is property, but from the law which gives the creditor this power over it. There may be a peculiarity, but there is no inconsistency in holding that the same law which gives property may define its tenure, limit its use, and control its disposition, or may deny any power, or prescribe an exclusive mode of alienation. So far as these lands are concerned, they were given for purposes of common benefit to the inhabitants of the pueblo, and for the support of Government, not for a temporary purpose, but for all time; they were given that the lots might be parceled out and enjoyed by those who would settle on and improve them, and that those lots and parcels not needed for actual occupation as homesteads and appurtenances thereto, and as places of business and the like, might be used as easements or commons by the residents. To hold, therefore, that this purpose and this whole policy might be defeated through the medium of forced sales, and that this magnificent domain might be made the subject of individual aggrandizement and speculation, is to change the whole spirit of the grant and the whole policy of the Government. If the Government saw fit to change that policy, it might do so, or if it chose it might alter the terms of the trust; but its intention to do this must be shown by clear and affirmative acts. It cannot be presumed, and there is nothing shown us from which such presumption can arise.

If, therefore, we concede that the agents of this corporation had a right to contract this debt, and the debt became the proper debt of the corporation, and that the corporation owns these lands, it still does not follow that the law which devoted this property to this permanent purpose must be defeated to give place to the law under which the debt was created. Both can stand. The creditor retains his debt and has all the remedies he had to enforce it at the time it was contracted; the city retains the lands given to it for certan purposes, and those trusts and uses, annexed by the law to the tenure, continue. The object of the Government and the spirit of the grant are preserved without injury or injustice to any one. There is nothing inconsistent in the title in the pueblo, and the use, partial or total, in the public. What are these pueblos but a collection of people at a particular point—like the hundreds in England, or like the inhabitants of townships who are grantees, for school purposes, under acts of Congress? They may be regarded as corporations, or *quasi* corporations, for governmental purposes; as a local public organized as a district or township, holding lands, to be granted and used for settlement, and to support the government of the local jurisdiction, and for the comfort, maintenance and convenience of the inhabitants.

If Congress gave to the inhabitants of each township lands in fee for school purposes, and these were organized by the State into corporations, with powers of government as to school objects, with the right to contract debts in this matter, would any one contend that the lands could be seized and sold under execution against the corporation? Would not the answer be, the grant was to the inhabitants for perpetual use, and cannot be divested by the agents so as to disappoint and exclude that use? And what is the difference in principle between the two cases?

Having stated these general views, we proceed to examine the authorities to see how far we are sustained by them. And here we may remark that the nature of this property is so peculiar that it could scarcely be expected that adjudged cases bearing directly upon the facts can be found. The learned counsel for the respondents, with all their research, have not been able to find a single case in the United States in which the lands of a municipal corporation, dedicated to special purposes like these, have been held subject to execution. The cases in our own State we will presently review.

Doe ex dem Parr v. Doe, 1 Adolp. and Ellis, N. S., 700, (41 E. C. L., 736) is the first case cited to sustain the doctrine that municipal lands may be sold. But that case merely holds that the defendant's motion to be allowed to defend without entering into the consent rule should be denied.

One of the Judges states the question as to the validity of an extent upon the town hall of the borough, but waives the expression of any decisive opinion. But this is no decision; and if such property had, in England, been held expressly to be liable to extent, yet we know that no such doctrine obtains in the United States. Court houses, town halls, jails, etc., are not subject to levy and forced sale. Nor do we apprehend that plazas, parks, public squares, etc., dedicated to the public use would be so held. And yet the distinction which would exclude these, and admit the municipal lands must be very nice.

We see nothing in the case of Mayor of Poole v. White, 15 Meeson and Welsby, which goes to sustain the respondent's doctrine. In Harvey v. East India Company, 2 Vernon, 395, a distringas was issued on a decree against that corporation. Nothing appears to be decided in that case by the Lord Keeper, but that a decree having gone against defendant, a distringas should issue at once, and that the corporation was not entitled to further heard as to matters in avoidance of the writ. Lyell v. The Board of Supervisors of St. Clair county, 3 McLean, 580, was a suit in the United States Circuit Court against the county named. By the law of Michigan, a county was subject to suit. This was a proceeding by creditors' bill to subject certain bonds or mortgages to the plaintiff's debts. The Judge says: "Suits against counties are placed on the same footing as against individuals, by the statute, so that it would seem a creditor's bill may be filed against the Supervisors of a county. The objection that a *fieri facias* cannot be issued against a county is technical, and is by no means conclusive of the objection founded upon it. The statute which regulates a creditor's bill, requires a *fieri facias* to be returned *nulla bona* before the bill is filed. In other words, this evidence of the inadequacy of remedy at law is required. But this has been done in the present case, and the objection is, that the writ could not be issued against a county. This is not admitted. A judgment having been legally obtained, it is not perceived why the property of the county may not be levied on. The power given to the Supervisors to levy the amount by a tax on the county is cumulative, and does not necessarily prohibit the ordinary course of the execution, as in case of an individual.

"In Massachusetts the doctrine is established, that on a judgment against a county or town, the property of any citizen may be taken in satisfaction. (6 Metcalf, 552.) But this doctrine is not sustainable in this State. The imposition of a tax by the Supervisors, they being subject to a *mandamus*, is a more reasonable and just mode. The county being made subject to a suit, no serious objection is perceived against reaching the rights in question by the ordinary exercise of chancery powers, independently of statutory provisions." (See 10 Cal. 404.) It is not denied that ordinary debts and choses in action held by a corporation may be attached, and it may be true that some species of property may be levied on and sold to pay the debt. But the question is not touched by this decision, for the burthen of our argument is to show that *this* property, *characterized and conditioned* as we have shown, is not so subject.

We come now to review the decisions of our own Courts, though we shall have occasion to notice them briefly under another head, in connection with the rule of *stare decisis* invoked by the respondents. Smith v. Morse (2 Cal. 524) is a leading case. The main points made and argued by the Court, related to the validity of a conveyance by the city to certain commissioners, and the effect of the Funding Act. The only portion of the opinion which touches the question of title is this short extract, which refers only to a water lot: "It was contended, upon the argument of this case, that the city of San Francisco had no title to a portion of the property in question. It is admitted, in the agreed case, that the title was in the city, so far as the question of the right to sell the water property of the city is concerned. The city is estopped from setting up any right in the State. She cannot take advantage of her own wrong by showing an indebtedness to the State. The Sheriff merely sold the right, title and interest of the city. And whenever the State chooses to assert her right in the premises, it will be time enough for this Court to determine the character of the title which the plaintiff acquired." It appears that so far as this upland property was concerned, (which was, we presume, a part of the old municipal lands) the case expressly admitted the title of the city, and so the record shows; the point to which the Court directs its attention in this brief extract is, as to a portion of the property derived from the State by grant, and this is summarily disposed of, without affirming or denying the right of the city, upon the ground of estoppel. No question was made as to the leviable character of the upland property. It is evident, therefore, that the questions presented in that case and the facts of the record were different from those here, and it is not necessary to disturb that case for any purpose of this decision. In the case of the People ex rel. Thorne v. Hays, 4 Cal. 130, the only question was as to the right of redemption. The Court was divided. The able dissenting opinion of Mr. Justice Heydenfeldt leaves great doubt of the correctness of the judgment; but we do not disturb it. No question of property was or could have been raised. The mere right of redemption was passed on, which was irrespective of the value or title of the property. Wood v. San Francisco, 4 Cal. 193, is as remote from the point here involved. That was ejectment against the corporation to recover a wharf at the end of a street, the plaintiff claiming through a sale under judgment. But the Court only held that the property was not leviable. The validity of the sale or title of the city did not arise. If anything, this case makes against respondent, and does not seem entirely consistent with the case of Smith v. Morse, for the city was allowed to set up her own want of title, which seems to be denied by the first case.

Seale v. Mitchell, 5 Cal., is badly reported. As reported, it would seem on close inspection to be no authority upon the point of the city's title. Upon looking into the record, we find no error assigned by the appellants. But in the transcript is the statement on appeal, from which it appears that the grounds for the motion of nonsuit were these; 1. The Sheriff's deed was void. 2. On the ground that the *plaintiff had proved no title* in the city of San Francisco, under which the plaintiff claimed. The respondents filed a brief of points, in which they contended that the plaintiff was bound to prove against them, who claimed under an Alcalde grant, that the city had title at the time of the judgment; that this must be shown by paper title, or by possession of the city at the date of the judgment, and that the mere fact that the lot was within the boundaries of the pueblo, created no presumption of title in the city at the date of the judgment and the execution sale. But no sort of question was raised or considered as to the character or quality of the title, or whether it was subject to levy and sale. The point, therefore, was neither made nor decided as to the matter here—whether this property was subject to sale—but the judgment of nonsuit upon these points, so made, was reversed and cause remanded, the Court passing upon and deciding nothing more than the propositions submitted and argued, though in doing so some general expressions are employed, which, however, are in nowise binding upon succeeding Judges.

Welsh v. Sullivan, 8 Cal. 166, deserves particular notice. That case was first decided at the July term, 1857. It was argued with great learning and ability upon the first point—the city's title to the land—and is the first case in which that important question was thoroughly discussed. But in the elaborate and learned brief of Judge Bennett, leading counsel for appellant, we find nothing but the bare statement of the proposition as to the leviable quality of the estate. Mr. Chief Justice Murray delivered an extended and able opinion, in which he discussed the first question here made at considerable length. But the question as to the effect of the Sheriff's sale was not discussed by the learned Chief Justice in any of the aspects in which that question has been argued here at the bar, or in this opinion. The Chief Justice seems to have taken it for granted that if he maintained the proposition that the title was in the pueblo, the validity of the Sheriff's sale followed as a necessary consequence. The opinion appears to be a little inconsistent in claiming title upon the grounds taken in Cohas v. Raisin, and then attributing to the Act of Congress of 1851 the effect of creating a new tenure, and operating a confirmation in fee to the city. We have seen that no such effect can be given to the Act of Congress. It created only a presumption of that which existed before, and conferred no new faculty or quality on the former title. We do not see how the mere acknowledgment by the Federal Government of the claim of the pueblo or of the city makes that claim any different from that which the pueblo asserts, and which the Government confesses. The acknowledgment of the Government, it being the only adverse claimant, may be conclusive, but it is conclusive only of the title asserted, and in manner and form as asserted. But this opinion was that of the Chief Justice alone. Mr. Justice Burnett concurred in the judgment in this guarded language: "I concur in affirming the judgment of the Court below on two grounds: First, that the title to the property in question vested in the city of San Francisco by virtue of the Act of Congress. Second, that the title of the city passed to the purchaser under the Sheriff's sale. *Neither of these grounds is discussed by the learned counsel of defendant.* And as to the questions decided in the two cases of Woodworth v. Fulton and Cohas v. Raisin, they are not necessarily involved in this case, and I express no opinion in respect to them." Justice Terry specially concurred upon the ground that the question was decided in Cohas v. Raisin, (3 Cal.) and he thought the doctrine of *stare decisis* applicable. A reconsideration was had, and the case was again reviewed at the October term, 1857. Mr. Justice Burnett delivered an opinion, in which some of the views of the former Chief Justice, then dead, were corrected, and also the judgment rendered at the former term modified. The opinion was concurred in by Judge Terry, then C. J. The opinion rests upon the effect of the Act of Congress; Mr. Justice Burnett sustaining the judgment below upon the ground, if we rightly apprehend him, that the instruction of the Court "that if the jury found the Limantour claim fraudulent they should find for the plaintiff," was right, because the Act of Congress vested the title in the city necessarily if Limantour did not have it. This was the only ground upon which that ruling could be maintained. The only authoritative opinion in this case, then, appears to be that the Act of Congress operated as a grant to the city of San Francisco, which gave to the vendee, at Sheriff's sale under the execution, a title to the premises. This ground, we feel confident, for reasons already given—and many more might be added—is not tenable. The Act of Congress, as we have shown, has not a single feature of a grant; at most, it only creates a presumption of an anterior and adverse title in the city, and probably neither the United States nor the city, in the face of this acknowledgment, could claim that there was no such pre-existing title. If the United States could disprove this presumption, then it would be no grant at all; if it could not, then the presumption stands as a conclusion of a title, existing at least in 1846, before the United States had a pretense of claim.

It is useless to comment at large upon Cohas v. Raisin. It is unnecessary to call in question the views expressed by Mr. Justice Heydenfeldt on the main propositions assumed by him as involved in the case. The Alcalde's grants considered by him may be good titles, and there is nothing inconsistent in holding this, and holding the invalidity of the Sheriff's sale. It does not follow, because the title was in the pueblo, or in the city as its successor, that it was such a title, or so held as that it might be disposed of by forced sale.

We are not without authority in support of the views we have taken. A somewhat analagous principle was held in the case of Edgerton v. The Third Municipality of New Orleans. (1 La. Annual Rep., p. 435.) In that case the question was made whether the taxes, levied for the support of the corporation could be seized. The Court decided they could not. This language is employed in the opinion: "The power to create the corporation of the city of New Orleans for purposes of local government, involves the power to preserve and protect it; but that protection would be unavailing if it could be deprived of the regular supply of means, without which it cannot work its task. For all useful and practical purposes, the exercise of the right claimed would, in the present embarrassed condition of the municipalities, as effectually abrogate their charters as if they had been repealed by law. We conceive such a state of things to be repugnant to the letter and spirit of the Constitution.

"It is urged that the defendants cannot avail themselves of the privileges of public power, because they may be sued, and that sueing them would be doing a vain thing, if in default of any other property their taxes cannot be seized under the judgment obtained against them. We all know that Judges and Governors may also be sued, notwithstanding the political powers they exercise, and although their salaries may be their only means of paying their debts, those salaries are not liable to seizure. It is true that out of superabundant caution our codes make special provision in relation to salaries of office, but the same rule prevailed before upon general principles."

A stronger case, and one going far beyond the necessities of this, is found in the 9th vol. of Watts & Sergt., p. 28. It is the case of the Susquehanna Company v. Bonham. The opinion of the Court was delivered by Sergeant J., who said: "The spirit of the decision in Ammant v. New Alexandria and Pittsburg Transportation Company, (13 Sergt & Rawle, 210) seems to be, that privileges granted to corporations to construct turnpike roads, canals, etc., are conferred with a view to the public use and accommodation, and that they cannot voluntarily deprive themselves of the lands and real estate and franchises which are necessary for that purpose; nor can they be taken from them by execution and sold by a creditor, because to permit it would tend to defeat the whole object of the charter, by taking the improvements out of the hands of the corporation, and destroying their use and benefit. It has therefore always been held, and our Acts of Assembly are constructed on that idea, that the franchises and corporate rights of the Company and the means vested in them which are necessary to the existence and maintenance of the great object for which they were created, are incapable of being granted away and transferred by any act of the corporation itself, or by process of another against it *in invitum*. By the second section of the Act of 15th of April, authorizing the incorporation of defendants, they are made capable, among other things, of purchasing, taking and holding such lands, tenements and estates, real and personal, as are necessary in the prosecution of their business as a canal company. And by section eight they are empowered to enter upon and occupy for the purpose, all the land necessary and suitable for constructing the canal. It is admitted by the court below, and the evidence proves beyond a doubt, that the property levied on here is essentially necessary to the enjoyment of the corporate rights and privileges of the defendants, the house being necessarily occupied by the collector of tolls on the canal for himself and his family, and as a collector, in which he performs the duties of his office. That being the case, what difference can there be whether it is on the site of the canal or on ground adjacent? Especially where it may happen, and, indeed, such appears to be the case here, that if confined to the former, the site would be inconvenient, unsafe and unfit for a dwelling place for the collector's family. Nor would the company have expended their money in procuring another building, if they could have been accommodated without it, in the office built on ground already taken as part of the line of the canal. The remedy for creditors in such case by sequestration was suggested in the opinion of Chief Justice Tilghman, (13 Sergt. & Rawle, 210) and has since been carried into effect by the provisions of the Act of 16th June, 1836, and it gives to the creditor all the redress the Legislature thought he could have against the property necessary to the company, consistently with the preservation of the public interests."

The case of Ammant v. New Alexandria and Pittsburg Transportation Company, (13 Sergt. & Rawle, 210) is still more direct to the point we have been discussing. That was the case of a levy of an execution upon the land upon which the company were permitted to enter near by and contiguous to their turnpike road. It was held that their right of way and the privileges connected with it were not subject to levy. The Court draw the distinction between the property which the company held as such, and that property or interest in it which they held as subservient and indispensable incidents to the public use for which it was given. The stress of the opinion is to show that, when a public trust is so directly connected with property as that taking the property destroyes the trust, the property cannot be sold under execution. The principle applies directly to this case where the land was originally given to the *quasi* corporation, not as so much property to enrich it, but as a general fund to support the town, and to be granted for its use and settlement. It cannot be sold under execution any more than the trust could be sold, or repudiated by the grantees. The trust is directly and indissolubly associated with the property, and a coercive sale of the last is equivalent to a destruction of the first. It might as well be contended that medicines and meat furnished to a town to feed and minister to the sick in the hospitals, could be sold to pay the debts of the town. Or, if a league of land were given to be laid off into town lots and donated to the settlers, in order to build up a town, that it could be all sold out at once under an execution for debts contracted by the trustees, who were to lay off the lots and distribute them. The very purpose of the gift would be destroyed by this use of it.

And in these Pennsylvania cases we find the true solution of this question, and the broad and satisfactory reason which solves it. It is a solecism to suppose a system of laws which creates a trust for the public, the constitution and preservation of which is a leading feature of State policy, and yet the same system allow a right on the part of individuals to destroy that trust, and deprive Government of its power to regulate and administer it. The Mexican Government had provided its own means for the administration of its laws. Those means are of the attributes and faculties of sovereignty, and were or might have been essential to the existence of the State. The sole power of selecting and determining these agencies of administration is in the Government. Nor were the pueblos alone interested in this government or in the fact or means of preserving it. It was alike the interest and duty of the State to provide for its people this government and the means of maintaining it; and it did not rest with the pueblos, representing a portion of those people, to decline or to waive the benefits to themselves and to the State of this government; and especially did it not rest with a portion of the inhabitants of such pueblos to waive or decline these benefits. The Government had a right to rule its own people in its own way; it did provide this means of local government by the constitution of pueblos, which were political departments, and a provision for their support, by means of grants of land, and, coupled with this, as a part of their powers of local administration, a right to grant lots for settlement and to hold lands necessary and useful to the inhabitants. This was their title and this the trust; a public trust connected with the title; and this title and this trust were the means of civil government provided by the sovereign authority for its own benefit and that of these people. This being so, it would be a radical error to imagine that these appointed means of government are not as inalienable, save by the Government or its express authority, as are the powers of government themselves. A destruction of either the power or the means to execute it, invades the same principle and causes the same evil; it denies to Government the right to execute its own laws in its own way, and places it in dependence upon the will of a citizen. The giving of these lands for this purpose, therefore, was a denial of all other use whereby the end designed by the grant could be defeated. The title of the land was a part of this very trust, without which the trust became worthless and must fail. These observations apply with nearly, if not quite, the same force to the title of these lands after the cession.

If the cases cited from the Supreme Court of Pennsylvania go too far, in holding that the property of railroads, etc., is so connected with the public trusts for which those corporations were created as that no forced sale can be made of such property, yet the error, if any there be, is not in the principle, but in the application of it to the facts of the cases decided by that enlightened tribunal.

It is no answer to say that the policy of the Mexican Government, in respect to its pueblo lands, and the tenure by which they were held, are not a portion of our system of laws. We do not see that if a particular or general trust were created under that system, and the execution of such a trust be not incompatible with our own policy and laws, why it is less effectual because it had its origin in another and different Government. But if the trust became changed as to the mode of administration and the particular agents, the lands remained for the same general purpose for which they were given, namely: for the support and settlement of the city; and if there was power to sell, lease, etc., on different terms from those prescribed or followed under Mexican law, this makes no substantial difference in the character of the tenure as a trust estate exempt from seizure. No authority was given by the new government to sell these lands at forced sale to pay the debts of the city, the effect of which authority might be to prevent the settlement of the town, and to destroy this source of municipal revenue; but when the power of sale was given at all, it was given to particular agents, who were limited and restrained by specific and guarded regulations, having the force of powers of attorney with special authority. If, therefore, we have shown that this land came to the city impressed with this character, it became a fund for the support of the local government with a trust to be administered for that object, and could not be subjected to seizure any more than the revenues arising from the taxes; and if it also came impressed with the trust so to be disposed of as to promote the growth of the city and the comfort and convenience of the inhabitants, this purpose cannot be thwarted by a forced sale, transferring the title to a few persons who might use it or refuse to use it, so as to prevent any settlement at all, or to greatly embarrass and delay such settlement. The trust being that the agents and officers of the town should exercise control *for this purpose* over this property, and not that one or more purchasers at execution sale should exercise the power or defeat it at pleasure, should prevent the formation or settlement of a town, or destroy it afterwards by denying all means, or these means of support.

In the Heirs of Villars v. Kennedy, 5 La. Ann'l R., 725, is found some curious learning in regard to cities and their common lands, which bears some relation to this subject. We extract from the opinion of the Court, delivered by Mr. Justice Preston: "It will be seen by the thirty-fifth chapter of the Book of Numbers, and the twenty-first of the Book of Joshua, that the children of Israel were commanded with great particularity, in founding cities for emigrating tribes, to lay off extensive suburbs outside of *the walls*, for the common use of the inhabitants. The Christian sovereigns of Europe, either from a reverence for the example or the intrinsic utility of the custom, incorporated it into their laws for the government of their colonies in the Indies. By the term *city*, in Spanish jurisprudence, was understood a place surrounded by walls. (7 Part., Title 33, Law 6.) And by the laws of the Indies it was expressly provided that no houses should be erected within the distance of three hundred paces from the walls or breastworks of the town, this being necessary for the good of our service and for the safety and defense of the towns. (See the Laws of the Indies, Book 4, Title 7, Law 12; or White's new Recopilacion, Vol. 2, p. 47.)

"In Merlin, *verbo* Fortification, Vol 12, Brussel's edition of 1826, it will be seen that by an ordinance of the King of France, dated the 24th of September, 1678, ramparts, ditches and other places which had served for the fortifications of the cities of the kingdom could not be alienated by his officers, because they were things out of commerce and belonged to the King. It will be seen further, under the word *communaux*, that cities could not alienate their commons, and in the collection of the laws and ordinances of the colonies by Moreau de Saint Mercy, he gives some very striking cases in which even public officers had attempted to locate themselves permanently on places destined to public purposes in which their pretensions were rejected, having, as expressed in one decree, the shame of having speculated without profit upon an object the destination of which rendered it worthy of the protection of the colonial laws." (See his work, p. 262 and 309.)

In Municipality No. 3 v. Hart, (6 La. Ann'l, 572) the Supreme Court of Louisana reaffirm the decision of Edgerton v. the Municipality, that taxes or judgments for them cannot be seized; but hold that ordinary debts due the corporation may lie.

In Police Jury v. Mitchel, (4 La. Ann'l, 84) the question of the liability to seizure of the public buildings, jails, etc., under execution was before the Court. The decision was, that being provided for public purposes, they were not liable upon the principles of Edgerton and the Municipality before cited. The case of New Orleans v. the United States (10 Peters, 738) is an able exposition of the rights of cities in their public lands. That case involved the title of the city to the quay, which, it was claimed, had been dedicated to public purposes. The Court says: "The land having been dedicated to public use was withdrawn from commerce, and so long as it continued to be thus used could not become the property of any individual;" and again, at page 736: "That this common having been dedicated to public use was withdrawn from commerce and from the power of the King rightfully to alien it has already been shown, and also that he had a limited power over it for certain purposes." The opinion proceeds then to show that the Federal Government did not succeed to this power, but that it was in the State Government.

Lewis v. San Antonio (7 Texas, 288) is a very strong case on several points. This case holds that the town lots were commons like the commons in New Orleans, treated of in 10 Peters, and withdrawn from commerce and individual appropriation. It holds, further, that the authorities of the pueblo could not, by estoppel or otherwise, defeat the grant. It was claimed that the authorities had adopted a subsequent grant of two leagues and laid out the town accordingly, and in consequence of this, locations by third persons had been made on the land now claimed. But the Court answered the point in the language of the Supreme Court of the United States in 10 Peters, which case has already been commented on: "It may safely be assumed that they (the authorities) had not the power by the Acts referred to, to divest the city of a vested interest in the commons." And this was held in connection with the declaration that the property was dedicated to public use, and that it was the policy of Spain not to permit land so dedicated to be thus alienated. It would seem that this is conclusive of any right to subject it by execution; and in 10 Peters, 734, cited before, the United States Supreme Court evidently consider that the commons, or *ejidos*, retained the same character under the new government which they had under the old, and therefore, were unaffected by these acts of the city authorities.

To show the character of these lands and the relation of the pueblos to them, it is only necessary to refer to the Spanish authorities, many of which have already been given. These lands may, for illustration, be comprised within the two general titles of *ejidos* and *propios;* the latter term designates that property whose revenue is assigned to the support of the Government, and which was given in order to furnish the means of such support; and *ejidos* are common lands, not very different from those which exist in the older States by the name of commons, on the outskirts of towns and villages. That such property was not subject to execution by the civil law is expressly held. (Vide Escriche, verb Juicio Executivo, p. 980; Partida 5, Law 15, tit. 5 and note 2.) This being the use of the *propios*, they would be protected like *arbitrios* or imposts, a twin source of municipal revenue within the terms of the reasoning in the Louisiana cases; for to hold that they could be sold by execution, would be to hold the power of a creditor to destroy the government; or, as the civil law authorities express it in the reason given for the grant—"as an individual cannot live without food, neither can a town exist without its rents."

VIII. But it is earnestly insisted by the counsel for the respondents, that whether these views be correct or not, we are precluded from giving effect to them, because the question has been definitely settled by the adjudications of this Court; that the rule of *stare decisis* has closed the controversy, whatever its original merits. We acknowledge the force of the general argument of the counsel, but feel compelled to dissent from its application to the case at bar. The review we have made of the authorities strips the proposition of the imposing character it assumed upon its first presentation. Really, the whole argument rests upon a single decision of two Justices of this Court, rendered so late as October, 1857, during, we believe, the pendency of this suit; for we have shown that no single binding judgment touching the point now in controversy was made before, and that single decision is made finally to rest, not on the original right of the pueblo or on the previous decisions, but upon a new assumption, namely: the grant by Congress—a point which was never before taken in this Court, and which is, as we think, manifestly indefensible. The counsel then, must maintain that a single decision of this Court upon the construction of an Act of Congress, by which, too, the Federal judiciary are not bound, is conclusive of all rights of property in the same category, although that decision is of recent date, and there is no showing that extensive rights of property have vested in consequence of it or under it. Nay, more—that this decision, so made, can destroy the rights of the city of San Francisco, not a party to that judgment, to many acres of city land; can destroy the rights of all the old pueblos in the State to all their immense possessions; can abrogate and repeal, practically, the laws of the Legislature, regularly passed, giving title to the actual possessors of thousands of acres of city property, and those laws which, if we are right, forbade the sale, the validity of which is thus confirmed.

This is a startling proposition. If it be true, a singular anomaly is shown. The very decision which is relied upon, though without authority, to sustain this pretension—that of Cohas v. Raisin—ignores the ground now assumed to give validity to the principle it is invoked to sustain. That decision overruled Woodworth v. Fulton, which held the city lands to be the property of the United States, upon which settlers could go, protected by the general law in reference to cities or towns on the public domain; and if this effect be given to a single decision, the consequence would be that we must return to that doctrine, as probably many settlements have been made and much money expended on the faith of it; and Woodworth v. Fulton was re-affirmed in Reynolds v. West (1 Cal. 322).

The great importance of the question, and the zeal with which a contrary view is pressed, have induced us to go into a full examination of this question of *stare decisis*, though at the expense of some repetition. We have shown our construction of the case of Seale v. Mitchell, in 5 Cal.; but we will suppose that this last *is* to be considered as an authority on that point equal in dignity and force to the case of Welsh v. Sullivan; then it must be argued that these two decisions—for there are none others to this point—are enough to constitute the "rule of property" involved. This singular result, then, is before us—that Woodworth v. Fulton, and Reynolds v. West, affirming the doctrine that the city had no title, were held to be insufficient, while these other two are held sufficient to establish the law that she *had* a title, and that it was leviable; and Vanderslice v. Hanks, and Leese and Vallejo v. Clark, were insufficient to establish a rule of property, while more modern decisions have that effect. But we proceed to consider the point on this gratuitous concession that Seale v. Mitchell is an authority for the respondent.

It is important to ascertain with precision of what description of adjudications this doctrine is predicated. A decision is not even authority except upon the point actually passed upon by the Court and directly involved in the case. But even then, the mere reasoning of the Court is not authority. The point decided by the Court, and which the reasoning illustrates and explains, constitutes a judicial precedent. The books are full of cases in which learned Judges have earnestly deprecated the attempt to urge the mere *dicta*, or the arguments of Judges, as authoritative expositions of the law. Chief Justice Marshall, in the case of Cohens v. The State of Virginia, 6 Wheat., 399, thus defines the rule: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which these expressions are used; if they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom investigated." Chief Justice Best in Richardson v. Mellish, 2 Bingham, 248, says: "The expressions of every Judge must be taken with reference to the case on which he decides, otherwise the law will get into extreme confusion. That is what we are to look to in all cases. The manner in which he is arguing is not the thing—it is the principle he is deciding."

We attach but little weight, then, to the cases of Cohas v. Raisin and its successors affirming the same general principle. No point was involved as to the *character* of the tenure—whether leviable or not—of the pueblo lands. That question was neither argued nor considered. There was no necessity for any limitation of the general proprietary right therein asserted. The proposition therein announced may be true for all the purposes for which it was used; and even if that proposition be the thing decided—and not the minor point, the right of American Alcaldes to grant lots—yet this proposition, as Chief Justice Marshall says, is to receive its definition, sanction and limitation as authority, from the particular facts which show its application. The proposition in Cohas v. Raisin, thus limited, would be, at most, that the pueblo of San Francisco had a grant of lands, and could convey lots by her officers after the conquest. If a Court, in construing a lease in a case in which the term only is involved, affirm that a plaintiff has a fee in the land, and is, therefore, entitled to recover, the case is only a precedent establishing the validity of the title for the term, not for the fee; for the facts do not call for any larger proposition. Touchard v. Touchard, 5 Cal., follows the same course of observation taken by its predecessor, Cohas v. Raisin. The only question in that case was, whether the pueblo making a grant with conditions subsequent, the conditions not complied with, could re-grant so as by the new deed to vest title in the last grantee. The Court held she could. The appellant's argument was, that the land must be denounced by or to the Government before it could be re-granted; and the Court answered this argument by the propositions as to the character of the pueblo title; in other words, the Court said the land need not be denounced, because it did not belong to the Government, but to the pueblo. But it was not necessary to give all the terms and conditions of the title. This reasoning was neither necessary nor conclusive; for the same result, if truly deduced, in either case, would follow, whether the land was clothed with a public trust or not. It had passed from the Government, and that was enough to show that this process of denouncement—a process peculiar to governmental lands—did not apply. But Touchard v. Touchard was subsequently overruled as to the only point—the power or effect of the re-grant—really involved or decided by the case, and from that time ceased to be authority for anything.

Originally the obligation of the Courts is to declare the law as it exists. They have no right to substitute their own dogmas or assumptions for the law. It would seem, therefore, that *the mere fact* that an error has been committed is no reason or even apology for repeating it, much less for perpetuating it. But even in the correction or removal of such errors the law is reasonable, and looks to the welfare and repose of society and the protection of the public interests. Accordingly it sometimes happens that the reversal of an erroneous ruling would prove of greater evil consequence than to suffer it to remain. It becomes then a matter of policy to refuse to overrule it. Among the more general reasons for this refusal are the importance of consistency and stability in the decisions, and the uneasiness and uncertainty which changes of them produce in the public mind; but this consideration is not alone of overruling weight, for it applies to all decisions, especially of Courts of last resort, whether they create or do not create rules of property; and it is not pretended that, as to these last, it is not the duty of the Court to reform clear and admitted error in a previous decision. The reason given for this rule of *stare decisis* is, that rights vest by decisions which affirm a title under a given state of facts, and therefore, it would be unjust to deprive a party of property acquired under such circumstances. This rule, unquestionably, applies to cases where particular modes have been declared effectual for passing property, and where technical or formal objections to such modes are interposed, the effect of which objections would be to make a mere legal claim prevail over justice and right. But it is not so clear if two men claim property—one under a statute, and the other under a decision, that the man claiming under a wrong decision, which destroyed the good title under the statute, is entitled, as a matter of justice, to the property as against the first. Again, that this matter—the vesting of a right—is not the conclusive thing which gives effect to the principle, is seen in the fact that a single decision is not necessarily or usually held protected by this rule. The rule itself is stated in vaguer terms than almost any other principle of law. It is thus stated by Kent: (1 Com. 476) "A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the Judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would, therefore, be extremely inconvenient to the public if precedents were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules that the professional men can give safe advice to those who consult them; and people in general can venture with confidence to buy and trust, and to deal with each other. If judicial decisions were to be lightly disregarded we should disturb and unsettle the great landmarks of property. When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a Court of appeal or review, and never by the same Court, except for very cogent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law."

The language of Sir William Jones is given, which reflects the rigid rule of the old English Judges, who held, with the utmost strictness, to the sacredness of precedents. But it may be doubted whether this doctrine is ever professed now in England. The Lord Chancellor, in the case reported in 12 E. L. and E., p. 1, says: "At the same time, I should venture to state to your Lordships as my opinion, that although you are bound by your own decisions as much as any Court would be bound, so that you could not reverse your own decision in a particular case, yet you are not bound by any rule of law which you could lay down, if, upon a subsequent occasion you find reason to differ from that rule. That is like every Court of justice, and I regard this as a Court of justice; it is inherent in the nature of every Court of justice that it should have liberty to correct any error into which it may have fallen." The strict rule was certainly not very closely followed by Lord Mansfield, the founder of the Commercial Law of England; indeed, the splendid eulogy of Burke ascribes to him rather the quality and successes of a lawgiver than those of a judge.

Chancellor Kent proceeds to qualify this doctrine as follows: "But

I do not wish to be understood to press too strongly the doctrine of *stare decisis*, when I recollect that there are more than one thousand cases to be pointed out in the English and American books of reports, which have been overruled, doubted or limited in theirapplication. It is probable that the records of many of the Courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error."

Then comes this significant language: "Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule and the extent of property to be affected by a change of it. Lord Mansfield frequently observed that the certainty of a rule was often of much more importance in mercantile cases than the reason of it, and that a settled rule ought to be observed for the sake of property; and yet, perhaps, no English Judge ever made greater innovations and improvements in the law, or felt himself less embarrassed with the disposition of the elder cases when they came in his way to impede the operation of his cultivated judgment." Lord Kenyon, his successor, was quite as unreserved in his treatment of Lord Mansfield's judgments as the latter was of those of his predecessors. He overruled several of Lord Mansfield's decisions on the ground that they disturbed the land-marks of property, saying: "I cannot legislate, but by my industry I can discover what my predecessors have done, and I will tread in their footsteps." This learned and accomplished jurist evidently did not consider that *stare decisis* meant an adherence to the last decision, when so to adhere was to desert the ancient law.

The High Court of Errors and Appeals of Mississippi, in 2 Smedes and Marshall R., overruled a former decision of the Supreme Court of that State. The decision was of long standing, being one of the earliest cases in that Court after its organization. The question was that of the rule of distribution of estates of deceased persons in certain cases—a matter affecting the title to property. The Court says: "We are fully sensible that the stability of jurisprudence requires an adherence to the decisions of our Courts. If solemn judgments once made are lightly departed from, it shakes the public confidence in the law and throws doubt and distrust on its administration. Yet even this backwardness to interfere with previous adjudications does not require us to shut our eyes upon all improvements in the science of the law, or require us to be stationary while all around is in progression. * * Perhaps no general rule can be laid down on the subject. The circumstances of each particular case, the extent of influence upon contracts, and interests which the decisions may have had; whether it may be only doubtful or clearly against principle, whether sustained by some authority or opposed to all; these are all matters to be judged of whenever the Court is called on to depart from a prior determination." It is just to remark, that no Court in the United States was more distinguished than this for conservatism and impartiality.

The rule as laid down by Chancellor Kent, in the first extract given from the Commentaries, is almost literally taken from 16 Johns., 402.

In 25 Ala., 210, the Supreme Court of that State hold that a series of decisions made and followed up from the earliest judicial times are binding upon the Judges, but say that if those decisions be opposed to the State or Federal Constitutions, they would take pleasure in discarding them.

Foxcroft v. Mallett, 4 How. U. S. R., 353, was a case affecting the construction of a grant and a mortgage under it. The general question of the title had been passed upon, as Mr. Webster contended, and rightly, we think, in a series of cases in the Supreme Court of Maine, in which the title was affirmed. The case was thoroughly argued, the appellant contending that these decisions were final and conclusive upon the Supreme Court. But the Supreme Court denied the conclusion urged, not upon the ground that the objection insisted on—the effect of the mortgage in question—was not involved in these previous decisions, but that the question "did not appear to have been agitated." Mr. Justice Woodbury, delivering the opinion, used this language: "In conclusion, it has been urged against the judgment we have formed in favor of the right of the demandant, that several actions have been tried in Maine, where his interests have been brought in question as to the premises, and decisions had against him; and that such local adjudications in respect to the titles to real estate should control the opinions of this Court. (9 Cranch, 87; 2 Wheat., 316; 10 Wheat., 152; 12 Wheat., 153; 2 Gallis, 105.) But on examining the particulars of the cases cited to govern this, (3 Fairfield, 398; 4 Shepley, 84, 88; 14 Maine R., 51) it will be seen that the construction of the mortgage to the college, in respect to this reservation or condition, never appears to have been agitated. If it had been, the decision would be entitled to high respect; though it should not be regarded as conclusive on the mere construction of a deed as to matters and language belonging to the common law, and not to any local statute. (3 Summer's R., 136, 277.)"

This last sentence is certainly very suggestive of the idea that the Supreme Court did not consider the doctrine of *stare decisis* necessarily to arise from even a series of decisions affecting the very titles in controversy.

Equally significant is the case in the same Court—Lane v. Vick, et al. This case involved the title to a large tract of land in the city of Vicksburg, including a great portion of the city in extent and value. The case was decided at the January term, 1845, of the Supreme Court of the United States. The case involved and went off upon the construction of the will of one N. Vick; the plaintiff claiming that, by the will, the daughters of the testator were entitled equally with the sons to the land. The case of Vick v. The Mayor and Aldermen of Vicksburg, 1 How. Miss. R., 420, involved the construction of this will, not as the leading object of the bill, but incidentally, and that question was fully argued by the counsel. The Judge delivering the opinion, in noticing a substantive ground of the complainant's claims, says: "It becomes important to notice and construe the will." * * "The whole proceeding was based upon a wrong construction of the will. The daughters of Vick acquired no right by device to this land of their father;" and then go on and decide that the claim of the bill, on the ground affected by this supposed misconstruction of the will, cannot be maintained. This decision was made in 1837. The case in 3 How. U. S. R., rested entirely upon the construction of this will; and the plaintiff contended that this construction by the Supreme Court of Mississippi was erroneous. For the defendants, the Vicks, it was argued that the construction of the Mississippi Court should be received as the final adjudication of the matter. Mr. Justice McLean delivered tho opinion of the Court. He said: "It is insisted that the construction of the will has been conclusively settled by the Supreme Court of Mississippi, in the case of Vicks et al., v. The Mayor and Aldermen of Vicksburg, 1 How., 379.

"The parties in that case were not the same as those now before this Court; and that decision does not affect the interests of the complainants here. The question before the Mississippi Court was, whether certain grounds, within the town plot, had been dedicated to public use. The construction of the will was incidental to the main object of the suit, and of course was not binding on any one claiming under the will. With the greatest respect, it may be proper to say, that this Court do not follow the State Courts in their construction of a will or any other instrument, as they do in the construction of statutes.

"Where, as in the case of Jackson v. Chew, (12 Wheat. 167) the construction of a will had been settled by the highest Courts of the State, and long been acquiesced in as a rule of property, this Court would follow it, because it had become a rule of property. The construction of a statute by the Supreme Court of a State is followed, without reference to interests it may affect, or the parties to the suit in which its construction was involved. But the mere construction of a will by a State Court does not, as the construction of a statute of the State, constitute a rule of decision for the Courts of the United States." Here, for seven or eight years, the decision of the highest Court of Mississippi had remained undisputed, and affected the title to many hundreds of city lots; and yet the Supreme Court of the United States did not consider the decision as constituting a rule of property within the principle of *stare decisis*.

In Lion v. Bertiss, (20 Johns. 483) Spencer, C. J., says: "*Stare decisis* is a maxim essential to the security of property. The decisions of Courts of law become a rule for the regulation of the alienation and descent of real estate; and when that rule has been sanctioned and adopted in our Courts it ought to be adhered to, unless manifestly wrong and unjust."

In the case of Jackson v. Chew, (12 Wheaton, p. 168) the Supreme

Court of the United States illustrate what they mean by a settled course of adjudication, at least as applied to the facts there. The Court says: "In the case now under consideration, there have been two decisions in the highest Courts of law in the State upon the identical question now in judgment, and which were in conformity to a settled course of adjudication for twenty years past."

But we might take bolder ground. We might admit that the general doctrine, as contended for, that a single decision or two decisions on a question of property are decisive and conclusive, as a general rule, however flagrantly erroneous those decisions were; and yet hold that this principle, like all general rules, has and must have its exceptions. It would devolve upon us then to show that to this rule there were exceptions, and next, that this case constitutes one of them; and we should feel no distrust of our ability to maintain this ground. Let us suppose a case by way of illustrating the first of these propositions: Suppose this Court had decided on its first organization that the public lands belonged to this State; and that, therefore, the patents of the General Government were void. The United States Courts, of course, hold a contrary doctrine. Suppose this decision had been consistently maintained ever since the existence of the State until the present time, when the question came up for review again. Would we be bound, and would any Court be bound, its predecessors to the contrary notwithstanding, to hold to this doctrine as the permanent, unalterable law of this tribunal? If so, it must be held to be the true doctrine for all time; and then, it not being recognized by the Federal tribunals, we should have a perpetual conflict of opinions and jurisdictions, and practical revolution or civil war; or at least, two irreconcilable systems of law and sets of rights prevailing in the State. It may be said that this is an extreme case; but so, as we shall show in the sequel, is the case before us. But the purpose of this view is answered by the establishment of the point that *there may be* an exception to the general rule; though we are very far from conceding that this case is within the general principle. On the contrary, we think we have shown that it is clearly excluded from its operation.

Nor is this Court without example in this very respect. Early in its judicial history it held (Leese et al. v. Clark, 3 Cal. 18; Vanderslice v. Hanks, ibid, 18) that a Mexican grant without the approval of the Departmental Assembly, or segregation of the land by the grantor, passed no title to the grantee upon which ejectment could be maintained. This doctrine did not merely touch the remedy. It related to the character of the title. The early cases held that this title was a mere inchoate claim upon the bounty or favor or justice of the Government, requiring its action before a legal interest in the land vested in the grantee. The decision remained as the doctrine of the Court for several years, until it was abandoned in 1857, by Chief Justice Murray, who had announced it; and it was afterwards directly overruled by this Court in 1858. Thus for a series of years was a principle of law of real estate going to the very foundation of titles held and maintained, and afterwards reversed and abandoned. We need say nothing of the case of Woodworth v. Fulton, expressly reaffirmed in Reynolds v. West, and the subsequent cases overruling the doctrine in that case. But enough to maintain this proposition results from the language used in announcing the rule by all judges and authors, for they state the rule, as has been seen, with a qualification which implies of itself an exception.

And apart from all express authority, reason must convince us that no such inexorable rule could exist. The rule itself implies that the doctrine protected by *stare decisis* cannot stand of itself. But it is a solecism to say that causes should be tried upon wrong principles—be decided against the law—whether it be for the purposes of justice or not, so to decide them. The law is not so false to itself as to require its own permanent overthrow, unless the subversion be necessary to the public interests; and whether it be so necessary in a given case or not, is for the Court to decide as a matter of legal discretion, whenever the rule is invoked. For, as this rule of *stare decisis* is avowedly put upon the ground of policy, we cannot conceive that the application of the rule could be rightly so made as to overthrow the paramount public policy of deciding causes by the rules of the law, when those rules work justice and do equity in the major part of the cases to which they apply, and protect the rights of the many against the claim of a few.

This would be practically the working of wholesale injustice and the destruction of legally acquired rights of property under cover of a conservative policy formed to protect such rights, and to enforce justice.

This case, however, is not within the rule of *stare decisis*. This will be seen from the review we have made of the cases in this Court. It is only necesary to refer to the citations we have made at such length, to show *that the point of the title to this property under Sheriff's sale has not been so definitively settled as to have worked itself into the body of the law of real estate in California.* The question of the conclusiveness of adjudications is not necessarily dependent upon the number of them. It is true that some of the authorities use the terms "a series of decisions"—an "uninterrupted series," "a long established rule," and the like expressions; but we apprehend that the language was designed to imply not solely the age of the rule, but its permanent, settled, stable character. A single decision, never called in question, but consistently acted on and generally acquiesced in for a great many years, would probably fall within the rule; while several decisions, like those of Leese and Vallejo v. Clark, and Woodworth v. Fulton would not. We must give force to these qualifications expressed in the words "settled," "acquiesced in," and the like. They cannot mean "settled," by the mere fact or force of the adjudications, for then there would be no use for these terms; they would be without meaning, for *every* judgment upon a title would upon this construction settle the law; nor is the "acquiesence" that of the parties to the case, for they are bound to acquiesce, at least to submit. The meaning is, that the sense of the profession and of the public has recognized the rule as fixed and established—as being closed to further debate, and that conveyancers and intelligent men dealing in such titles, pass them as good and marketable; that the property is considered and treated as owned under the title in question, with the incidents of ownership, and the benefit of such claim to the owner. If it be not the meaning of these qualifying terms to convey an idea of this condition and stability and repose, it is difficult to assign a meaning to them. But there has been no acquiesence, no repose to these titles. The question has not been "*settled*," if "settled" means put to rest, nor has it been recognized as settled. On the contrary, the whole matter has been in perpetual dispute, controversy and discussion. Bar and Bench have been divided; suits brought and litigated at every step and in all Courts; adverse possessions held and maintained by those who contest the title; controversies pending, involving the same principle in the Federal Courts, and those Courts (as in the case involving the title to land in the old pueblo of San Jose) decided against the Sheriff's title, the title of the city herself to the lands disputed, and this question still pending in the Supreme Court of the United States; the grounds taken in the Circuit Court of the United States and before the Land Commission, and those assumed here as to the general title, variant and clashing, and the doctrines pronounced by our own Judges, when affirming the title, inharmonious and shifting. Besides all this, the city of San Francisco, by ordinance, practically ignores the title here, and the Legislature validates, so far as it can, the act which ignores it. And then, the decisions of this Court have been conflicting—"interrupted"—in which event, the subsequent decision has diminished weight. For, as observed by an eminent Judge: "The decisions of Courts are not the law; they are only the evidence of the law; and this evidence is stronger or weaker according to the number and uniformity of adjudications, the unanimity or dissension of the Judges, the solidity of the reasons on which the decisions are founded, and the perspicuity and precision with which those reasons are expressed." Add to this, that these are public and notorious facts, and that the original Sheriff's deed, as held in Argenti v. The City, contained upon its face, in the paltry sum paid for the land, a *caveat* to a purchaser of all defects in the title thus deraigned.

Moreover, the cases relied on were not decided, so far as the point we have been discussing goes—the leviable character of this title—upon "*solemn argument and mature deliberation;*" and this seems to be one of the conditions by which Chancellor Kent qualifies the conclusive effect of the adjudication. This consideration becomes the more important, when we reflect that the interests of many parties and of other communities than San Francisco are involved; and their rights ought not in such a case, to be concluded without an opportunity to be heard, or when argument had not been made by others.

It may be remarked that, in this particular case, the real plaintiff was the original purchaser at the Sheriff's sale, in 1851, and therefore, *no equity* of the rule of *stare decisis* would apply to him, whatever his technical legal right to claim it.

"The *rule of property*," then, is not necessarily created or shown by the mere decision, or two or three decisions of a court. It is the settled, fixed, stable principle regulating titles and the estimate of their validity and value in the minds of practical men, who draw their conclusions from judgments which have been commonly acquisced in as settled law, or the general titles affirmed, by which they have passed beyond contention and dispute.

Nor is the loose expression "*that rights have vested*" under such decisions, to be construed in the sense supposed, if by this phrase be meant that the vesting of any rights under a judgment—however limited in extent or the number of persons claiming—makes the principle therein asserted irreversible; for, probably, no judgment such as this is ever without *some* effect on the transfer of property; and therefore, if this were the criterion, *every* judgment affirming a title would be protected. Nor is there either principle or justice in giving to the smaller right or interest of one, however acquired, a protection at the expense of the larger interest of another, or of many others, acquired as honestly. It is not seen how, as a matter of abstract justice, it can be held that many men claiming under a statute regularly passed, homesteads which they have improved at large expense, confiding in the validity of the statute, should, when it is admitted—for that is the case we are supposing—that their claims were originally good, be forced to surrender them to enrich a purchaser, who bought relying upon a wrong decision of the Courts, and who, therefore, claims to be protected in his purchase. Why, in other words, the claimant, under an erroneous decision, affirming incorrectly a title, should be any better protected than many claimants under a statute which correctly affirmed the title; especially when the latter was for years in possession of the premises, and so held at the time the purchaser bought, the purchaser buying, therefore, with notice that his claim would be contested? The rule of *stare decisis* is for the benefit of *bona fide* purchasers buying since the establishment of the doctrine or rule; and to give the benefit of the rule to them, it is urged that we must establish a principle which protects the present plaintiff, and those like him, representing, probably, no inconsiderable proportion of this city property. These last claimants, it is not pretended, are protected by any equities of the rule of *stare decisis;* for they bought before these decisions, and their case on its real intrinsic merits presents the naked question of title. The question, then, on this claim of justice—and the justice here is not far from the law of the case—is this: Is it just to protect all claimants of this property under execution sales—those claimants resting for title upon an erroneous decision—that protection to be afforded by taking the property from the possession of hundreds who rightly claim it under statute, and this to give effect to a rule of policy which, in this way, is to protect those who bought portions of this property since the decision in Welsh v. Sullivan; the number of whom and the extent of whose purchases are unknown? Is not the answer that it is not policy to do injustice to the majority that justice may be done to the smaller number, and this though the equities of the smaller number were equal *per capita* to those of the adverse side? But how is this question, as it affects the city, thus summarily deprived of her magnificent endowment in favor of these original vendees, who have invested in the speculation but a trifling proportion of the value of the property bought? And how would it be with other pueblos who have never yet had an opportunity to be heard upon the question, whether their lands have passed under such sales?

We are here led to the observation that it is not pretended, at least, it cannot be reasonably contended, that this doctrine of *stare decisis* was perfected—supposing it ever was—until after the case of Welsh v. Sullivan, in July or October, 1857. The Van Ness ordinance was passed in 1855, and the statute confirming it in March, 1858. The statute confirmed the ordinance from its passage, and the ordinance gave effect to a possession in January, 1855. Thus the claim under the Van Ness ordinance had its inception, and so far as the city and county could convey the property, was made good in 1855. If, however, it needed the legislative confirmation, and could only take effect as a title from that fact, it received it in 1858, but a few months after Welsh v. Sullivan was decided. So this title by *stare decisis*, and the title by statute seems to have been nearly contemporaneous, unless, indeed, the statutory title was, by relation, anterior. [But *when* Welsh v. Sullivan settled the question, in the sense of the books, if it ever has done so, is a curious inquiry into which we do not propose to enter.] The cases cited seem to hold, we may add in illustration of some of these views, that the principle of the doctrine of *stare decisis* applies as well to the words of a statute as to a decision. (Dwarris on Statutes, p. 704.)

We cannot appreciate the force of the argument which ascribes a destructive or revolutionary tendency to the view just presented. We have endeavored to show that it has the sanction of authority and the support of reason. A true conservatism does not consist in the maintenance of innovations upon established law, when the general effect of a restoration of the law is wise and just. We only destroy the innovation, and in doing so we conserve the law. And we cannot see, that under the circumstances of this case, we should not be violating our duty in giving perpetuity to an error, as much as if, in the first instance, we consciously committed it.

Again, the views which we have expressed respecting the rule of *stare decisis* are particularly applicable to cases decided in this Court involving questions of Spanish and Mexican law. The Bench and the Bar in California, generally, have not been familiar with these laws; it has been exceedingly difficult to procure copies of the Mexican statutes, and sometimes impossible to procure the works of the most distinguished commentators on the Spanish civil code. And even when procured, it was equally difficult to obtain correct translations of such laws and of the works of such law writers. Add to this the fact that nearly all the Mexican orders, laws, decrees, etc., respecting California, are still in manuscript, scattered through immense masses of unarranged archives, almost inaccessible, and known, even imperfectly, to scarcely half a dozen persons, and will it appear surprising that errors have been committed by our judiciary? Must we persevere in these errors, no matter how great or how much opposed to justice they may be, even after new lights, new authorities and new laws are brought to our notice, proving these mistakes beyond a doubt? We cannot believe that any Court would sustain such a doctrine respecting its decisions.

In illustration of these views we need only refer to the fact that this same embarrassment has been felt by other Courts coming to pass upon the laws and usages of a foreign Government, which they have been suddenly called to administer. The Supreme Courts of the United States, and of Texas especially, have experienced this difficulty; and have felt bound to modify their first rulings and decisions upon important questions arising under Spanish law, by the knowledge obtained after further investigation and research.

We are not insensible to the eloquent admonition of counsel that we do nothing to disturb the titles to real estate in San Francisco. We have no disposition to disturb them. So far as is consistent with the law, we are anxious to protect and preserve all rights of property in that large and growing city. But titles must rest upon some better and more stable basis than upon an erroneous judgment of this Court. We uphold everything decided in the past jurisprudence which we think not plainly erroneous.

Nor do we see that we, directly or indirectly, disturb any title heretofore recognized, unless that of the plaintiff and those in the same category with him be an exception. But in ignoring this claim, we settle and quiet the titles of the larger number now in possession adversely. The last remark brings us to consider the effect of the Act called the Van Ness Ordinance, and the Acts of the Legislature in connection therewith.

IX. We have seen that the title of this property, before the treaty, was in the pueblo, and that the city succeeded to the same title, clothed substantially with the same trusts or similar trusts. But these trusts and this property are under the political dominion and control of the sovereign. The property and trusts and corporation were municipal, and therefore, subject as political institutions, trusts and property, to the superior political authority. This principle has been asserted by the Supreme Court of the United States in the celebrated Dartmouth College case, (4 Wheat., 660) and afterwards confirmed in 10 How., 534; also, so held in 13 Wendell, 9 Cranch; see, also, 1 Tucker's Com., 454. This ordinance was not only the Act of the city; by its confirmation by the Legislature it became the Act of the State. Its purpose was to quiet titles in San Francisco, and it seems justified by a policy, which, if too generous, yet bears some analogy to the laws and purposes which gave existence to the rights of the pueblo. The ordinance was passed by the Common Council on the 20th of June, 1855, and was confirmed by that body on the 27th of September following, and was also confirmed by the Legislature on the 11th of March, 1858. The first section is in these words: "It shall be the duty of the Mayor to enter, at the proper land office of the United States, at the minimum price, all the lands above the natural high water mark of the bay of San Francisco, at the time of the admission of California into the Union as a State, situated within the corporate limits of the city of San Francisco, as defined in the Act to incorporate said city, passed April 15th, 1851, in trust for the general use, benefit and behoof of the occupants or possessors thereof, according to their respective interests.

"Section 2d. The city of San Francisco hereby relinquishes and grants all the right and claim of the city to the lands within the corporate limits to the parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, A. D. 1855, and to their heirs and assigns forever; excepting the property known as the slip property, and bounded on the north by Clay street, on the west by Davis street, on the south by Sacramento street, and on the east by the water lot front; and excepting also any piece or parcel of land situated south, east, or north of the water lot front of the city of San Francisco, as established by an Act of the Legislature of March 26th, A. D. 1851; provided such possession has been continued up to the time of the introduction of this ordinance in the Common Council; or, if interrupted by an intruder, or trespasser, has been, or may be, recovered by legal process; and it is hereby declared to be the true intent and meaning of this ordinance, that when any of the said lands have been occupied and possessed under and by virtue of a lease or demise, they shall be deemed to have been in the possession of the landlord or lessor under whom they were so occupied or possessed; provided, that all persons who hold title to lands within said limits by virtue of any grant made by any Ayuntamiento, Town Council, Alcalde, or Justice of the Peace of the former pueblo of San Francisco, before the seventh day of July, 1846; or grants to lots of land lying east of Larkin street and northeast of Johnson street, made by any Ayuntamiento, Town Council, or Alcalde of said pueblo since that date, and before the incorporation of the city of San Francisco, by the State of California, and which grant, or the material portion thereof, was registered or recorded in a proper book of record deposited in the office or custody or control of the Recorder of the county of San Francisco, on or before the third day of April, A. D. 1850, or by virtue of any conveyance duly made by the Commissioners of the Funded Debt of the city of San Francisco and recorded on or before the first day of January, 1855, shall, for all the purposes contemplated by this Ordinance, be deemed to be the possessors of the land so granted, although the said lands may be in the actual occupancy of persons holding the same adverse to the said grantees.

" Section 3. The patent issued, or any grant made by the United States to the city, shall inure to the several use, benefit and behoof of the said possessors, their heirs and assigns, mentioned in the preceding section, as fully and effectually, to all intents and purposes, as if it were issued or made directly to them individually and by name."

The second section of the Act of 1858 following, is in these words:

" That the grant or relinquishment of title made by the said city in favor of the several possessors, by sections two and three of the Ordinance first above recited, shall take effect as fully and completely, for the purpose of transferring the city's interest, and for all other purposes whatsoever, as if deeds of release and quit claim had been duly executed and delivered to and in favor of them individually and by name; and no further conveyance or other act shall be necessary to invest the said possessors with all the interest, title, rights, benefits advantages which the said order and ordinances intend or purport to transfer or convey, according to the true intent and meaning thereof; *provided*, that nothing in this Act shall be so construed as to release the city of San Francisco, or city and county of San Francisco, from the payment of any claim or claims due or to become due this State against said city and county, nor affect or release to said city and county any title this State has or may have to any lands in said city and county of San Francisco."

We think this Act valid and effectual for the purposes therein mentioned. The effect of it, and of this decision, is to declare valid Alcalde grants made before and after the cession of California; also the title to all lots held under sales by Commissioners of the Funded Debt; and it releases to parties in *actual possession*, by themselves or tenants, on the first of January, 1855, the lots so held by them respectively, giving to the release the effect of a perfect title. The lots within the limits of the old pueblo not so granted or occupied or otherwise disposed of, of course remain the property of the city. This is, in general terms, the effect of this legislation, and it is not necessary for any purpose of this explanation to be more particular or definite in the statement. Nor is it necessary to express any opinion as to the effect of the sale of the property granted by the State to the city and sold under judgment. Those titles do not rest upon the same facts as those passed upon, and the question of their validity is now before us in other cases and will soon be decided. Most of those lots, we believe, are and have long been in possession of the claimants under those sales; and therefore, such possession would seem to be protected by the ordinance and Act of the Legislature.

X. Lastly, the counsel for respondents contend that the defendants cannot set up the want of leviable title in the city, or as they express it, the exemption of this property from forced sale; and they cite several authorities to show that if a debtor does not object to the sale of property exempt by law, a third person cannot. But these cases do not apply. Undoubtedly the owner has a right to assent to have property sold, though exempt by law from sale. He can do what he pleases with his own; he may waive a privilege personal to himself. But the corporation had no right to assent to the sale of this property, since, for this purpose, it was not its own, nor was the exemption its privilege. It could not, by its silence or otherwise, dispose of the trust property in this way. The plaintiff must show his title before he can dispossess any tenant on the strengh of it. He has attempted to do this by deraignment from the city, and has failed; and, as held in Wood v. The City, he cannot recover. A similar decision in principle was made by the Court of Appeals of Kentucky (1 Dana, 359).

We have extended this opinion to a length which is only to be justified by the great importance of the case, the public interest in the questions, and the long and bitter controversies, which, for years, have divided the Bar and the Bench. We cannot hope to give satisfaction to all of the many parties, who, in one way or another, are interested adversely to the decision; but we feel a natural desire to show that we have given the subject a careful consideration in all of its material bearings and aspects, and to prevent any misapprehension which might result in injury to public or individual rights. We close by affirming these propositions:

First—That San Francisco was, at the date of the conquest and cession of California, and long prior to that time, a pueblo, entitled to and possessing all the rights which the law conferred upon such municipal organizations.

Second—That such pueblo had a certain right or title to the lands within its general limits, and that the portions of such lands which had not been set apart or dedicated to common use, or to special purposes could be granted in lots, by its municipal officers, to private persons, in full ownership.

Third—That the authority to grant such lands was vested in the Ayuntamiento, and in the Alcaldes or other officers who at the time represented it, or who had succeeded to its "powers and obligations."

Fourth—That the official acts of such officers, in the course of their ordinary and accustomed duties, and within the general scope of their powers, as here defined and explained, will be presumed to have been done by lawful authority. [39.]

Fifth—That these municipal lands, to which the city of San Francisco succeeded, were held in trust for the public use of that city, and were not, either under the old government or the new, the subject of seizure and sale under execution.

Sixth—That this property and these trusts were public and municipal in their nature, and were within the control and supervision of the State sovereignty, and that the Federal Government had no such control or supervision.

Seventh—That the Act of the State Legislature of March, 1858, confirming the so-called Van Ness Ordinance, was a legal and proper exercise of this sovereign power; and that this Act gave full effect to the provisions of that Ordinance, and vests in the possessors therein described, as against said city and State, a title to the lands in said Ordinance mentioned. [40.]

Eighth—That the city of San Francisco holds the municipal lands of the pueblo, not legally disposed of as hereinbefore explained; and that her title is wholly unaffected by Sheriff's sales under execution against her, so far as those sales touch or affect the aforesaid pueblo lands.

Ninth—That a defendant in ejectment, holding such lands merely by possession, may set up the invalidity of such sales, or the plaintiff's title derived therefrom, to defeat the plaintiff's action.

It becomes unimportant to notice any other points, for those already decided determine the merits of this controversy.

The judgment is reversed, and the cause remanded.

Baldwin, J.

I concur: Field, C. J.

Hart vs. *Burnett et als.*—I regret that I am unable to agree with my associates in the conclusion at which they have arrived in this case. The questions affecting the merits of the controversy were long since settled by this Court, and whatever may be our opinion of the correctness of that settlement, I think that a due regard for the doctrine of *stare decisis* requires that it be strictly adhered to. I shall never hesitate in a proper case to co-operate with my associates in correcting the errors of this tribunal, but I am unwilling to interfere where the effect may be to create confusion in titles, and destroy rights acquired and held upon the faith of the most solemn adjudications. We cannot suppose that the people of San Francisco have been so unmindful of their interests as to disregard the former decisions of this Court, and rely for the protection of their rights upon a change in the opinion of the Judges, or in the organization of the Court. It is safe to assume that these decisions have been generally acquiesced in, and have been accepted and acted upon by the people of that city as the paramount law and rule of property. Titles emanating from the city must have become the subject of trade and commerce, and under the influence and upon the faith of these decisions large sums of money must have been expended in the acquisition of these titles. In point of fact, we know that these expenditures have been made not only as investments, and for purposes of speculation, but whenever it could be done, by the actual possessors of property for the purpose of protecting their possessions. If under these circumstances the doctrine of *stare decisis* has no application, I think it would be difficult to state a case in which that doctrine could be properly invoked.

To show precisely what I understand to have been decided by this Court, it is necessary to refer to the decisions themselves.

In Smith v. Morse, 2 Cal. 524, certain property had been levied upon and sold as the property of the city, and one of the points made was that the city had no title to a portion of this property. The Court did not consider it necessary to determine the question of title, but held that if the property belonged to the city it was subject to levy and sale.

In Cohas v. Raisin, (3 Cal. 443) the Court passed upon the character of the title of the former Pueblo of San Francisco to the land lying within the limits of the pueblo, and held that under the laws of

Mexico the pueblo was invested with a valid legal title to such land. The conclusion of the Court, as announced in the opinion of Mr. Justice Heydenfeldt, was: "That before the military occupation of California by the army of the United States, San Francisco was a Mexican pueblo or municipal corporation, and was invested with title to the land within her boundaries." The opinion of Mr. Chief Justice Murray was never published, and the consequence has been that the opinion of Mr. Justice Heydenfeldt has always been regarded as the unanimous opinion of the Court. There is, however, no conflict in the two opinions, and the substantial grounds of the decision were concurred in by the whole Court. The absolute title of the pueblo is the leading idea of both opinions and the controlling principle of the case. The decision was placed expressly upon the ground that the grant to the pueblo was in full property, and carried with it and vested in the pueblo all the rights and incidents of absolute ownership.

The case of the People ex rel. Thorne v. Hays, (4 Cal. 127) was an application for a mandamus to compel the Sheriff of San Francisco county to execute deeds to certain lots held by the city under the pueblo title, which lots had been sold under an execution against the city and purchased by the relator. The right of the city to redeem the property from this sale was the only question decided by the Court, and the decision was adverse to this right and a peremptory mandamus was awarded. No question was raised as to the title of the city or the leviable character of the property, though it would have been a sufficient answer to the application to have shown that the property was not subject to execution. This point seems to have been conceded, or at least was not brought to the attention of the Court, and the case can only be regarded as an authority upon the particular question passed upon by the Court.

In Touchard v. Touchard, (5 Cal. 306) the case of Cohas v. Raisin was referred to and approved. In speaking of that case, Mr. Justice Heydenfeldt, in delivering the opinion of the Court, said: "We had occasion to examine the power and authority of towns under the Spanish and Mexican systems, to acquire and dispose of lands, and the conclusion there attained, after a careful examination of the Spanish and Mexican decrees, places their right upon as high ground as that of natural persons—a right of property beyond even the reach of royal interference." This language, as well as the language in Cohas v. Raisin, necessarily excludes the idea of a trust. An examination of this case will show that the reference to Cohas v. Raisin, though incidental, was entirely pertinent, and it must therefore be regarded as an authoritative exposition of the principle of that case.

In Seale v. Mitchell, (5 Cal. 401) the Court passed upon and sustained the very title in controversy in this suit. The action was ejectment, and on the trial of the case the plaintiff, to prove his title, gave in evidence a judgment obtained in the Superior Court of the city of San Francisco, by Peter Smith, against the city. Upon the judgment an execution had been issued, and the plaintiff had purchased the property in dispute at Sheriff's sale. The execution and a deed from the Sheriff were also given in evidence. It was admitted that the property was situated within the limits of the former pueblo of San Francisco. Upon this evidence the plaintiff was nonsuited, but the published report of the case does not show upon what particular grounds the nonsuit was asked. It appears from the record, however, that it was asked, *first*, upon the ground that the deed from the Sheriff was void; and *second*, upon the ground that the plaintiff had failed to establish any title in the city. It was granted upon the first of these grounds, but as the second went directly to the right of the plaintiff to recover, it was relied upon in the argument before this Court. In response to the argument upon this point, the Court said: "In the case of Cohas v. Raisin, we decided that before the military occupation of California by the army of the United States, San Francisco was a Mexican pueblo, or municipal corporation, and was invested with title to the land within her boundaries. It results from this that when a plaintiff sues for a lot in the former pueblo of San Francisco, and deraigns his title from the city, it is *prima facie* evidence of title." The conclusion was that the nonsuit had been improperly granted, and the judgment was reversed. I do not see how this case can be distinguished upon principle from the case at bar. It affirmed the same title upon which the plaintiff seeks to recover in this suit, and it must be conceded that upon the principal questions now before the Court, it is directly in point.

In Welsh v. Sullivan, (8 Cal. 165) the question of the validity of this title was again brought before the Court; and after full argument was again decided in the same way. Mr. Chief Justice Murray delivered an elaborate opinion, in which he maintained the authority of Cohas v. Raisin, and the cases subsequently decided; both upon principle and upon the doctrine of *stare decisis.* The Associate Justices concurred in the decision. Mr. Justice Terry held that upon the principle of *stare decisis*, the Court was bound by its former decisions; and Mr. Justice Burnett placed his concurrence upon the ground that the title vested in the city under the Act of Congress of 1851. It is contended that the authority of this case is impaired by the difference in the reasons assigned by the Judges for their decision. I do not think so. They arrived at the same conclusion, and two of them agreed as to the effect of the previous decisions of the Court. This was certainly a legitimate reason for the decision, and I do not think that the concurrence of Mr. Justice Terry in the opinion subsequently delivered on the petition for a rehearing, can be regarded as an abandonment of his opinion upon this subject. If this case is to be regarded as law, it is conclusive of the questions involved in the controversy now before the Court.

I have not alluded to the case of Woodworth v. Fulton, for the reason that it is not proposed to return to the doctrines of that case, and the fact that it was overruled in Cohas v. Raisin furnishes no argument against the authority of the latter case or the other cases to which I have referred.

I have now examined, so far as is necessary for my present purpose, the several decisions of this Court bearing upon the questions in controversy in this suit. If these decisions were permitted to stand, the controversy upon the merits would of course be at an end. I cannot avoid the conclusion that their overthrow is against public policy and in violation of the rights of individuals. I regard it as a dangerous experiment, the consequences of which cannot be foreseen. Any change in the rules and principles regulating the administration of justice should be introduced with great caution. In matters of property every such change, the tendency of which is to disturb titles and impair the security of vested rights, is in contravention of the spirit and policy of the law. A steady and uniform rule of property is of much more importance than the mere legal reasons upon which the rule was originally founded, and no Court can be justified in disturbing such a rule upon the ground that it originated in an erroneous conception of the law. However gross the error, if it has taken root and become a rule of property, it is sacred and inviolable.

Where a rule has become settled law, says Mr. Broom, it is to be followed, although some possible inconvenience may arise from a strict observance of it, or although a satisfactory reason for it is wanted, or although the principle and policy of the rule may be questioned. *Misera est servitus, ubi jus est vagum aut incertum* is a maxim which applies with peculiar force to questions respecting real property. (Broom's Leg. Max., 111.) When a doctrine is once fixed, says another learned author, as if it be so fixed by a decision, and subsequent practice grounded on it, it is to be adhered to. One ground of such adherence is the inconvenience of uncertainty in the law, an inconvenience which, with regard to property, may affect every man by the circumstance that the ablest conveyancers may not be able to direct him. Another reason for adhering to a rule of property is, that many estates may depend upon the rule, and the danger that the new determination may have a retrospect and shake many questions already settled. (Ram. on Leg., Judg. 126, 127.) "When a rule," says Chancellor Kent, "has been once deliberately adopted and declared, it ought not to be disturbed, unless by a Court of appeal or review, and never by the same Court, except for very cogent reasons and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law." (1 Kent's Com., 476.) "No man," says Sir William Jones, "who is not a lawyer, would ever know how to act, and no man who is a lawyer would, in many instances, know how to advise, unless Courts were bound by authority as firmly as the Pagan deities were supposed to be bound by the decrees of fate." (Jones on Bail, 46.) "*Stare decisis*," says Chief Justice Wilmot, "is a first principle in the administration of justice; and this, not from any fear of bringing appeals or writs of error in particular cases, but because these cases have furnished the light, by which conveyances have been directed in settling and transferring property from one man to another. Upon the faith of an established rule, and the acquiescence of judges and of the whole nation in it, property to the amount of millions may depend. The Judges now, as their predecessors have always done, bow down to the rule *pro salute populi*, which is the supreme law of every community." (Wilm. Notes, 312.) "It is for such reasons," says Mr. Greenleaf, "that judges have deemed themselves bound to adhere to the rules of the law of real property, with a closeness sometimes bordering upon servility, but in truth dictated by sound wisdom." (Greenl. Cruise on Real Property, 543.) "The altering settled rules concerning property is the most dangerous way of removing land-marks." (Parker, C. J., in Goodright v. Wright, 1 P. Wm., 399.) "My opinion is," says Lord Chancellor Macclesfield, in Wagstaff v. Wagstaff, 2 P. Wm., 288, "never to shake any settled resolutions touching property or the title to land, it being for the common good that these should be certain and known, however ill grounded the first resolution might be." The same view was expressed by Mr. Justice Wilmot, in Robinson v. Bland (1 W. Bl. 264). "There is no mischief," said Lord Mansfield, in Rice v. Shute, (2 W. Bl., 696) "that attends setting aside rules of practice, when erroneous, though in rules of property it is otherwise." And again, in Hodgson v. Ambrose, 1 Doug., 341, he said: "The great object, in questions of property, is certainty; and if an erroneous or hasty determination has got into practice, there is more benefit to be derived from adhering to it than if it were to be overturned." Lord Camden, in Morecock v. Dickens, (Ambl., 678) speaking of the English rule, that the registration of a deed is not notice of its contents, said, that if it were a new case, he should have his doubts; but that the point was settled by previous decisions, and much property had been settled, and many conveyances made upon the strength of it. "A thousand neglects to search," added he, "have been occasioned by that determination, and I cannot therefore take upon me to alter it." In Doe v. Manning, (9 East., 71) Lord Ellenborough expressed a similar opinion, saying: "It is no new thing for the Court to hold itself concluded, in matters of real property, by former decisions, upon questions, in respect of which, if they were *res integra* it probably would have come to very different conclusions."

Authorities in support of this doctrine might be multiplied to an indefinite extent, but those already cited would seem to be amply sufficient. I propose, however, to refer to a few cases emanating from the Courts of this country. In Towle v. Forney, (4 Kernan, 423) the

Court of Appeals of New York, per Denio, C. J., said: "Theoretically the judgments of Courts are only evidence, more or less authentic, of the law, and not the law itself; and it is unhappily true that cases sometimes occur where a prior judgment upon the same legal question cannot be conscientiously followed after the principle has received a further and more deliberate examination. The cases, however, are extremely rare in which the determination of the highest appellate Court can be properly departed from, when the same legal question again arises before a Court of the same government. If it shall be thought that an erroneous rule has been established by the adjudication relied on as a precedent, it is better that it should be changed by the Legislature, by an Act which cannot retrospect, than that the Courts should overturn what they have themselves established, and thus disappoint all who have acted upon the rule which had been considered settled. If this is so where an abstract rule of law, determined in a prior case, is sought to be applied to new facts, the reason is stronger where, as in this case, a series of particular acts has been passed upon and held to produce a given result, and the same identical facts are again before the Court between other parties. In such a case, there being no pretense of collusion, and no reason to impute carelessness or inattention to the Judges, the determination should be considered final and conclusive upon all persons in interest, or who may become interested in the question, as well as upon the parties to the particular action. The present case affords a forcible illustration of the importance of this doctrine." The same Court, in Curtis v. Leavitt, (1 Smith, 188) said: "It is quite clear that this question has never been fully considered by this Court; but inasmuch as it has been expressly determined by the Court in two cases, I do not feel at liberty to disregard the determination, although I believe it to be erroneous; for I do not think that the correction of the error will compensate for the mischief of shaking the stability of the decisions of the Court." The Court adopted the opinion of Sir William Grant, (18 Ves., 110) that "It is essential to the security of property that a rule should be adhered to when settled, whatever doubt there may be as to the grounds on which it originally stood." The Supreme Court of Alabama, in Rawls v. Kennedy, (23 Ala., 240) said: "We have elaborated our views as to the operation of these statutes more than we should have done, for the reason that it has been urged that the question we have discussed is not an open one in this Court; that a different construction was given to the Act of 1843, in the case of Henry v. Thorpe, (14 Ala., 103) and the construction there given was recognized and affirmed in the later cases of Doe v. Haskins (15 Ala., 619) and Coxe v. Davis (17 Ala., 716). If this be so, and the construction thus given was made under such circumstances as to give to these cases the force of adjudications upon the questions here presented, whatever may be our own views as to their correctness, we should feel bound, from a just regard to the rights of others who may be supposed to have acquired titles under them, to adhere to the rules which they have established. The evils arising from a wrong decision, great as they may be, would, in our opinion, weigh but little in comparison with the consequences which might ensue to the community from the establishment of a precedent under which the most solemn adjudications of this Court, in relation to the titles of real property, might be questioned and abrogated."

If there is anything in the facts of this case to exempt it from the operation of the rule laid down by these authorities, I am unable to see it. It is true, so far as Cohas v. Raisin is concerned, it is admitted that the decision was correct, and upon the mere question of the validity of a grant made by an American Alcalde, during the military occupation of the country by the army of the United States, its authority is not disputed. But the theory of that case was that the pueblo was the absolute owner of the property, and it cannot be denied that this theory is entirely subverted and overthrown. It was this theory which was approved in Touchard v. Touchard, and subsequently adopted in Seale v. Mitchell and Welsh v. Sullivan; and it is this theory, thus approved and thus adopted, which I think should not now be overturned. The last two named cases affirmed the identical title in controversy in this suit, and the public had a right to consider that all questions in relation to its validity were finally and conclusively determined. Upon the decision of this case depends the most important property interests of the wealthiest and most flourishing community in the State, and I am unwilling to do anything, the effect of which may be to render these interests less secure or less valuable. No doubt any decision that we could make would be productive of hardship to individuals, but we have reason to apprehend a less serious result in this respect from adhering to former adjudications, than from any other course. But, however this may be, the stability and uniformity of our decisions, in matters of property, are of much greater importance than any consideration connected with the preservation of individual rights.

I will say in conclusion, that if the questions presented in this case were *res integra*, I should have no difficulty in arriving at a conclusion in accordance with the opinion of my associates; and as it is important that some settled rules should exist on these subjects, in any future case involving the same questions, I shall consider myself bound by the present determination of the Court.

In my opinion, the judgment of the Court below should be affirmed.

COPE, J.

STATE OF CALIFORNIA.

Supreme Court, April Term, 1860.

S. H. HOLLIDAY, Appellant,

vs.

W. R. FRISBIE, Appellee.

Opinion of the Court by Chief Justice Field.

This is an action of ejectment to recover possession of certain premises situated within the city of San Francisco. The premises constitute a portion of the property known as the beach and water lot property, granted to the city by the Act of March 26th, 1851. The case is presented upon an agreed statement of facts, and appears to be an amicable suit for the purpose of determining the respective rights of the parties.

The plaintiff claims title to the premises by virtue of a conveyance executed to him by the President and two members of the Board of Land Commissioners, created by the Act of May 18th, 1853, providing for the sale of the interest of the State in the property within the water line front, as defined by the Act of March 26th, 1851. The conveyance bears date of the twenty-third of April, 1853, and it is admitted that, whatever right, title or interest the State possessed in the premises at that date passed by the conveyance to the plaintiff. (Laws of 1853, chap. 160, secs. 6 and 8.)

The defendant claims title to the premises. First—By virtue of a grant from a Justice of the Peace of the city of San Francisco, bearing date on the nineteenth of December, 1849, and the Act of the Legislature of May 1st, 1851, confirmatory thereof. Second—By virtue of a conveyance from the Sheriff of the county of San Francisco, bearing date on the twenty-third of October, 1851, executed upon a purchase of the premises at a sale under a judgment and execution against the city. And third—By virtue of the Ordinance of the Common Council of the city of San Francisco, for the settlement and quieting of land titles in the city, passed on the twentieth of June, 1855, commonly known as the Van Ness Ordinance, and the Act of the Legislature of March 11th, 1858, confirmatory thereof, he being in possession of the premises on the first of January, 1855.

We shall pass over the defendant's first alleged source of title without consideration, as there is no evidence before us that the city ever complied with the conditions upon which the right of the State to the beach and water lot property was to be relinquished by the Act of May 1st, 1851; and it is unnecessary, for the determination of the present case, to express any opinion upon the question whether the clause in the Act, confirmatory of the grants made by any Justice of the Peace of the city, is independent of these conditions, and operative without reference to their performance. Whatever may be the effect of the clause referred to, its provisions could not, of course, divest the leasehold interest previously passed to the city.

By the Act of March 26th, 1851, a grant is made to the city of the use and occupation of the beach and water lots therein described, with certain specified exceptions, for the period of ninety-nine years, with a proviso that the city shall pay into the State Treasury, within twenty days after their receipt, twenty-five per cent. of all moneys arising in any way from the sale or other disposition of the property. There has been much discussion as to this proviso and its effect upon the estate granted. It has been regarded by some members of the profession as a condition annexed to the grant, and by others as creating a trust in the city in favor of the State. The plaintiff takes the latter position; and as a consequence flowing from it, that the interest which passed to the city was not subject to sale under execution.

The proviso is in no sense a condition annexed to the grant, either precedent or subsequent. It is not, of course, a condition precedent, for its requirement presupposes the estate *to have vested*, and the right to sell or otherwise dispose of the same to have been exercised. It is not a conditon subsequent, for the non-performance of which the estate can be defeated, for by its terms the right of the State to the per centage, and the obligation of the city to pay the same, can only arise *after* the city has parted with the estate and received the consideration.

Nor does the proviso create a trust in the city in favor of the State, so far as the property itself is concerned; that is to say, the estate granted is not, by force of the proviso, held in trust partly for the benefit of the State. If there be a trust, it is, of course, an express one, of which grantees and purchasers will be deemed to have notice; and in cases of this kind, the rule is settled that the interest of the *cestui que trust* cannot be defeated. It is an interest in the property distinct, it is true, from the legal ownership, but one which can be enforced in equity. It accompanies the property in all its changes and transfers until the trust is executed. The trust asserted is to pay over a certain portion of the proceeds. If this provision does in fact create a trust, so far as the property itself is concerned, in favor of the State, then the property is charged with the payment of the per centage in the hands of the purchaser. Yet it will not be pretended that the premises, when once sold or disposed of by the city, remain thus charged. It is not for the grantee or purchaser to see to the payment of the per centage to the State. That is a duty devolving upon the city, with the performance of which the grantee or purchaser has no concern. There is no such interest in the property remaining in the State, as the existence of the supposed trust would necessarily imply. The possession of *any* interest in the property is negatived by the express terms of the grant; which terms are absolute, conferring the unconditional right to the use and occupation for ninety-nine years. The interest which the State reserved is to a portion of the proceeds arising upon the sale or other disposition of the property, if any proceeds were received by the city. To a portion of such proceeds alone could the State ever assert any claim. The obligation rests upon the city to pay over the per centage, and that is all. If there be any trust, then, created by the proviso, it is only a trust in the one-fourth of the proceeds which the city may receive, amounting, in fact, only to a covenant on the part of the city, which in no wise qualifies the grant or affects the legal estate of the city in the premises.

"Words of proviso and condition," says Parsons, "will be construed into words of covenant, when such is the apparent intention and meaning of the parties." (Law of Contracts, 2 vol., 23.) In Clapham v. Moyle, (1 Levinz, 155) a proviso to pay was held to be a covenant. Clapham conveyed an office to Moyle, *provided* that Moyle should pay to Clapham five hundred pounds out of the first profits of the office. The action was brought in debt for the five hundred pounds, the plaintiff alleging the conveyance of the office, the receipt by the defendant of the amount of the profits, and its non-payment. The defendant demurred, but the Court adjudged that the action was properly brought on the proviso; "for this proviso is not by way of condition or defeasance, but by way of agreement to pay the five hundred pounds."

The interest of the city in the beach and water lot property is a legal estate for ninety-nine years. The property is not devoted by the grant of the State to any specific public purposes, or made subject to the performance of any trusts by the city. It is held by a very different tenure from that by which the city holds the lands of the old pueblo, and which was the subject of elaborate consideration in Hart v. Burnett, et als., recently decided. Those lands were given upon express trusts, and are now held, if not upon precisely the same trusts, yet upon trusts equally effectual to protect them from forced sale under execution. As to the beach and water lot property, the case is different. In that property the interest of the city is absolute, qualified by no conditions and subject to no specific uses. It is, therefore, a leviable interest, subject to sale under execution, and such interest in the premises in controversy passed to the defendant upon the sale and conveyance under his judgment and execution.

The objection that, if the sale of the city's interest under execution be sustained, the proviso in the legislative grant will be entirely defeated, is without force. In Smith v. Morse, (2 Cal. 524) a portion of the property in controversy consisted of a water lot, covered by the grant of March 26th, 1851, and whilst it was admitted that the title to the lot was in the city, so far as the right to sell the property was concerned, it was insisted by counsel, as appears from their briefs on file, (not published in the report of the case) that the interest of the city was not liable to sale under execution, as such sale would defeat the proviso; but the Court answered that "the city is estopped from setting up any rights in the State;" and that "the Sheriff merely sold the right, title and interest of the city. And when the State chooses to assert her right in the premises, it will be time enough for this Court to determine the character of the title which the plaintiff acquired." We do not, however, meet the objection in this way, but rest the answer to it upon the language of the proviso itself. The proviso does not indicate the manner or time in which the property shall be disposed of, nor require that any sale or other disposition shall be made at all. The city may have retained the whole property, or have leased it for the full term upon the condition of improvement, or parted with its interest in a variety of other ways without the receipt therefrom of any moneys of which the State could have claimed a portion. The proviso operates, in fact, only as a covenant on the part of the city, that if she makes any sale or other disposition of the property, and realizes from such sale or other disposition any moneys, twenty-five per cent. of the same shall be paid into the State Treasury. On the other hand, if the property is disposed of without the receipt of any moneys by the city, no obligation arises in favor of the State. Any other construction is not required by the language or purposes of the Act, and would be accompanied with insurmountable difficulties. The legal estate being vested in the city—not qualified or affected by her covenant—was subject, as we have already stated, to sale under execution; and if by reason of such sale a voluntary disposition by the city and consequent receipt of moneys, of which the State could have claimed a portion, became impossible, it was a result against which the language of the proviso does not protect the State, and she cannot complain.

Perhaps the per centage upon the sum for which the property sold under execution might have been claimed by the State, considering the application of such sum to pay the debt of the city as amounting virtually to a receipt of the same by the city. It is unnecessary to express any opinion upon the point, and we only allude to it because it is admitted in the present case that an amount equal to the per centage of the sum for which the premises in controversy were sold was actually paid by the city to the State, though not until the year 1853.

But were we less clear than we are, as to the liability of the city in the beach and water lot property to sale under execution, we should not depart from the decision made in Smith v. Morse, which expressly asserts the right of a judgment creditor to subject this interest to sale, after full and elaborate argument upon the point. Upon the faith of that decision, improvements have been made by the purchasers, or parties claiming under them, to the value of millions, and by no act of ours will the title of such purchasers and parties ever be disturbed. It is true, that the case of Smith v. Morse was a controversy between a purchaser at Sheriff's sale and the Commissioners under the Act of May 1st, 1851, authorizing the funding of the floating debt of the city, the latter claiming that the interest of the city had passed to them by a conveyance from the Commissioners of the Sinking Fund. Our decision, therefore, in the present case, is made without reference to any rights which those Commissioners may pass. They are not parties to this suit, and their rights are not involved, and it would, therefore, be improper to express or intimate any opinion in relation to them.

But independent of all considerations of the title derived from the sale and conveyance of the Sheriff, the defendant can successfully resist a recovery by the plaintiff by force of the title vested in him under the Van Ness Ordinance. That ordinance was passed by the Common Council of the city on the 20th of June, 1855, and was ratified and confirmed by the same body by an ordinance passed on the 27th of September, 1855. On the 11th of March, 1858, these ordinances were ratified and confirmed by an Act of the Legislature. The first section of the ordinance appears to have been framed upon the supposition that the land within the corporate limits of the city, above the natural high water mark of the bay of San Francisco, might have been public property of the General Government, and provides for an entry of the same at the proper Land Office of the United States. The second section of the ordinance, however, is of a very different character. That section embraces all the lands within the corporate limits, including the beach and water lot property, and was framed upon the supposition that the city possessed some title or interest in them, and, by its provisions, she relinquishes and grants all her title and claim thereto, with certain exceptions, to the parties in the *actual possession* thereof, by themselves or tenants, on or before the 1st of January, 1855, provided such possession was continued up to the time of the introduction of the ordinance in the Common Council; or, if interrupted by an intruder or trespasser, had been or might be recovered by legal process. The ordinance then proceeds to designate certain parties who shall be deemed to have been in possession. It is unnecessary to specify the parties thus designated, as the designation has no bearing upon the position of the defendant. It is admitted that he was in the possession of the premises in controversy on the 1st of January, 1855, and has continued in such possession ever since. If, therefore, the city held at that date any interest in the premises, such interest was transferred to and vested in the defendant, by the operation of this ordinance and the legislative confirmation thereof. Whatever question may be raised as to the liability of her interest to forced sale, there can be none as to the validity and effect of her voluntary grant of the same, after such grant has received the approval and ratification of the Legislature.

The interest of the plaintiff in the premises derived from the conveyance of the Commissioners under the Act of May 18, 1858, is only to the reversion after the ninety-nine years designated in the Act of March 26, 1851.

Judgment affirmed. FIELD, C. J.

I concur: BALDWIN, J.

I concur in the judgment of affirmance, and in the opinion of the Chief Justice, except that I do not draw any distinction between the leviable character of the beach and water lot property and the lands of the old pueblo, being in this respect, governed by previous decisions of the Court. COPE, J.

NOTES AND COMMENTS.

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NOTE 1.

EXTRACTS FROM THE LAWS OF THE INDIES, 1680.

BOOK IV, TITLE V.

OF TOWNS.

Law I relates to the character of land to be selected for a town; Law II requires that the site shall be easy of approach, and capable of defense; Law III regulates the use to be made of the voluntary labor of Indians, in establishing towns; Law IV provides for the payment of officers; and Law V directs that settlers, who are unmarried, be persuaded to marry.

LAW VI.

"If the character of the land should be suitable for establishing a town of Spaniards, with a council of ordinary Alcaldes and Regidores, and any person should offer to contract for founding it, the agreement shall be made on these terms: That within the time specified, it shall have at least thirty residents; each one to have a house, ten breeding cows, four oxen, or two oxen and two steers, one breeding mare, one sow, twenty Spanish ewes, six hens, and a cock. He will also appoint a *clerigo*, to administer the Holy Sacrament, who, at first, shall be of his own election, and afterwards to be elected in conformity with our royal *patronasgo*; and he shall provide the church with ornaments, and things necessary for Divine worship; and he shall give security that he will do so within the time specified; and if he fail to comply with his obligations, he shall lose what he may have built, cultivated, or farmed, which we apply to our royal patrimony; and besides, he shall incur a penalty of one thousand ounces of gold, for our treasury; and if he shall comply with his obligations, let there be given to him four leagues of boundary and territory, in a square or prolonged form, according to the quality of the land, so that, when surveyed, there shall be four square leagues; with the condition, that the boundaries of said territory be at least five leagues distant from any city, town, or village of Spaniards, previously established; and that there be no injury done to any Pueblo of Indians, nor to any private individual."

LAW VII.

"If any one should propose to contract for founding a new town, in the prescribed form, for more or less than thirty residents, if not less than ten, let there be granted to him a proportionate boundary and territory, and upon the same conditions."

LAW X.

"Whenever any private individuals shall unite for the purpose of forming a new town, and there be a sufficient number of married men for that purpose, let permission be given to them, provided there be not less than ten married men; and let there be granted to them boundary and territory, proportioned as aforesaid; and we give them authority to elect, annually, among themselves, ordinary Alcaldes, and officers of the council."

NOTE 2.

SPECIAL LAWS AND ORDERS, PRIOR TO 1789.

In the instructions of the Viceroy, dated November 12th, 1770, to the commandant at Monterey, directions are given for the formation of "Mission Towns," (*Pueblos de Mission*) and particularly at the Port of San Francisco, "in order that a place so important may not remain exposed to foreign occupation."

The Royal Regulations of September 10th, 1772, for the frontier Presidios of New Spain, contain minute instructions for the government of these establishments. Title XI directs, that individuals and families be induced to settle in the vicinity of each Presidio, for the purpose of building up a town; and that captains and commandants of these military posts, grant to such settlers, building lots, and lands for cultivation. In these grants, preference was to be given to the soldiers who had served out their enlistment.

The present towns of Altar, Tubac, Fronteras, Janos, Paso del Norte, Goliad, San Antonio de Bejar, &c., in Texas and New Mexico, and of Loreto, San Diego, Santa Barbara, Monterey, and San Francisco, in California, were first established in this manner, and are the legitimate results of these regulations.

The following extracts from the Instructions of the Viceroy to the commandant of the "new establishments of San Diego and Monterey," that is, of Upper California, dated August 17th, 1773, relate, more particularly, to the organization of Pueblos:

"ARTICLE 12. With the desire to establish population more speedily in the new establishments, I, for the present, grant the commandant the power to designate common lands; and also, to distribute lands in private, to such Indians as may most dedicate themselves to agriculture, and the breeding of cattle; for, having property of their own, the love of it will cause them to radicate themselves more firmly; but the commandant must bear in mind, that it is very desirable not to allow them to live dispersed—each one on the land given to them—but they must, necessarily, have their house and habitation in the Pueblo or Mission, where they have been established, or settled.

ARTICLE 13. I grant the same power to the commandant, with respect to distributing lands to the other founders, (*pobladores*) according to their merit, and means of labor; they, also, living in the town, and not dispersed; declaring that in the practice of what is prescribed in this article, and the preceding, 12th, he must act in every respect in conformity with the provisions made in the collection of the laws respecting newly acquired countries and towns; (*reducciones y poblaciones*) granting them legal titles, for the owners' protection, without exacting any remuneration for it, or for the act of possession.

"ARTICLE 14. The commandant must be carefully attentive that the founders who go to the new establishments, have the requisite arms for their defense, and for assisting the garrisons of the Presidios or Missions, in case of necessity; binding them to this obligation, as a thing necessary for their own safety, and that of all their neighbors.

"ARTICLE 15. When it becomes expedient to change any Mission into a Pueblo, the commandant will proceed to reduce it to the civil and economical government, which, according to the laws, is observed in the other pueblos of this kingdom; giving it a name, and declaring for its patron, the saint under whose auspices, and venerable protection, the mission was founded.

"ARTICLE 18. The commandant shall, in every thing, proceed with the understanding that the object of the new establishments is for the advancement of the spiritual conquest, hence, the extension of the dominions of the king; and, in as much as the Port of San Francisco, already examined, requires further investigation, the commandant shall, at once, give the necessary orders for that purpose, in order to ascertain, concurrently with the Father President, whether it is possible to establish any mission at that place."

It appears from official documents, and from Palou's Life of Junipero Serra, that measures were soon after taken to explore the bay of San Francisco; that a reconaisance was made by the vessel called "San Carlos," and a most favorable report made by the commander, respecting its character as a harbor, and its commercial importance. There are still preserved, a number of letters from the Viceroy to different persons in California, urging upon them the importance of occupying the Port of San Francisco. In 1775, a military expedition, under Lieut. Col. Anza, was sent from Sonora, to reinforce the troops in California, and to conduct a party of *pobladores*, who were to assist in forming towns at the several Presidios, and especially at the Port of San Francisco. This party was accompanied by Father Pedro Font, who kept a journal of the expedition. They started on the 29th of September, 1775, and reached the entrance to the bay of San Francisco, on the 27th day of March, 1776. Father Font gives a glowing account of the bay, which he calls "the port of ports;" and says they went upon a clear, table land, near the entrance, about half a league wide, and a little more in length, with a gradual slope towards the bay. "This table land," he continues, "was designated, by the commandant, for the site of the new town and fort, which were about to be established in this port." On the 13th of April, he started on his return to Sonora, from the Mission of Carmelo, stopping at Monterey, to ascertain "how many of the people who had come along with us in the expedition, had remained in Monterey, destined for the new town and fort of the Port of San Francisco." Although the list was not yet completed, he found that the number so remaining, was one hundred and ninety-three souls.

Various delays occurred in carrying out this intention, and the Presidio of San Francisco was not founded until the following September, and the Mission of the same name, in October, 1776.

Governor Neve's Regulations for the Government of the Californias, are dated June 1st, 1779, and were approved by the King, October 24th, 1781. It is stated in the preamble, that one of its objects was, to encourage settlers (*pobladores*) to come to California, for the purpose of establishing settlements, and pueblos, under the protection of, and connected with, the Presidios and Missions. Consequently, arrangements were made for supplying such *pobladores*, for a time, with money, provisions, and clothing. These matters are, also, set forth in Titles I and II, and at the end of the latter, an estimate is made for *pobladores*, at the Presidio of San Francisco; each one being allowed, for the first two years, pay and rations, and for the next three years, only a ration. Art. 23, of Title XIII, makes it the duty of the paymaster of the Presidio in the vicinity, or in the boundaries of which a new pueblo of civilized people (*Pueblo de gente de razon*) was to be established, to form a registry, and open an account with the *pobladores*, crediting each with the amount of his allowance, and charging him with the outfit, implements, and cattle, with which he had been supplied in Sonora, or had received from other Presidios. The subsequent articles of this Title, direct, with great minuteness, the manner of keeping these registries, and accounts of supplies issued to such *pobladores*.

Title XIV relates, exclusively, to the formation and government of new towns, and consists of eighteen Articles, of which the following is a brief synopsis:

Article 1 states, that in order to reduce and settle California, it had been determined to erect pueblos of white people (*Pueblos de gente de razon*). With this idea, the Pueblo of San Jose had been formed, and colonists and their families were expected from Sinaloa and Sonora, for establishing others.

Articles 2 and 3 provide the pay, rations, agricultural implements, cattle, &c., which were to be given to the *pobladores*, as soon as they took possession of the *solares y suertes de tierra*, which were to be assigned them in each pueblo.

Article 4 provides for the granting of *solares*, according to the laws of the Kingdom; and that *ejidos* and *propios* be designated for each pueblo.

Article 5 provides for the distribution of *suertes*, for cultivation, to the first founders, and to those who should afterwards come, to settle.

Articles 6 and 7 provide that the *solares* and *suertes* given to the *pobladores*, shall be perpetually hereditary to their children; but that they shall not be subject to entail, mortgage, &c.

Articles 8 to 14 give minute instructions respecting the management and care of the stock, &c.; the amount each was required to possess at the end of five years; prohibiting the sale of breeding animals, &c.

Articles 15 and 16 provide that the *pobladores* shall re-pay the advances made to them, by supplying grain, at fixed prices, for government purposes; and that they shall keep themselves armed and equipped for military service, in the defense of their respective districts.

"ARTICLE 17. The corresponding titles to house-lots, lands, and waters, granted to the new *pobladores*, or which may be hereafter granted to other residents, shall be made out by the Governor, or commissary whom he may appoint for this purpose; records of which, and of the respective branding-irons, must be kept in the general town book, to be made and kept in the government archives; as a heading to which, a copy of these instructions shall be placed.

"ARTICLE 18. And whereas, it is expedient for the good government and police of the pueblos, the administration of justice, the direction of public works, the distribution of water privileges, and the carrying into effect the orders given in these instructions, that they should be furnished with ordinary Alcaldes, and other municipal officers, in proportion to the number of inhabitants; the Governor shall appoint such, for the first two years; and for the following ones, they shall appoint some one from amongst themselves, to the municipal offices which may have been established; which elections are to be forwarded to the Governor, for his approbation; who, if he sees fit, may continue said appointment for the three following years."

The following is the order of the Commandant General, to the Governor of California, June 21st, 1786, and the accompanying opinion of Navarro:

"Honorable Commandant General: In the instructions which treat of the political government, and population of California, and are found inserted in Title XIV, of the Regulation for that Peninsula, approved by His Majesty, in a royal order of the 24th of October, 1781, it is directed by Article 8, that the new settlers shall enjoy, for the maintenance of their stock, the common advantage of waters and pastures, wood and timber, of the commons, forests, and pasture-grounds, which, in compliance with the laws, are to be marked out for every "Pueblo;" and that, besides, each individual shall privately enjoy the pastures of his own lands, with the warning, that each settler, hereafter, will not exceed fifty head of cattle of each kind, in his possession; so that, in this manner, the usefulness resulting from the stock may be distributed among all, and the true wealth of the pueblos not confined in a few residents.

"By the 5th law, and the consecutive ones of Title XVII, Lib. 4, of the "Recopilacion" for these territories, it is commanded that the use of the pastures, woods, and waters of the Provinces of the Indies, be common to all the residents thereof, that they may enjoy them freely with their cattle; revoking, when necessary, whatsoever ordinances there might exist; this provision to apply, not only to the woods, pastures, and waters of the "Seignories," (*Lugares de Senorios*) conceded in these territories, but also to lands and cultivated property, sold and granted, whereon, after the harvest, the pastures remain for common benefit.

"The allotting of tracts of land (*sitios*) for cattle, which some settlers in California claim, and the Governor proposes, in his official communication of the 20th of November, 1784, cannot, nor ought not to be made to them, within the boundaries assigned to each pueblo; which, in conformity with the Law VI, Title V, Lib. 4, of the "Recopilacion," must be four leagues of land, in a square or oblong body, according to the nature of the ground; because the petition of the new settlers would tend to make them private owners of the forests, pastures, water, timber, wood, and other advantages of the lands which may be assigned, granted, and distributed to them, and to deprive their neighbors of these benefits; it is seen, at once, that their claim is entirely contrary to the directions of the forementioned laws, and the express provision in Article 8, of the Instructions for setltements (*Poblaciones*) in the Californias; according to which, all the waters, pastures, wood, and timber, within the limits which, in conformity to the law, may be allotted to each pueblo, must be for the common advantage, so that all the new settlers may enjoy and partake of them; maintaining thereon their cattle, and participating of the other benefits that might be produced.

"By the Law 1st, and consecutive ones, to the 13th, Title XII, of the same, Book 4, the distributing and allotting of *Peonias, Cavalerias,* and *Sitios,* for tracts "*de Ganados Mayores y menores,*" is permitted; provided they be given far from the Indian villages, and their cultivated fields; obliging the owners to keep as many shepherds, and cattleherds, as shall be sufficient to prevent such damages as the cattle might commit, and to satisfy for that which they might cause them; and the concession of the said lands being very useful for the protection of the population in California, where, owing to the extent of land, and the abundance of its pastures, there are means of carrying it into effect, without prejudice to the Indians, or to a third party, and where, through the want of active commerce, and of consumption and export of the other produce, the greater wealth of the pueblos must, necessarily, consist in the rearing and the increase of cattle; for these reasons, it seems to me your honor can, if you please, decree and command that an order be issued to the Governor of the Californias, Don Pedro Fages, to the effect, that allotting at once, to each new "*poblacion,*" the extent of the four leagues belonging thereto; he may measure and mark them out in a square or prolonged body, as the nature of the ground will admit; and that he do not concede within it, nor grant, nor distribute any portion whatsoever for farms, or for the rearing of cattle, to any resident or settler; the woods, pastures, waters, and other benefits and advantages to be left in common for all the residents and settlers, without any of them exercising dominion, or owning private property thereon; and that in the other lands, outside of the said limits, and of the district assigned to each pueblo, and at such a distance that there cannot result any injury to the *Missions, Pueblos,* or *Rancherias,* nor to their fields, he do grant and distribute "*sitios*" for farms, and tracts for rearing cattle; with the express condition, that the residents and settlers to whom he may grant them, shall obligate themselves to put as many shepherds and cattle-herds as will be sufficient to prevent damage, and to satisfy the amount which, in any event, may happen; and (with the condition) that no resident or settler shall have more than three "*sitios*" tracts; and be obliged to build in each one a stone house; to have thereon two thousand head of cattle, at least; and that, notwithstanding his grant and concession, the pasture shall remain for the common advantage; and that where there are no herds of cattle, "*sitios*" may be given for sugar plantations, and other hereditaments, according as is directed by the Laws 12, Title XII, as in reference to Hispaniola Island; and in Law 5, Title XVII, Lib 4, of the "Recopilacion" for these territories; which conditions and laws will be inserted in an express clause in the deeds of grants that may be made, that as evidence for the residents and settlers who may obtain the same, they may comprehend their obligations, to the fulfillment of which they shall be obliged; and that they may not have any just motive, nor pretext, to allege any right against it hereafter; or your honor will resolve, otherwise, what may suit your pleasure, notwithstanding.

"*Chihuahua,* 27th October, 1785. GALINDO NAVARRO.

"A copy, according to the original, which I certify.

"*Chihuahua,* 21st June, 1786. PEDRO GARRIDO Y DURAN.

"I transmit to you the enclosed opinion of the Attorney of this Commandancy, of the 27th of October, last year, upon the subject of marking out the lands which some individuals of that province asked, as you reported in your representation No. 204, of the 20th of November, '84; that you may proceed to grant them, agreeably to the requirements of said officer (*ministro*).

"The Lord preserve you many years.

"*Chihuahua,* 21st June, 1786. JACOBO UGARTE Y LOYOLA.

"SR. DON PEDRO FAGES."

NOTE 3.

FROM 1789 TO 1824.

The Plan of Pitic, referred to by the Court, is dated Chihuahua, November 14th, 1789. Its preamble states that it had been approved by His Majesty, and ordered to be adopted for the other projected new towns in that general commandancy. It consists of twenty-four Articles, and refers to the Laws of the Partidas, as giving to the new pueblo, when formed, a right to four square leagues of land; and to the Laws of the Recopilacion, as regulating the organization of its Ayuntamiento. Articles 6 and 7 are as follows:

"ARTICLE 6. The tract of four square leagues, granted to the new settlements, being measured and marked, its *pastos, montes,* &c., shall be for the common benefit of the Spaniards and Indians residing therein, and in its suburb, or village of the "Seris,"&c.

"ARTICLE 7. The residents and natives shall equally enjoy the woods, pastures, water-privileges, and other advantages of the royal and vacant lands that may be outside of the new town, in common with the residents and natives of the adjoining and neighboring pueblos; which bounty and privilege shall continue so long as they are not changed or altered by His Majesty," &c.

An officer is appointed to mark out the boundaries of the town, and to divide up the land into *ejidos, pastos, suertes,* &c., and to designate those which were to be used as *propios.* Provisions are also made for the government of the town, the manner of keeping its records, the jurisdiction of the Alcaldes, the election of the Ayuntamiento, &c.; but it nowhere contains any special grant of land, nor is any such grant contemplated. But the right of the town to four square leagues, is referred to in Articles 1 and 2, as being derived from the Laws of the Indies; and it seems to have been considered that that right resulted *ipso facto* from the foundation of the town, and the organization of its municipality.

The following is the order of the Commandant General to the Governor of California, respecting the lands to be assigned in each Presidio, for grant to the settlers of the new pueblos, which were to be formed under their protection:

"In conformity with the report of the Assessor of this General Commandancy, I have determined, by decree of this day, that notwithstanding the provisions of the 81st Article of the Ordinance of *Yntendentes,* it belongs to the Captains of the Presidios to grant and distribute building lots, and lands to the soldiers and residents who shall solicit them, for the establishing thereupon their residences.

"Considering the extent of four common leagues sufficient for the settlements that are being made under their protection, measured from the center of the plaza of the Presidio, two leagues in every direction; I also have determined, for the purpose of preventing questions and appeals, in future, that the captains henceforth be restricted in the making of grants of lots and lands, to those which are embraced within the said four leagues, without exceeding them in any manner whatever; leaving free and *expedita* the special jurisdiction which belongs to the *Yntendentes* of the public treasury, for the sale, composition, and distribution of the remainder of their respective districts.

"You will transmit this order to the captains and commanders of the Presidios of this province, for its observance and fulfillment, notifying me of your compliance herewith.

"God preserve you many years.

"*Chihuahua*, 22d October, 1791. PEDRO DE NAVA.

"To Sr. Don JOSEPH ANTONIO ROMEU."

The law of May 23d, 1812, for the formation of Ayuntamientos of Pueblos, is composed of thirteen sections. The preamble sets forth the object of the law to be, the securing of the prosperity of the nation, by the immediate establishment of Ayuntamientos in those pueblos which have not heretofore had them.

"ARTICLE 1. Any pueblo which has no Ayuntamiento, and a population of less than one thousand souls; and which, by its particular circumstances of agriculture, industry, or population, considers that it ought to have an Ayuntamiento, will apply to the Deputation of the Province, in order that, in virtue of its report, the proper measures may be taken by the Executive."

This law also determines the number of members of the Ayuntamientos, according to the population, from below two hundred, to ten thousand, and upwards; it also provides for the primary and secondary elections for such municipal officers.

The law of July 10th, 1812, provides for the cessation of perpetual Regidores, in places where such exist, in order that the previous law of May 23d, may be fully carried into effect.

The law of October 9th, 1812, is divided into four chapters, and each chapter into articles. Chapter second provides for the administration of justice in the several *partidos* into which a province might be divided by its Deputation; each *partido* to have a Judge *Letrado*. Where the population of a *partido* was small, adjacent *pueblos* might be annexed to it, for judicial purposes. The Judges of *Partido* were to hold their office for the term of six years, or more. In case of absence, sickness, or death, their place was to be filled by the First Alcalde of the pueblo of their residence, or of any other pueblo, if better qualified. The political chief was to fill all vacancies, and report to the superior authorities.

Chapter third relates to Alcaldes of Pueblos, who were to hold courts of conciliation, and have certain local jurisdiction in their respective pueblos. They were, also, to exercise such executive, fiscal, and police powers, in their pueblos, as had previously been exercised by the *Alcaldes ordinarios*, subject to the provisions of the constitution. In these matters, they were to be entirely independent of the Judges of *Partido*.

Chapter fourth relates to the administration of justice, prior to the formation of *partidos*.

This law was evidently intended to provide, fully, for the administration of justice, civil and criminal, in pueblos and *partidos;* but it gives no jurisdiction, whatever, to Ayuntamientos.

The law of January 4th, 1813, provides for reducing vacant and common lands to private ownership. Article 1 directs that all the vacant and municipal lands, (*terrenos de propios y arbitrios*) except the commons necessary for the pueblos, (*escepto los ejidos necessarios a los pueblos*) be reduced to private ownership; and Article 2 declares that the lands so distributed, shall be in full ownership (*en plena propiedad*). In making these grants, the domiciled residents of the pueblos, (*los vecinos de los pueblos*) were to be preferred. The documents of these grants were to be made by the Ayuntamientos, and submitted to the Deputations.

The law of June 23d, 1813, defines the general duties of Ayuntamientos of Pueblos, and makes the First Alcalde the executive officer of that body. The First Alcalde of the pueblo, which is the *cabeza* of a *partido*, is required to circulate all orders to the other pueblos of the *partido*, and is made the medium of communication between them and the political chief. It defines many of the duties of Ayuntamientos, with respect to the government of their respective pueblos; and, finally, provides that they are to perform such other duties as may be imposed on them by the laws, regulations, and municipal ordinances.

NOTE 4.

FROM 1824 TO THE FOUNDATION OF THE PUEBLO OF SAN FRANCISCO, 1834.

On the 18th of August, 1824, the Congress of Mexico passed what is called the General Colonization Law. The second section of that law says, distinctly, that it does not apply to lands "pertaining to any corporation, or pueblo;" and the sixteenth section confers upon the Executive, power to colonize "the Territories of the Republic." In 1825, a commission, or *Junta*, was assembled in the City of Mexico, to draw up plans for the government and colonization of the Territories. Their reports were published in 1827, and formed the basis of the Executive Regulation, which was issued on the 21st of November, 1828. These reports are of the highest interest, and will be referred to in another Note. The plans of the *Junta* were not adopted, *in toto*, because they required new legislation, by Congress. The seventeenth section of the Regulation of 1828, is as follows:

"SECTION 17. In the Territories where there are Missions, the lands which they occupy cannot be colonized, at present, and until it shall be determined whether they ought to be considered as property of the settlements of converted Indians, and Mexican residents."

August 17th, 1833, Congress passed a law, directing the secularization of the Missions of Upper and Lower California. On the 9th of August, 1834, Governor Figueroa published the Provisional Regulations, which had, previously, been passed by the Territorial Deputation. The following extracts from this law, relate to pueblos:

"ARTICLE 1. The Governor, agreeable to the spirit of the law of August 17th, 1833, and to the instructions which he has received from the Supreme Executive, will, with the co-operation of the prelates of the missionary priests, partially convert into pueblos the missions of this territory, beginning in the next month of August, and commencing at first with ten missions, and afterwards with the remainder."

"ARTICLE 5. To every individual head of a family, and to all over twenty-one years of age, although they have no family, a lot of land, irrigable or otherwise, not exceeding four hundred varas square, nor less than one hundred, shall be given out of the common lands of the missions, and in community a sufficient quantity of land shall be allotted to them for watering their cattle. Common lands (*ejidos*) shall be assigned to each pueblo, and, when convenient, *propios* also."

"ARTICLE 14. The political government of the pueblos shall be organized in perfect conformity with the existing laws; the Governor will give the necessary instructions to have Ayuntamientos established and elections held."

"ARTICLE 15. The economical government of the pueblos shall be under the charge of the Ayuntamientos; but as far as regards the administration of justice in contentious matters, they will be subject to the primary judges of the nearest towns constitutionally established."

Various other orders and regulations were subsequently issued for the same object, and conforming generally to the principles of this act. But, without pursuing this matter further, let us recur to the proceedings relating to the formation of pueblos from presidios.

It appears from the archives that the presidios of Monterey and Santa Barbara were, under an order of the Governor, dated December 15th, 1826, changed into pueblos in 1827, and that the Ayuntamiento of the former, consisting of one Alcalde, two Regidores and a Sindico-Procurador, was installed on the nineteenth of April of that year. A dispute soon afterwards arose between this Alcalde and the Military Commandant respecting the powers and jurisdiction of the former as judge of the partido. The Governor's official letter on this dispute, dated April 22d, 1828, recognizes Monterey as a *pueblo,* and discusses the judicial powers of the Alcalde of that pueblo over the *partido,* of which Monterey was then the head. It also appears from the proceedings of the Deputation on the twenty-fourth of July, 1830, that the demarcation of the lands of the pueblo of Monterey, made by Castro, the Alcalde, was approved. Subsequently, and at the same session, a discussion took place as to the limits of the *partido* of which that pueblo was to be the *cabecera.*

On the 22d of October, 1833, the people of the presidio of San Diego sent to the Governor a long communication, asking for the organization of an Ayuntamiento in that place. This communication and others relating to Santa Barbara, Los Angeles and Monterey, were laid before the Deputation, upon which there were numerous proceedings and reports, all of which serve to illustrate this question of the organization of pueblos in California. The power of the Governor and Deputation to organize such pueblos was discussed, and admitted by all to be amply sufficient. The Governor was of opinion that the previous organization of Santa Barbara was not effected in entire conformity with law, and that the number of Alcaldes and Regidores in that place, and also in Monterey and Los Angeles, ought to be increased, as the law allowed a larger number; and inasmuch as these Alcaldes exercised judicial powers over large sections of country, there ought to be at least two to each pueblo. He says, with respect to Los Angeles especially, that inasmuch as the "pueblo of San Juan Capistrano" had been added to the jurisdiction of that officer, the one Alcalde could not properly perform the duties of the office. On the 2d of August, 1834, this matter was finally settled by organizing an Ayuntamiento at San Diego, to be composed of one Alcalde, two Regidores and one Sindico-Procurador, and re-organizing the Ayuntamiento of Santa Barbara, to consist of one Alcalde, four Regidores and one Sindico-Procurador: and also by adding one Alcalde and two Regidores to each of the Ayuntamientos of Los Angeles and Monterey. The new officers were to enter upon their duties on the first of January, 1835. Other proceedings were soon after had by the Deputation with respect to pueblos, and especially with respect to organizing new ones at Sonoma and other places, and marking out their boundaries. The law of August 4th is referred to elsewhere. On the 3d of November that body passed the following:

"1st. The Political Chief will direct the *partido* of San Francisco to proceed to the election of an Ayuntamiento constitutional, which shall reside in the presidio of that name, composed of one Alcalde, two Regidores and one Sindico-Procurador, it being conducted in all respects according to the existing constitution and law of June 12th, 1830.

"2d. That a report be made, in the usual way, to the Supreme Executive, for the due approbation."

The next day, November 4th, 1834, Governor Figueroa transmitted a copy of this Act to M. G. Vallejo, the "Military Commandant of San Francisco," saying: "And I transcribe it to you, for your information and compliance, recommending that the election be carried into effect on the day appointed by the said law of June 12th.

"I also notify you that the Ayuntamiento, when installed, will exercise the political functions with which you have been charged; and the Alcalde, the judicial functions which the laws, for want of a Judge *Letrado,* confer on him; you remaining restricted to the military command, alone; and receiving, in anticipation, the thanks due for the prudence and exactness with which you have carried on the political government of that demarcation."

There is nothing in the particular Act for the organization of the Ayuntamiento of San Francisco, respecting the demarcation of pueblo boundaries; but, as that subject was involved in the proceedings of the Deputation, in relation to Sonoma, and other places, which preceded these resolutions respecting San Francisco, the Governor might, very properly, have considered those resolutions as authorizing him to direct the designation of boundaries to this and other pueblos. He may, therefore, have assumed, and so stated, that the Deputation had approved, or had ordered, the marking out of the limits of that municipality, as sworn to by Vallejo, and as stated in Wheeler's Land Titles; although Wheeler's quotation is erroneous; and, except the Zomorano letter, we have not found anything in the Archives, confirmatory of the alleged fact, that Figueroa did make such official statement. But, as sworn to by Mr. Clar, keeper of the Archives, the greater portion of Figueroa's correspondence has been lost; consequently, there is no means of ascertaining the correctness of Wheeler's statement, and Vallejo's deposition.

The official returns show that an election was held at the Presidio, in the commandant's house, on the 7th day of December, 1834, for electors; and that, on the following Sunday, these electors proceeded to choose the members of the Ayuntamiento of the new pueblo; who were to enter upon the duties of their respective offices, on the first of January, 1835.

It is seen by this brief summary of these documents, that they fully sustain the position of the court. It will be noticed, that in all these documents, the distinction between a *pueblo* and *partido,* is observed; and also, between the powers of the Ayuntamiento, and the jurisdiction of its Alcalde. Moreover, in organizing these pueblos, not the slightest allusion is made to the necessity of a special grant of land. Monterey was surveyed out, and its limits defined by metes and bounds, but there was no act of grant for the lands within such boundaries. The same may be said of other pueblos in California.

NOTE 5.

DOCUMENTARY EVIDENCE RELATING TO THE PUEBLO OF SAN FRANCISCO, FROM THE END OF 1834, TO JULY 7th, 1846.

The following synopsis of original papers, of undoubted authenticity, from the Archives, City Claim, Limantour case, &c., will serve to prove, if further evidence be required, the correctness of the opinion of the court, on this, and some other points.

January 31st, 1835, Governor Figueroa writes to M. G. Vallejo, Military Commandant of *San Francisco,* acknowledging the receipt of a letter from the latter, dated January 1st, and thanking him for having constitutionally installed "the *Ayuntamiento of that pueblo*" (*el Ayuntamiento de ese pueblo*).

June 22d, 1835, Governor Figueroa sends a circular to the Military Commandant and *Alcalde of San Francisco.* This is endorsed by the Alcalde, Francisco de Haro, as having been received and published by him, in "San Francisco de Asis, July 12th, 1835." It will be seen from this, that even at that early day—the first year of the formation of the pueblo, and organization of the Ayuntamiento, at the Presidio—it was called by the official authorities, without distinction, "San Francisco," and "San Francisco de Asis."

Soon after this, Jose Joaquin Estudillo applied for a grant of two hundred varas, in the place called Yerba Buena. This application was for a larger amount of land than that designated for house lots, and, consequently, the matter was referred to the Territorial Deputation. On the 22d of September, that body, on motion of Alvarado, resolved, generally, that the Ayuntamiento of San Francisco had authority to grant *solares* in the place of Yerba Buena, at a distance of two hundred varas from the beach.

September 23d, 1835, Governor Castro transmitted to the "Alcalde Constitutional of San Francisco," a copy of the foregoing resolution of the Territorial Deputation, with respect to the power of "the Ayuntamiento of San Francisco" to grant lots two hundred varas distant from the sea shore, "in the place called Yerba Buena."

October 28th, he addresses another official letter to the "Alcalde of San Francisco de Asis," containing a brief statement of the substance of the resolution of September 22d, and directing him to inform the residents of "that pueblo" not to apply to the political chief for lots, "as it is one of the favors which the Ayuntamiento can grant." For these grants, a *canon* was to be paid to the Ayuntamiento.

There is filed in the city claim, a certified copy, from the Archives, of an old *expediente,* which contains several important papers. It begins with a petition to the *Gefe Politico,* dated May 30th, 1835, and purporting to be signed by residents of the ranchos of San Pablo, &c., asking to be separated from the "jurisdiction of the Port of San Francisco," and annexed to that of San Jose. They allege, as reasons for the proposed change, the distance, the difficulty and danger of crossing the bay, and the want of accommodations for themselves and families, at the *Presidio,* "for a whole year, when they shall be called upon to discharge some office in the Ayuntamiento," &c. This petition was, by the Territorial Deputation, on the 5th of September, 1835, ordered to be referred to the "Ayuntamientos of the Pueblos of San Jose and San Francisco," for reports; and the Governor so referred it, on the 28th of September. November 4th, the Ayuntamiento of San Jose reports in favor of the petition, with the remark, that the petitioners had previously pertained to that jurisdiction. December 20th, the "Ayuntamiento of San Francisco" reports against the petition, denying the genuineness of the signatures to it, and the correctness of its statements. With respect to the want of accommodations at the Presidio, it says, "it is a well known and established fact, that the military commandant of the Presidio furnished houses to the functionaries of the present Ayuntamiento, as soon as it was installed." This report is dated, "Port of San Francisco," and is signed by the Alcalde, Francisco de Haro, and the Secretary, Francisco Sanchez.

1836, January 2d, Governor Castro directs a communication to the "Illustrious Ayuntamiento of San Francisco de Asis," informing it that he had transferred the political government of the Territory to General Nicolas Gutierrez. On the same day, Gutierrez directs a communication to the "Illustrious Ayuntamiento of San Francisco," informing that body that he had been placed in possession of the political government of the Territory.

1836, January 22d, the Alcalde, Jose Joaquin Estudillo, directs an official communication to the Sindico-Procurador, dated at the "Pueblo of San Francisco de Asis."

1836, January 19th, Governor Gutierrez transmits to the "Alcalde of San Francisco de Asis," a copy of an order received from the Supreme Government of Mexico.

1836, December 13th, Governor Alvarado transmits to the "Very Illustrious Ayuntamiento of San Francisco," copies of decrees of the Congress of the "Sovereign State of Alta California."

1837, January 2d, Alcalde Martinez sends to the Sindico-Procurador, an order for paper for the use of the "office of this Ayuntamiento." It is dated, "Pueblo of San Francisco." There are various other official papers, signed by Martinez, which are dated in the same way. Francisco Sanchez, as Secretary of "this Illustrious Ayuntamiento," signs various official papers dated, "Pueblo of San Francisco." In one case, he dates "Presidio," and in some others, "Yerba Buena."

1837, August 4th, Jose Carrillo appeared as the commissioner from the Departmental Government, to administer the oath to "this municipality," of obedience to the constitution of 1836. The *acta* states that it was sworn to by the "First Alcalde of the Port of San Francisco de Asis."

1837, December 3d, the primary election "in the pueblo of San Francisco de Asis," is certified to have been held in the "Plaza of said Pueblo." The return is certified by Francisco de Haro, as President, Francisco Guerero and Francisco Sanchez, as Secretaries, and A. M. Peralta and J. de la C. Sanchez, as Inspectors. The letter transmitting these returns is dated "San Francisco, December 7th, 1837," and directed to the "Constitutional Alcalde, Ygnacio Martinez." At the secondary election, the returns of which were transmitted to the Governor on the 23d, William A. Richardson was chosen Alcalde; but he, having applied to the Governor to be excused from serving *as such,* for the ensuing year, Alvarado, on the 30th, directed a letter to the constitutional Alcalde of San Francisco," ordering a new election, which was held January 8th, 1838, and Francisco de Haro elected Alcalde in place of Richardson. Domingo Sais was, at the same time, elected second *Regidor,* which office, it appears, was also vacant. It will be observed that the above-mentioned Richardson is the same man who swore that there was no pueblo or town of San Francisco before July, 1846, and that he had no personal knowledge of any elections here prior to 1846. Richardson himself received from the Ayuntamiento of San Francisco a grant of a lot of one hundred varas in Yerba Buena, June 2d, 1836. In one part of his deposition he says that he received this grant in October, 1835, and that it was made by Francisco de Haro, "the Alcalde of the *Mission* of San Francisco de Asis," by order of the Governor, the same order which reserved two hundred varas all along the beach, and directed him, Richardson, to survey out the little strip of land assigned to the pueblo of Yerba Buena. In another part of his testimony he says this lot was regranted to him in 1836, by Joaquin Estudillo, Alcalde of the same *Mission*. The order of the Governor, as well as the proceedings of the Deputation respecting the reserve of two hundred varas along the beach, is found, but it contains no orders respecting any grant to Richardson, or the survey of any land. The petition of Richardson for the lot referred to, is dated June 1st, 1836; it is directed to the "Illustrious Ayuntamiento," and asks for a grant of the lot by that body. It refers to no order of the Governor, and nothing is said about any previous grant or its loss. The grant is made in the name of the "*Corporacion*," and the land is there stated to be an "*ejido de esta poblacion*." Richardson's statements are therefore flatly contradicted by the record of his own title.

1839, January 17th, Governor Alvarado transmits to Alcalde De Haro a proclamation, for putting into effect the constitutional system of 1837, and for holding elections according to the law of November 30th, 1836, which he says he received from "the Supreme Government by the last mail!"

1839, January 18th, Governor Alvarado sends another official communication directed "to the Alcalde of San Francisco," in which he states that inasmuch as many individuals had asked for *solares* for building houses in the lands of Yerba Buena, which had previously been prohibited from being granted, and as he was desirous of advancing the commerce in that recent congregation of *vecinos*, he therefore had decreed (*dispuesto*) that grants for house-lots may be made of any part of said prohibited lands; with the understanding, however, that those asking for such concessions shall present to the Government their petitions for the favor, with the necessary reports, or *informes*. The Alcalde is directed to give notice of this to the *vecinos*.

1839, January 25th, Governor Alvarado directs a proclamation "to the Alcalde of San Francisco," and orders him to give it due publication.

1839, February 28th, Governor Alvarado directs "to the Illustrious Ayuntamiento of San Francisco," his proclamation of the previous day, (27th) dividing all California, from the frontier of the north to Cape St. Lucas, into three districts, the first district including all north of the ex-Mission of San Luis Obispo. This district was divided into two *partidos*, one extending from the north of Sonoma to the *Llagas* with Dolores as the *cabecera*, and the other from the *Llagas* to San Luis Obispo with the pueblo of San Juan de Castro as the *cabecera*. He also informs that body of the appointment of Jose Castro as Prefect of that district, and that he must be recognized and obeyed according to the laws.

1839, March 9th, Governor Alvarado sends "to the Alcalde of San Francisco," a proclamation, and directing that the notice be given, that all petitions for lands or other things should be transmitted to the Secretary through the Prefects, for their reports thereon.

During the early part of this year Francisco de Haro continued to act as "Alcalde," but about the middle or a little after, Francisco Guerrero assumed the duties of *Juez de Paz*, and continued to act in that capacity till the end of 1841, when he was succeeded by Francisco Sanchez, who held that office to the end of 1843, when the election was held for two "Alcaldes of Nomination," under the new organization made by Micheltorena.

1843, May 23d, Francisco Sanchez, as "*Juez de Paz* of the jurisdiction of the Port of San Francisco," issues an order to the owners of gardens "in the establishment of Dolores," respecting irrigation. He dates this order in "San Francisco."

1843, November 14. Governor Micheltorena issues a proclamation restoring, in part, the old system of Ayuntamientos, and discontinuing the Prefects from the beginning of the coming year. The pueblo of San Francisco was to elect, on the following December, two Alcaldes, of first and second nomination, the first to act as Judge of First Instance, and to take charge of the Prefecture. At this election, William Hinckley was elected Alcalde of first nomination, and Francisco de Haro Alcalde of second nomination. The former resided at Yerba Buena, and the latter at the old Mission.

1844, January 20th, Secretary Jimeno writes to the "First Alcalde of the Port of San Francisco," congratulating him, in the name of the Governor, on his election, and hopes he will devote himself to the public welfare, and the improvement of that town, and its vicinity.

1844, March 6th, Secretary Jimeno directs two official communications to the "First Alcalde of San Francisco."

1844, March 14th, Jimeno directs an official communication to "the Alcalde of first nomination of the Port of San Francisco."

1844, March 30th, the Superior Tribunal addresses an official communication to "William Hinckley, Alcalde of first nomination of San Francisco." April 29th, the tribunal addresses him as "first constitutional Alcalde in San Francisco de Asis;" on June 4th, as "first Alcalde of San Francisco;" and on October 29th, as "first *Juez* of San Francisco," &c. There are various official documents extant, addressed to him by the Governor, the Secretary, the Military Commandant, and other government officers, as "Alcalde of San Francisco," "Alcalde of San Francisco de Asis," "Alcalde of the Port of San Francisco," "Alcalde of the Pueblo of San Francisco," "Alcalde of the Pueblo of San Francisco de Asis," "Alcalde of Yerba Buena," "*Juez* of first nomination of the Pueblo of San Francisco de Asis," &c., &c. Of the local authorities, and private persons, some addressed him as "Alcalde of San Francisco," some as "Alcalde of San Francisco de Asis," some as "Alcalde of Yerba Buena," some as "Alcalde of the Pueblo of San Francisco," &c., &c. Hinckley dated his official papers, sometimes, "Pueblo of San Francisco," sometimes, "Court of first nomination of San Francisco de Asis," "Yerba Buena," &c., &c. In the official correspondence between him and the Second Alcalde, the former residing at Yerba Buena, and the latter at the Mission, their letters are dated, indiscriminately, "San Francisco," "San Francisco de Asis," "Pueblo of San Francisco," &c. At that time, at least, no distinction was made in the use of these names. On the 12th of November, an order was issued by the Governor, and directed to the "First Alcalde of San Francisco," to hold an election of Alcaldes, on the first Sunday of December, for the coming year. On the 5th of December, Hinckley issued a notice, dated "San Francisco de Asis," for an election, to be held in "Dolores," on Sunday, the 8th, for First and Second Alcaldes, no election, having been held on the previous Sunday. At the secondary election, held December 15th, Juan Padilla was chosen First Alcalde, and Jose de la C. Sanchez, Second Alcalde. In the returns, it is described as an election "in the Pueblo of San Francisco de Asis;" and these returns are sent to Hinckley, who resided at Yerba Buena, and is addressed as "First Alcalde of San Francisco de Asis." Hinckley writes an official letter dated, "Pueblo of San Francisco de Asis," and sends it to De Haro, at the Mission, addressed to the "Alcalde of second nomination of San Francisco de Asis."

1845. In the official correspondence of this year, Padilla and Sanchez are addressed as "First and Second Alcaldes;" sometimes, "of San Francisco," sometimes, "of San Francisco de Asis," and sometimes, "of the Pueblo of San Francisco," &c., &c. On the 12th of October, of this year, Sanchez issued a proclamation, dated at "Yerba Buena," in which he styles himself "Constitutional Alcalde of the jurisdiction of San Francisco."

1846. Sanchez continued to act as Alcalde, during the early part of this year; and, after him, Jose Jesus Noe seems to have officiated, until July. Noe is called, in the official documents, "Alcalde of San Francisco," "*Juez* of San Francisco," "Alcalde of first nomination," "*Juez de Paz*," &c., &c. The officers appointed and elected after the military possession by the United States, in July, at first, assumed the title of "Magistrate," but, very soon afterwards, adopted the Spanish word "Alcalde," which was continued till 1850.

The foregoing is but a brief synopsis of a very small number of the official papers and records still existing. They are sufficient, however, to show the correctness of the reasoning of the Court, on this point; and to disprove the absurd theories which have been raised by interested parties, about the different names applied, in old documents, to the *Pueblo*, generally, and to particular localities. The attempt of Richardson, and other Limantour witnesses, to ignore the Pueblo of San Francisco, which was organized at the end of 1834, and to erect a new "Pueblo of Yerba Buena," with a little plat of land, between California and Dupont Streets, and the beach, is so thoroughly exploded, by the official records, as to deserve not the slightest consideration.

NOTE 6.

SPANISH AND MEXICAN LAWS RELATING TO FORTS.

There have been several judicial decisions upon this question of Spanish law relating to sites of forts and their *pertenencias*.

Judge Hoffman, in the case of The United States v. J. C. Palmer et al., with respect to this same point, says:

"The fifth article of the law of 1824 provides that the Government of the Federation may make use of any portion of the lands of the nation to construct warehouses, arsenals, etc., it may deem expedient, with the consent of Congress. It is to be presumed, therefore, that the appropriation and occupation of these military sites must have been made by the Government of the Federation. Until, then, the Federal Government determined to abandon them, no Governor of a department would be at liberty to treat these sites as vacant public land, because through accident, neglect or the disturbed condition of public affairs their garrisons might have been withdrawn, or the fortifications in some degree dismantled. The fort or castle occupied a position unmistakably indicated by nature as the site of defensive work for this harbor. It had been selected as such, perhaps, by the Spanish conquerors, and the United States have since, at the same point, erected the most extensive fortifications on this coast. It is not conceivable that under a general power to distribute vacant lands to actual settlers, it could have been intended to clothe the Governor with discretionary power to give to a private individual a spot so necessary to the national defense, which had long been used for the purpose, and on which the cannon of the nation still remained."

The following extracts from the decision of the United States Supreme Court in the case of Mitchell et al. v. The United States, 15 Peters' Rep. pp. 86 et seq., seem conclusive, not only with respect to the fact that the law reserves such places from grant, but also with respect to the extent of the *pertenencias* of a fort.

After giving a history of the grants in that case and confirming them, the Court goes on to say: "It is here necessary to give that (the history) of the fortress of St. Marks, as it is to be collected from the evidence in the original case."

"In the record, 123, a dispatch from the Marquis of Casa Calvo shows that during the possession of Florida by the English, the fort of St. Marks had been a military post, though it had been abandoned and suffered to go to decay. Shortly after its retrocession to Spain, the latter extended the jurisdiction of West Florida so as to include the site of the fort. Rec. 189. In May, 1785, Count Galvas issued an order to repair the old fort at St. Marks, and a detachment of troops was ordered to it from Pensacola. Rec. 306. This detachment was cut off, or driven away by the Indians. Rec. 582. But in the spring of 1787, (Rec. 198, 306) a royal order was issued, directing the permanent establishment of the fort. "It is notorious and public," (Rec. 233) says Governor Folch, the principal witness of the claimants, and the person who gave them possession of their whole purchase, "that at the establishment of the fort of St. Marks, at Appalachia in the year 1787, all the solemnity and requisites were observed to obtain from the Indians in sale, the lands necessary to that object." Benigno de Calderon, who was then an officer of the Spanish Government, twice refers to the fact that, not merely a military post itself, "but the quantity of land needed to preserve it;" and what he calls "the circle of jurisdiction of a fortified place," was severed from the Indian land and vested in the Government of Spain. Rec. 570, 582.

"Immediately after the sale of which Governor Folch speaks, the fort was constructed by Spain at a heavy expense. So were the public stores. The evidence of the claimants shows at least two hundred thousand dollars were expended upon these works. Calderon says there was a regular Spanish garrison there from 1787 to 1818. Cavo says the Governor exercised both civil and military jurisdiction. When Florida was ceded to the United States, St. Marks was given up as a military fortress of the King of Spain. Such is the history of the fortress of St. Marks, taken from the testimony and the witnesses of the claimants in the original case. Is it surprising, then, that the Court in its mandate should have excepted the fort and land directly adjacent to it from its confirmation of the claimants' title to the lands bought by them from the Indians? The King's royal order to establish a fort at St. Marks, the occupancy of the fortress for more than twenty years before any grant was made to Forbes, twenty-five years before the grant was made, which includes it, and forty years occupation of it, with the use of the land adjacent, seemed to the Court to be inconsistent with the idea that it was intended to be included in the sale by the Indians, or by the confirmation of that sale by Governor Folch. It must be remembered also, that when Governor Folch gave possession of the land to the grantees, that the fort was retained; and that the land, to the extent at least of what is termed the circle of military jurisdiction, had been cleared; and that the grantees, though living by permission for protection of themselves and their trade within that circle, never exercised by cultivation or otherwise any acts of ownership over any part of it. Besides, the Court was advised when the decision in the original case was made, that, by the laws of the Indies, reservations of lands were made appurtenant to forts, though the extent of such reservations was not known. It was then, however, a subject of inquiry, and would no doubt have been fully investigated, if the counsel for the claimant had not admitted in his argument that the Indian title for the sale of the fort of St. Marks had been extinguished by a negotiation made by the Governor of West Florida." * * * * The Court then proceeds to remark, that, although the fort was within the boundaries of the grant, it cannot be supposed "that the Intendant General would have ventured to propose a session of land, including public stores and a fortress;" or that Governor Folch would have "sanctioned the purchase;" "or that the Captain General of Cuba, to whom Governor Folch reported his proceedings in this matter, would have approved and declared that the King would confirm them, if he had supposed he was permitting the Indians to sell a fortress, then garrisoned by the troops of Spain, and which had been so for more than twenty years." The Court, therefore, concludes, that "the fort of St. Marks and so much land appurtenant to it as, according to military usage was attached generally to forts," was reserved from the sale, and by the treaty passed to the United States; and that military usage generally, as well as the royal ordinances of Spain, made such appurtenance "a radius of one thousand and five hundred Castillian varas, measured from the salient angles of the covered way, all around the fortification."

It will be seen from these and other authorities which might be adduced, that the military site of old "Fort Joaquin," at Fort Point, and its appurtenances, were reserved from the pueblo grant; and consequently, the United States have no interest in opposing the confirmation of the city's claim for the full extent of four square leagues, to which she is entitled, according to Mexican law, as is fully proved in Judge Baldwin's opinion. Should the Government require a larger extent of ground for the purposes of constructing military defenses, the city would readily cede for that object whatever the board of engineers should deem necessary. The extent of the present military reserve is unquestionably a violation of the just rights of the city as the successor of the old pueblo.

NOTE 7.

CHURCH AND MISSION LANDS.

Commissioner Felch, in his opinion upon the claim of Bishop Alemany to "the church edifices, cemetaries and priests' houses, with the curtilages and appurtenances at the several Missions, and certain gardens and vineyards at or near the same," says of these Mission establishments:

"They were not merely church establishments; their organization had for its object something more than the spiritual care of those connected with them. They were intended not merely to christianize, but also to civilize the Indians; to instruct them in the arts, and to guide their labors. In their domestic arrangement it was a community system, in which all the neophytes, under the temporal as well as the religious care of the missionary priests, were gathered together; and in them the Indians, to the number at one time of, in the aggregate, nearly twenty thousand, laboring in their newly taught avocations of civilized life, were united, forming one family at each of the Missions. At an early day, immensely large tracts of land surrounding each Mission were regarded as within its rightful limits, and were used, as occasion might require, for grazing or cultivation. While these establishments were in a prosperous condition, all these lands were treated as lands of the Mission, and were under the charge of the Missionary Fathers for the benefit of the community. When subsequently the dissolution of the community was contemplated, they came to be regarded, in theory at least, as the property of the neophytes, and this theory, with slight modification, was retained after the Missions began to fall into decay, and even when the community system was abandoned. Lands were then distributed to the individual neophytes, by specific grants in small quantities, it is true, but in such parcels as were deemed sufficient for their wants and commensurate with the labor which they were likely to bestow upon them; the remainder were granted to other citizens of the Republic. The rapid breaking up of the establishment, followed by the dispersion and decrease of the neophytes, soon rendered the theory of little practical importance, and grants were made to the white inhabitants with little or no regard to it.

"It will not, therefore, do to regard all the property which was occupied by the Mission communities, under the charge of the missionary priests, as devoted to the church. Such evidently was not its character; and yet it is equally certain that the propagation of the Catholic faith and the establishing of permanent churches, were among the primary objects, both of the government and the ecclesiastics in the establishment of the Missions.

"Hence it happens that the property under the control of the missionary priests was considered to be of two kinds, viz.: Mission property and Church property; the former embracing the large tracts of land which were used for the ordinary purposes of the community, and which were to be divided eventually among the neophytes, to hold in severalty; or granted to the white inhabitants in colonization; the latter, comprising such smaller portions as were separated from the mass, were under the more especial charge of the priests, and devoted to the use of the church, the purpose of worship, and the support and comfort of the ministers, and like other ecclesiastial property, designed to be retained for those purposes.

"The distinction was founded in the very nature and design of the establishments. The missions were intended from the beginning to be temporary in their character. It was contemplated that in ten years from their first foundation, they should cease. It was supposed that within that period of time, the Indians would be sufficiently instructed in christianity, and the arts of civilized life, to assume the position and character of citizens; that their mission settlements would then become pueblos, and that the Mission churches would become parish churches, organized like the other establishments of an ecclesiastical character in other portions of the nation where no Mission has ever existed."

After a full review of all the documents in the case, the Commissioners came to the conclusion that, while the lands generally occupied by the Mission establishments were subject to settlement and grant, at least after the law of August 17th, 1833, the church edifices, priests' houses, &c., with their curtilages and appurtenances, had been dedicated to the church; because:

"1st. It was the original design, when the Missions were established, that the Mission churches should become permanent curacies; and the property used for purposes incident to the church, and its services, was, evidently, designed to be permanently devoted to that purpose, after the Mission priests should give place to the ordinary clergy.

"2. The direct connection of the government with these establishments, erected on the national domain; its approval, supervision, and aid of them; its constant recognition of them, as most important institutions, in propagating the national faith, and securing its services for future generations, show a direct assent, by the government, to the use of the land in question, and give ample evidence of its devotion to those sacred and ecclesiastical purposes.

"3d. The testimony of numerous witnesses, conversant with the subject, proves that the property claimed, was always distinguished from other property at the Missions; this being known as the "church property," and the other as the "Mission property;" and this being always recognized, and admitted by the public officers, as well as by the whole community, as property belonging to the church.

"4th. Proof is given, of the possession and use of this property, for the purposes specified, for periods of time, varying at the several Missions, from thirty to eighty-six years. This possession and use, seems never to have been interrupted by the King, or the Supreme Government of Mexico; and by the local authorities, only for the brief period required to obtain the notice of the Supreme authorities, and to transmit directions to restore it to its previous use.

"5th. The secularization law of August, 1833, is a direct assignment, by the Mexican Congress, of all the Mission churches, to the use of the parishes; and as to the property in question, the decree of the President of the Republic, in answer to the petition of the bishop, is an express recognition of the ecclesiastical character of it, and a renewed dedication thereof to the church.

"These concurrent proofs bring us, irresistably, to the conclusion, that before the treaty of Guadalupe Hidalgo, these possessions were solemnly dedicated to the use of the church; and the property withdrawn from commerce. Such an interest is protected by the provisions of the treaty, and must be held inviolable, under our laws.

"A decree of confirmation will, therefore, be entered in the case."

The decision of the Commissioners, in these cases, met the concurrence of the Executive department of the government, and all the appeals were dismissed by the Attorney General; consequently, Patents have been, or will be, issued to the bishop, for these several buildings, and small tracts of ground, adjacent, or appurtenant thereto.

It would seem, from the foregoing opinion and decision, that these buildings, and small tracts of land, at the Mission of San Francisco, or Dolores, were, in November, 1834, exempted from becoming pueblo lands; but that the pueblo then formed, acquired some right, title, or claim to *all other* lands within its legal limits; although such Mission establishment may have formerly occupied and used them as "Mission Lands." And such seems to be the result of the reasoning of the Supreme Court, in this case, although the point is not definitively decided. The Court very properly distinguishes between the general right, or claim, which the pueblo may have had *to* these Mission lands, as lying within its limits, and the immediate right of possession—between the *jus ad rem* and the *jus in re.*

NOTE 8.

ZAMORANO DOCUMENT.

The following is a translation of this document:

"Political Government of Alta California.
Head-Quarters General of Alta California.

"The Government, satisfied with the zeal and activity which characterizes you, as well as the patriotism which animates you, sees in your official note of the 24th October last, a new proof of your vehemenent desire for the progress, and of your untiring efforts for the improvement and aggrandisement of your country, and of your fellow-citizens.

"In consequence, it affords me pleasure to inform you, in accordance with its request, that the E. D. T. has adopted, in its totality, the plan which you presented in your note, aforesaid, with regard to the Pueblo of San Francisco, declaring the boundaries to be the same that you delineated, in the said note; that is, commencing at the little cove at E. of the *Fortaleza,* following the line traced by you, as far as the shore, leaving to the north, the *Casamata* and the *Fortaleza;* thence following the border of the said shore to the Point of Lobos, on its southern side; thence following a straight line, as far as the peak of the *Devisedero,* (*Lookout*) continuing the said line towards the E. as far as the Point of the Rincon, embracing the *Canutales* and the *Gentil.* Said line shall terminate within the bay of the Mission Dolores, whose estuary shall serve for a natural boundary between the municipal jurisdiction of that pueblo, and the aforesaid Mission de Dolores.

"The Government, in proof of the confidence which your services inspired, has arranged that you shall be he who will have the honor of installing the first Ayuntamiento in that Pueblo of San Francisco, for which you have already done so much.

"You will, therefore, proceed, at the time, and in the mode provided by law, to the election of the municipal authorities, in order that they be installed on the first day of January, of the coming year, 1835; setting apart, for public buildings, those edifices which to you may seem most appropriate.

"God and Liberty.

"*Monterey, Nov. 4th,* 1834. (Signed) Jose Figueroa.

"Don Mariano G. Vallejo,
"Military Commander of San Francisco.

"It is a true copy. Zamorano."

General Vallejo, on his first examination, swears, positively, that such a document, signed by Governor Figueroa, had been in his possession, but he was unable to say what had become of it. He said, however, that he had, among his private papers, a copy, certified by Zamorano. On the direction of the Commissioner, he came into court, a few days after, and produced what purported to be such certified copy, and swore to the genuineness of the signature of Zamorano.

Governor Alvarado, a witness called by the United States, to impeach the validity of this document, says: "I have considered (examined) the words *es copia conforme*, and the signature of Zamorano, and cannot justify the words, or the signature, because I do not find it exactly as he used to write it." W. E. P. Hartnell, another witness for the government, says: "I think the signature of Zamorano, affixed to the paper, a very suspicious one, at least, and I do not believe it to be his handwriting." Jose Castro, another government witness, says: "According to my judgment, it is not his (Zamorano's) signature." William A. Richardson, Limantour's principal witness, says: "The signature at the bottom of the last mentioned paper, is not the signature of Zamorano." Leaving out the testimony of Richardson, as being, from interest, or other reasons, of no weight, it seems that the Commissioners considered, either that the positive testimony of Vallejo established the genuineness of Zamorano's signature, against the somewhat doubtful expressions of other witnesses, or that the line, as there described, was sufficiently proved, by evidence outside of that document. And there was considerable evidence to show that the line separating the lands formerly occupied by the Presidio, from those occupied by the old Mission, coincided very nearly with that described in this document. But, admitting it to be, in every respect, genuine, there is nothing whatever in it, limiting the right of the pueblo to the full four square leagues. As suggested by the Court, it is quite probable that at the time the pueblo was established, its right of immediate *possession*, was restricted to the land north of this Zamorano or Vallejo line, which constituted the northern boundary of the lands then occupied by the Mission establishment. But Governor Figueroa very soon after recognized its right to lands which now constitute a part of the Bernal Rancho, and which lie at some distance south of the old dividing line between the Mission and Presidio; which line, it seems, was nearly the same as that described in the Zamorano document. We think that any one who examines this question carefully, and without prejudice, or pre-conceived opinions, will admit that the Land Commissioners have given undue importance to this document, even admitting its genuineness to be entirely above suspicion, and that the true boundaries of the Pueblo of San Francisco were those assigned to it by law, as pointed out in the opinion of the Court, and as will be more particularly referred to in a subsequent Note.

NOTE 9.

NAMES OF BAY, MISSION, PUEBLO, &c.

In further illustration of the remarks of the Court on the names of Missions, &c., it may be added, that there were three Missions in California, called "San Jose," two called "San Fernando," and two "San Juan," &c.

Those who are interested in the history of the foundation of the Presidio and Mission of San Francisco, will find a full account in the forty-fourth and forty-fifth chapters of Palou's Life of Junipero Serra. It is there shown, that they were both named after the same Saint. The Presidio was founded September 17th, and the Mission, October 9th, 1776. By comparing this account with the orders of the Viceroy, and the Journal of Pedro Font, it will be seen that the great object had in view, from the first, was the establishment of a *town* on this very site; and settlers were brought from Sonora, at government expense, for that express purpose. The Presidio and Mission, were, even then, considered as only preliminary to the future organization of a *pueblo,* on the northern extremity of this peninsula, which was to build up a commerce, and to command the splendid waters, which were declared by the captain of the *San Carlos,* who had been sent to examine them, to be, "not a port, but a case of ports, where many squadrons might lie, without a knowledge of each other". (*"respondio, que no era puerto, sino un estuche de puertos que podrian estar en el muchas escuadras sin saber la una de la otra."*)

It should also be remarked, that the official name of the Mission was never "Dolores." In the report of its foundation, it was said to be located "near the pond called Dolores," (*circa de la Laguna de Dolores*) which term was, in time, occasionally applied to the Mission itself, and in some instances, to the *pueblo,* which, in accordance with the original design, and early instructions of the Viceroy, was, at the end of 1834, organized in place of, and intended to supersede both the Presidio and Mission. The Court, in its opinion, has referred to certain documents, made of evidence in the City claim, in which various names are used to designate this *pueblo,* or particular localities, included within its general limits; and good and satisfactory reasons are given for the use and application of these particular terms. There are, as we have shown in Note 5, numerous other documents, of undoubted authenticity, in which the same terms are used, and applied in the same way. Many persons who used them were, probably, ignorant of their origin and meaning; and in giving testimony before the Land Commissioners, and in the Courts, they have drawn erroneous conclusions from their own imperfect knowledge and recollection of the facts and circumstances upon which they are called to give evidence. The Supreme Court has indicated a way in which we may not only vindicate and establish the pueblo title, and reconcile the documentary evidence relating to it, but may, also, explain the apparently conflicting testimony of respectable witnesses, such as Vallejo, Rose, Ford, Jose Castro, Alvarado, Vioget, and Francisco Sanchez.

It seems, from the documents already referred to, that Governors Echandia and Figueroa hesitated about organizing pueblos and Ayuntamientos, in California, on account of the impossibility of obtaining suitable persons for Alcaldes and Regidores. Some of the individuals then deemed hardly competent for these offices, afterwards became Governors of the Territory. Without reflecting upon their general capacity and integrity, it is evident, from their testimony, filed in this case, and from the official documents signed by them, that they were utterly ignorant of the laws under which they acted. How could it have been otherwise? There was not to be found in all California, at the time of the conquest by the United States, a single complete copy of the Statutes of Mexico, much less, of the great body of the Spanish Jurisprudence, from which, alone, any information could have been derived of the laws which determine the rights and powers of pueblos. There was not, most of the time, a single lawyer in the country; and, consequently, these Governors could have had no legal advisers. They, therefore, followed in the footsteps of their predecessors; exercising the same powers which they had exercised, but ignorant, in most cases, of the source of those powers. They knew that Governors Neve and Figueroa had established pueblos, and organized Ayuntamientos; they did the same. They knew that their predecessors had recognized a right in the officers of such municipalities to grant *solares* and *suertes,* in individual ownership; they did the same. They knew that their predecessors had exercised some prerogative or control over such grants, by municipal officers; they did the same. They knew that former Governors had recognized some right or title in such pueblos, to the lands within some general limits; they did the same; but it seems that in many cases they had a very indefinite idea of the character of this right or title, and of the extent of land which it embraced. It is, therefore, by no means strange that Governor Alvarado thought that his power to authorize Alcaldes to grant pueblo lands, was derived directly from the law of 1824—a law which, by express terms, had no application whatever to such lands. He knew that an Ayuntamiento was organized at the Presidio, in 1834; that this Ayuntamiento was authorized by the Governor, in 1835, and by himself, subsequently, to grant lots in Yerba Buena; that it subsequently removed to the Mission; and that its officers were authorized to grant lands at that place also; but he confesses that he knows nothing of the source of that power, except it be the law of 1824, and Regulation of 1828. He knows that the Mission was called a *pueblo,* after 1839, but has no knowledge of its boundaries, or the extent of its land.

Francisco Sanchez says, that the *pueblo* referred to in some of the official documents, was at the Presidio, and that the *pueblo* referred to in others, was at the Mission; that the Ayuntamiento organized at the end of 1834, held its sessions at the Presidio till about the end of 1837, or in 1839, when it removed to the Mission; that Alcaldes, and *Jueces de Paz,* granted lots at Yerba Buena, and at the Mission; that the pueblo pretended to own the lands immediately about the Mission which did not belong to any individuals—such being recognized as the lands of the pueblo; that he does not know by what right it claimed the lands; never saw any measurement of boundaries; &c., &c. Such is the general purport of the testimony of witnesses brought by the government, or rather by Limantour, *against* the pueblo claim. Making due allowance for the ignorance and forgetfulness of these witnesses, the evidence of every one, except Richardson, is perfectly reconcilable with the law and facts of the case, as proved by the official documents from the Archives.

With respect to the exact date when the Ayuntamiento removed its sessions from the Presidio to the ex-Mission, there seems to be some confusion in the recollection of the witnesses. Francisco Sanchez, the Secretary of the Ayuntamiento, thinks it was the latter part of 1837, but really fixes it in the early part of 1839. He says he cannot remember the date, but remembers that it was after Dolores was made the *cabecera* of the *partido* by the order of Governor Alvarado, which order was published, and deposited in the Archives. A reference to the order, will show that it was dated February 28th, 1839.

NOTE 10.

SPANISH AND MEXICAN SYSTEM OF SETTLEMENT.

The Court here refers to an important and somewhat peculiar principle of the Spanish system of settlement and civilization, which has been extensively commented on by learned historians and jurisconsults, but which seems to have been often overlooked by our own Courts. As this principle forms so prominent a place in the history of land titles in California, we have thought it would be of interest to the professional, as well as the general reader, to discuss, at as much length as the character of these Notes will admit, the origin and character of the Spanish municipal system, and its application to the settlement and civilization of the American dominions of the Spanish crown. Indeed, without a knowledge of this system, it is impossible to fully understand the various laws respecting the establishment of pueblos in the Indies, which are referred to in the opinion of the Court, or the laws which prevailed in California prior to the cession, respecting land titles in general.

In his second lecture on the history of civilization, Guizot attempts to account for the "agitated, diversified, and at the same time, prolific character which distinguishes the civilization of modern Europe," by an historical inquiry into its elements. He begins by investigating the condition of Europe at the fall of the Roman Empire, to "discover in its institutions, in its opinions, its ideas, its sentiments, what were the elements which the ancient world bequeathed to the modern."

"Rome in its origin," he says, "was a mere municipality. The Roman Government was nothing more than an assemblage of institutions suitable to a population enclosed within the walls of a city; that is to say, they were *municipal* institutions—this was their distinctive character."

"And what was the case when Rome extended her boundaries? If we follow her history we shall find that she conquered or founded a host of cities. It was with cities she fought; it was with cities she treated; it was with cities she sent colonies. In short, the history of the conquest of the world by Rome is the history of the conquest and foundation of a vast number of cities."

"Confining ourselves then to the West, we shall find the fact to be such as I have described it. In the Gauls, in Spain, we meet with nothing but cities; at any distance from these, the country consisted of marshes and forests. Examine the character of the monuments left us of ancient Rome—the old Roman roads. We find great roads extending from city to city; but the thousands of little by-paths, which now intersect every part of the country, were then unknown. Neither do we find any traces of that immense number of lesser objects—of churches, castles, country-seats and villages, which were spread all over the country during the middle ages. Rome has left no traces of this kind; her only bequest consists of vast monuments impressed with a municipal character, destined for a numerous population, crowded into a single spot. In whatever point of view you consider the Roman world, you meet with almost exclusive preponderance of cities, and an absence of country populations and dwellings."

"Thus the Roman Empire, at its fall, was resolved into the elements of which it had been composed, and the preponderance of municipal rule and government was again everywhere visible. The Roman world had been formed of cities, and to cities it again returned."

In about the twelfth century the feudal system had, to a great degree, supplanted the Roman municipal system. The territory of the old Roman Empire had been conquered and permanently occupied by new and hardy races, fresh from the forest and the field, all of whose habits were opposed to city life. Europe was then governed by castles. Its territory was partitioned among nobles, soldiers and priests of various degrees and ranks, and the ownership of land was the great source of personal influence and distinction. The castle became the suzerain of the city. The greatest men in all the nations of Europe were distributed here and there over the surface of the country, and dwelt upon their lands. They were no longer congregated in cities. They were the centers of country population. Country property was the most valued species of wealth, the greatest source of power, and residence on it the most dignified and honorable mode of life. It is in the feudal system, therefore, the natural order into which things settled after the Empire was overrun by the barbarians, that we discover the first great element in the social and political civilization of modern Europe.

Such was the general course of events in Europe, to which Spain offered a prominent and singular exception, for there the feudal system never obtained.

Mr. Guizot thinks there is no country in Europe, where, after the fall of the Roman Empire, the barbarian element had so little influence in reconstructing civilization as in Spain. In that country, he ascribes to the remnants of Roman civilization, and to the church, which was in truth a most prominent feature in the political government of the Roman Empire after the days of Constantine, the re-establishment of society and government. "In Spain," he says, "a different power, that of the church, endeavored to restore the work of civilization. Instead of the ancient assemblies of German warriors, the assembly that had most influence in Spain was the Council of Toledo; and in this Council the Bishops bore sway, although it was attended by the higher order of the laity. Open the laws of the Visigoths, and you will discover that it is not a lore compiled by barbarians, but bears convincing marks of having been drawn up by the philosophers of the age — by the clergy. It abounds in general views, in theories, and in theories indeed altogether foreign to barbarian manners." "In short, the code of the Visigoths bore throughout evident marks of learning, system and polity. In it we trace the hand of the same clergy that acted in the Council of Toledo, and which exercised so large and beneficial an influence upon the government of the country. In Spain then, up to the time of the great invasion of the Saracens, it was the hierarchy which made the greatest efforts to advance civilization." *Third Lect., Civ. Eu.*

It was doubtless owing to the large, active, highly cultivated and influential body of the clergy, that so much of the civilization, and even of the language of Rome, was preserved in Spain. To the same cause we may attribute the fact that the municipal system, so universally adopted for the government of the Roman Empire, was continued in Spain after its conquest by the Visigoths, and was never supplanted by any other, in the centuries during which they possessed that country. For when we reflect that long before the final overthrow of the Empire, the government of cities had fallen almost entirely into the hands of the clergy, the bishop having become the usual political head of the municipality, we perceive that the ecclesiastical and municipal systems were united and served mutually to sustain each other.

In speaking of this union between the two systems, Mr. Guizot says: "I could cite numerous other laws to the same effect, [that is to prove that the management of the affairs of municipalities had been placed by the Emperors in the hands of the clergy and bishops] and in all of them you would see this one fact very strikingly prevail, namely, that between the Roman municipal system, and that of the free cities of the middle ages, there intervened an *ecclesiastical* municipal system; the preponderance of the clergy in the management of the affairs of the city corporations succeeded to that of the ancient Roman municipal magistrates, and paved the way for our modern free communities."

Comparing the condition of Spain with that of France, during the three centuries which preceded the Saracen invasion, Hallam says, that the condition of Spain differed, in several respects, from that of the Franks. The Crown was less hereditary, or at least, the regular succession was more frequently disturbed. The prelates had a still more commanding influence in temporal government. The distinction of Romans and barbarians, was less marked; the laws more uniform, and approaching, nearly, the Imperial code.

We have thus endeavored to account for the fact that the municipal system of government continued to prevail to so great an extent in Spain, while in other parts of Europe it was almost entirely superseded by the feudal system.

In spite of the obstacles to the progress and development of Spanish civilization, interposed by the Saracenic conquest, in the eighth century, we note the establishment of chartered towns in Spain, at an earlier period than in England or France. The earliest instance of the erection of a community, is in 1020, when Alfonso V, in the Cortez at Leon, established the privileges of that city, with a regular code of laws, by which its magistrates should be governed. The citizens of Corrion, Llanes, and other towns, were incorporated by the same Prince. Sancho the Great, gave a similar constitution to Navarra. Sepulveda had its code of laws, in 1076, from Alfonso VI; in the same reign, Logrono and Sahagun acquired their privileges, and Salamanca not long afterwards.

The Cities of Spain may not only boast an earlier origin than those of France and England, but it was more honorable, their organization more complete, and their property and privileges infinitely greater. Instead of purchasing their immunities, and almost their personal freedom, at the hands of a master, the burgesses of Castillian towns were invested with civil rights, and extensive property, on the more liberal condition of protecting their country. The *fuero*, or original charter of a Spanish community was, properly, a compact, by which the King or lord granted a town and adjacent district to the burgesses, with various privileges, and especially that of choosing magistrates and a common council, who were bound to conform themselves to the laws prescribed by the founder. The territory held by towns was, frequently, very extensive—far beyond any comparison with corporations in England or France—including the estates of private land-holders, subject to the jurisdiction and control of the municipality, as well as its inalienable demesnes, alloted to the maintenance of the magistrates, and other public expenses.—*Hallam's Middle Ages—Spain.*

The municipal system of government, thus deeply grounded in Spain, was carried into practice in America, and became one of the most important means for securing its settlement, unlike our system of settlement, which consists of selling at a minimum price one hundred and sixty acres of land to the individual who will venture into the wilderness and build his cabin on the tract he desires to take up, and there plant himself permanently; the Spaniards, true to the habits of their country, conducted their settlements through the instrumentality of pueblos. Instead of placing each settler upon a farm half a mile square, they were collected in small towns, for the sake of mutual protection and civilization. Instead of offering to the individual settler one hundred and sixty acres of land, the Spanish government provided that the individual *poblador* might receive a building lot, and, if necessary, also a tract for cultivation in some pueblo, with theright of pasture, firewood, building materials, &c., in the *ejidos* or town commons. The rule was the same, whether such pueblo was formed by a single contractor, or by the union of a number of individuals or families.

This municipal system of settlement is carefully provided for in the numerous laws to be found in the *Recopilacion de Indias*, and referred to in the opinion of the court. As these laws are commented upon in other Notes, we will here only remark that they were *general* laws, designed to carry out the plan adopted by the king for the settlement of the Indies, and that there was no other law or regulation providing the means by which, for the consideration of occupation and settlement, an individual could procure from the government a title to a portion of the vacant lands. Settlement by means of pueblos was the only system of settlement known to the Spanish-American code. It is true that certain royal officers in America were authorized to grant lands, not pertaining to towns, to individuals; but such grants were, at least in early times, either intended as rewards for services rendered the crown, or as special contracts for forming settlements in certain places, as particular exigencies might require. Subsequently a greater extension was given to the practice of making private grants outside of pueblo limits, but such grants were usually made to royal favorites, and of very large tracts, in imitation of the estates of the nobility in Spain.

From this municipal plan of settlement, certain consequences resulted, which we must not overlook, if we wish to understand the true spirit of the laws on this subject. The habits of life induced by this system gave rise to certain necessities, and these again to certain rights; and it fixed upon a firm basis the relation between the pueblo and the king, as respects the right of property.

What this relation was, has been a matter of much dispute in California, and is discussed at some length in the opinion of the Court. Without entering particularly into that discussion in this place, we will offer a few remarks upon its general character.

In the first place, it must be borne in mind that the Spanish laws providing for the establishment of pueblos by either of the means we have mentioned, were *general* laws; they defined the circumstances under which such settlements might be made, the quantity of land to be included within the limits of each pueblo, the mode of laying it out, and of subdividing it according to the various uses which the respective parts were intended to subserve—such as *solares, suertes, propios, ejidos, dehesas*, etc.; and completely regulated all the details of the system with admirable clearness.

These laws in one respect resemble our incorporation laws. They are not special acts creating particular corporations, defining their powers and liabilities, and granting to each one a specific tract of land. On the contrary, they contain general provisions which are intended to apply to the mode of creating pueblos; they specify the quantity of land which every pueblo thus created shall receive, and the mode of locating it. The *grant* is made by a general law; it is what we would name a legislative grant; and it contains within itself the means of identifying the *pueblo lands* with the greatest accuracy. Consequently, a *pueblo* being established at any particular place, we can, from these laws, ascertain not only the quantity of land to which it is entitled, but we can also determine its exact boundaries, as will be more particularly shown in another note.

The subdivision of this tract, or the assignment of definite parts of it to the various uses to which lands in pueblos are put, is not made by the general law, and it cannot be; for that must depend upon the site in each particular case. But for our present purpose no such subdivision or assignment is necessary. It is enough for us to know that the land within the limits of a pueblo is intended and dedicated by the law for the purposes of the community—for the building up and the support of the town.

Where the laws effect settlement by means of pueblos, and force the inhabitants o a country to live *en poblado*—that is, collected together in villages, towns and cities—certain necessities are created which are unknown in our country, where towns grow up under the demands of trade, and are merely places for the manufacture and interchange of commodities. The Spanish people in America were collected together in towns, not for the purpose of trade or manufactures, but by the operation of laws. Indeed, it may be said that the Spanish Government, not only encouraged its subjects in America to live in towns, but it rendered that mode of life almost a necessity.

Let us see to what necessities this mode of life gave rise, and in what manner they were provided for.

1st. The *poblador* or settler in a town would require a site for his house. A *solar* was promised him for this purpose, and he obtained a grant for it in private property.

2d. He not only required a house for shelter, but, if not a mechanic, or engaged in trade or manufactures, he also required land on which he might raise grain and vegetables for the support of himself and family. A *suerte* was given him for this purpose, also in private property.

It will be remembered that the great body of pueblo lands, not assigned for special objects, were usually devoted to grants of *solares* and *suertes*.

3d. Again, the pueblo expenses, such as the pay of its municipal officers, the support of the police, etc., were to be provided for; this was done by the assignment of *propios*, which were not to be granted in private property, but to be rented out for the benefit of the municipality.

4th. And again, land was necessary for the *common* use of the inhabitants, as parks, streets, market-places, and wood-land for cutting firewood, and materials for building and fencing; and the mechanic or poor laborer, who was not engaged in agriculture, required a range for his horse and cow, and a few sheep, goats and pigs. To supply these wants, *ejidos, dehesas, montes*, etc., were usually assigned.

These were the principal, if not the only purposes to which the pueblo lands were usually applied; and in every pueblo, regularly laid out, there was a subdivision of land, corresponding to each one of these uses. This plan arose, naturally, out of the wants incident to the pueblo system, and provided for them. It was a necessity resulting from the system. It conferred definite rights, which no just mind can fail to appreciate, and which the Spanish laws jealously guarded and protected.

What we have said respecting the Spanish system of settlement, by means of pueblos, is, of course, intended as a general proposition. There were, doubtless, some exceptions. And it is also true, that the Spanish government was in the habit of making liberal grants of land to individuals, as a reward for services, a favor to particular persons, or to promote the convenience of particular localities. But these grants were special cases. There were no general Spanish laws for the distribution of government lands by sale and preemption, such as are embodied in our system for the disposal of the public lands, while there were very many such laws relating to settlements by means of pueblos; providing the terms upon which they were to be established, and defining their rights and privileges.

The pueblo system of Spain, while suggested by many considerations of convenience, had its real foundation in the habitudes of the Spanish people; just as our preemption laws find their origin in the country life to which the English people have always been so much devoted. In both cases, as always happens, the laws and the national customs have reciprocally acted on, and confirmed each other. The Spaniard takes, naturally, to town life. The laws favor his predelictions, by affording him the means of consulting them. They give him a building-lot, and perhaps a larger tract, for cultivation, and they furnish his town with the means of defraying its expenses, and ample commons for the ordinary necessities of a crowded population. The American prefers a country life. It is the habit of his race to live in the country, unless attracted to the city by business, and the inducements of pecuniary gain. Our land laws, therefore, carry us to the frontiers, and proffer a farm, at an almost nominal price, to any person who will agree to live on, and cultivate it. We say, that the habits of the English and Spanish races have influenced the legislation of their descendants in America, in respect to the mode of taking up, and settling the public lands; the system of the Spanish law being, the establishment of *towns;* and that of our law, the establishment of *farms.* And we say, further, that without noting this difference, and following it out in its practical consequences, it is impossible for any person, no matter how familiar he may be with one system only, to adjudicate upon rights which have grown up under the other, according to the true spirit of the laws applicable to the case.

Thus, the Spanish and Mexican governments, as we have stated, not only encouraged, but sometimes absolutely *required,* their citizens to live in towns. This was especially enjoined in frontier departments, and in the sparsely settled portions of the country. It forms a marked feature of the "Regulations of Presidios" of 1772, and the "Instructions" of the Viceroy to the Commandant of Upper California, of 1773. In Articles 12 and 13 of the latter, the Viceroy directs the Commandant to *require,* not only the *pobladores,* but also persons holding grants outside of pueblos, "to live in the towns, and not dispersed." Numerous other laws and orders of the same import might be referred to. Even as late as 1837—long after the Mexican colonization laws, formed partially in imitation of our system, for the settlement of portions of her vacant lands, had been in operation, the law of March 20th, for the regulation of the internal departments, Article 91, directed the Prefect of each district "to cause the inhabitants of the district who were scattered over the country, to live in towns (*en poblado*)." So stringently was this system enforced in the Spanish Americas in early times, that, as we learn from Spanish writers, the people of some districts were strongly disposed to dispute the right of the royal officers to thus restrict their liberty. Even in the case of the city of San Francisco, as is shown in Note 5, some of the inhabitants of the Contra Costa solemnly protested, in 1835, to the Governor against being obliged to reside in the new pueblo which had just been formed at the old Presidio.

And yet, in a claim before the Land Commissioners, of unquestioned genuineness, where it was proved that the grantee had, for many years, occupied the land with his *mayor-domo,* vaqueros and stock, that he had a house on it, in which his sons and servants had lived, while he lived with the remainder of his family in the pueblo of Santa Barbara, that Board rejected the claim solely because the grantee had not, *in propria persona,* resided on it! This decision was made in utter ignorance of the habits of the Spanish people and the policy of the Spanish and Mexican governments, and in direct conflict with their laws, orders and regulations on the subject of granting and settling vacant lands. Here, so far as the Board of Commissioners could do it, Mr. Carrillo was deprived of his property, simply because, like a good citizen, he lived in a *pueblo,* precisely where the laws of his country required him to reside. [Vide opinion of Board of Land Commissioners in claim No. 327.]

In reading this decision of the Commission, and others of a similar character by our courts on questions of Spanish and Mexican law, and especially on land titles in California, we are disposed to think that but little heed has been given, in these latter days, to the solemn injunction of the Psalmist:

"Be *learned,* ye that are judges of the earth."

NOTE 11.

PARTIDO AND PUEBLO LIMITS AND JURISDICTIONS.

The distinction between the limits of partidos and pueblos is too manifest to require any argument to point them out; and it seems to us that the court has given to the argument of counsel on this point as much, if not more attention than was really requisite. In the proceedings of the Deputation on the 24th of July, 1830, respecting the *pueblo* limits of Monterey and the limits of the jurisdiction of the Alcaldes of that pueblo over the *partido* of which Monterey was to be the head or shire-town, already quoted in Note 4, this distinction is clearly set forth. The same distinction is shown in the proceedings of the *Junta* on the 27th day of February, 1839, and in other documents already referred to. The laws of 1812, 1813, and 1837, provide for the election, and define the powers and jurisdiction of the Ayuntamientos and Alcaldes of *pueblos*, and not of *partidos*. Moreover the law contemplates and provides for the case of two or more Ayuntamientos in the same *partido*. Their powers were usually limited to a single parish, but might include two or more parishes, according as their *comarca* should be established; and such *comarca* might, or might not, be co-extensive with the *partido*, according to the circumstances of the particular case. Thus, by the Act of July 24th, 1830, the boundaries of the lands of the *pueblo* of Monterey were fixed within a circuit of a few miles of the port of that name; but the *partido*, in which that *pueblo* was included, extended from the *Llagas* (between San Jose and San Juan) to below San Luis Obispo. Moreover, February 28th, 1837, the *pueblo* of San Juan, instead of the *pueblo* of Monterey, was made the head (*cabecera*) of that *partido*. By the same proclamation of Governor Alvarado, the *partido* of which the establishment at Dolores was made the *cabecera*, extended from the *Llagas* to the extreme northern frontier, and included the *pueblos* of Sonoma, San Francisco and San Jose. This *partido* was a political division including several *pueblos*. The Alcalde or *Juez* of each *pueblo* exercised judicial jurisdiction over a specified territory, which was a sub-division of the *partido*, and much larger than the limits of the *pueblo;* but in all municipal matters, and especially in granting lands, his power was confined to the pueblo limits. Alcaldes and Ayuntamientos were *always* properly officers of *pueblos*, and *never* of *partidos*, although the laws gave the former certain powers over parts, and sometimes over the whole of a *partido*. This distinction is clearly defined in the laws, and is fully explained by Escriche. Some of the laws of Spain give jurisdiction also to Ayuntamientos; but these laws were never in force in Mexico, nor have Ayuntamientos there any jurisdiction outside of the *terminos* of their own cities or pueblos. It is distinctly so stated by Escriche. Vide *verbs Ayuntamientos* and *Alcaldes*.

This fully explains Figueroa's order of November 4th, 1834. According to that order, the Ayuntamiento, when installed, was to exercise, within the pueblo limits, the powers which the laws conferred upon it, which powers had previously been exercised by the military commandant; but the Alcalde, who was also the chief officer of the Ayuntamiento, was, for want of a Judge *Letrado*, to exercise the *judicial* functions which the laws conferred on him. The Ayuntamiento was a *municipal* body, composed of *municipal* officers only; but the Alcalde was both a *municipal* and a *judicial* officer;

in the latter capacity he had jurisdiction over an extensive territory; but in the former he had no jurisdiction whatever.

It is strange that the Board of Land Commissioners should, in the face of such plain laws, and such clear and unmistakeable language as that used by Escriche, have drawn such absurd inferences from Figueroa's order for forming this Ayuntamiento, and have so entirely mistaken the character and powers of that body, when organized. Their whole course of argument respecting this Ayuntamiento, is based upon a false foundation. They assume that it was a *political* organization, for the government of a *partido,* whereas, it was an organization for the municipal government of a *pueblo,* and the laws prohibit it from exercising any jurisdiction, or any authority, outside of the limits of such pueblo. But some of the individual members of an Ayuntamiento—not the body itself—exercised jurisdiction and authority beyond such limits, and over such portions of the adjacent country as might be designated by the political authority of the State. Thus, the first Alcalde, who was, also, a member of the Ayuntamiento of the pueblo, became, *ex-officio,* Judge of First Instance of a large judicial district. In his absence, inability, or incapacity to act, the second Alcalde, if there was one, and if not, the first Regidor, or Councilman, assumed the duties of that office. But such jurisdiction was not, and could not be, under the laws, exercised by the Ayuntamiento, as a body, nor by one of its members, as a *municipal* officer. The laws designated such officer to fill, in certain cases, another office also, and to perform other duties, as well as those of a municipal character. There was nothing unusual in this; but it was very natural that persons unacquainted with the Mexican laws, and the frequent union of judicial, municipal, and political powers in the same person, under the Mexican system of government, should have mistaken the character and source of the powers exercised by that person. Hence, some of the witnesses in the City claim speak of the Ayuntamiento as exercising jurisdiction over a large tract of country, meaning that *officers* of the Ayuntamiento exercised such jurisdiction. Putting an erroneous construction upon this testimony, the Commissioners have drawn inferences entirely opposed to Mexican law; and then, taking these inferences as a basis, they have argued that the pueblo had *no title,* quoting, in support of that argument, incorrect translations of the commentaries of Spanish law writers!

NOTE 12.

COLLECTION OF REPORTS OF THE JUNTA OF 1827.

In their report on the instructions which should be given to Political chiefs of the Territories of Upper and Lower California, after discussing the old Spanish Regulations and the new Colonization Law of 1824, the members of this Junta say:

"Although, then, the same law directs that the Government, conformably to the principles established in it, shall proceed to the colonization of the Territories of the Republic, it appears that to put it in execution in whatever of the Territories, there ought to precede, and it is absolutely necessary there should precede, some regulation formed with a knowledge of the particular circumstances of each Territory, which shall determine the conditions and obligations on which the lands shall be distributed, so that by these means the desired end of settlement and cultivation may be obtained, and so that the introduction of the colonies shall not be burdensome to the natives. In California there are very especial circumstances which make this regulation more necessary, on account of the existence of a prior one, whose effects will be perpetuated if some provision do not alter them and make uniform the new distribution; also, that in both Californias the width of the land occupied by the Mexican Republic is very unequal, stretching from nine to ten leagues in Upper California, which is the land held as most fertile, beautiful and picturesque, unless it be at the upper missions, where it may extend to fifteen leagues; under which supposition, there is no room there for foreign colonization; and moreover, in those interior parts of Lower California, in which there might be room, it might be necessary to provide against the spirit of invasion upon the lands occupied by the native tribes, since the inquietude caused by dislodging them from their lands would bring no advantage either to the said Indians or to the Republic, as social communication and friendship ought to be directly desired; and because it ought not to be forgotten, that occupation having been made of all the land; since the existing missions have, in forming themselves, taken possession before the conversion and reduction of the Gentiles, according to the rigorous law of discoveries, and planted at the same time the cross and the standard; that regularly they have chosen for the missions the *rancherias* themselves of the Gentiles, or those places which they, as acquainted with and owners of the land, had destined for the greater convenience and vicinity to the rivers or springs for their gatherings and campings; that although the California Gentiles have not known the right of the division of landed property, it cannot, therefore, be denied that they have it in the soil where they were born, according to the principles of the law of nations, it being the first and inexcusable step toward their civilization, to cause them to know and recommend to them how appreciable is that right; and in this view, the said ancient Christian Indians, neophytes and catechumens, ought to be considered with a right of preference in the distribution, which ought to be arranged between them and the settlers, in the proportion which their circumstances respectively admit, since, for the catechumens and strictly neophytes, it may be necessary that they shall be directed in the cultivation, or that they remain in community; and lastly, because the distribution of estates being so interesting a work, and any mistake once made is not easily repaired, care ought to be taken in each instance in giving to those who have the disposition and necessary means for cultivating it; for there never will be a society of cultivators, supposing each man who wishes land has nothing to do but to come and ask it, and scratch it over in order that it shall at once produce immediately and daily what is necessary for the subsistence of themselves and family.

"The *Junta* think, therefore, that the instructions which are given to the new chief, on this point, ought to be reduced to this: that he inform himself of what has been done, in pursuance of the said provisions in the Spanish Regulations; in what State he finds the distributions of lands; which are those occupied by the Missions; if there be any vacant lands, and their quality and extent; what number of persons, of the settlers, or Indians, have the capacity of cultivating for themselves; and in case there are some of them who undoubtedly have it, that they provide that of the common lands of the respective Missions to which they are attached, and taking care that there remain enough for the maintenance of the neophytes and catechumens; they shall assign to them, that which appears proportionate for their cultivation; with the reservation of rendering an account to the Supreme Government, for its approbation; and saving the provisions of the regulations, which shall be formed to prescribe the conditions and obligations to which the divisions of land shall be subject."

This *Junta* was, evidently, of the opinion that the law of 1824 did not repeal the existing laws relating to the powers of Governors of Territories to grant lands, but was simply intended to extend those powers to foreign colonization.

NOTE 13.

GRANTS OF LAND BY GOVERNORS, WITHIN THE LIMITS OF PUEBLOS.

The following is a list of the grants, and pretended grants, made by Governors, within, or partly within, the limits of the Pueblo of San Francisco:

November 30th, 1836. Governor Gutierrez to F. Guerrero; 400 varas north of the Mission, and on the Yerba Buena road. This does not purport to be anything more than a provisional grant, and further proceedings were intended to be taken in the matter. It has been confirmed as an equitable claim.

May 21st, 1839. Governor Alvarado to S. Vallejo and J. P. Leese; 200 by 100 varas on the point of the "disembarcadero de Yerba Buena. We think that no well-informed person, acquainted with the forms and language of grants in this country, would imagine this a grant of land in full ownership. Perhaps, however, it was such an equitable claim as ought to have been confirmed. Upon that question, we have no opinion to express.

October 10th, 1839. Governor Jimeno to J. C. Bernal; one square league, being "Rincon de Salinas y Potrero Viejo." It will be seen, by an examination of the Archives, that Bernal applied for a grant of this land, and "La Visitacion," on the 2d of November, 1834, two days before the order was issued, by the Governor, for organizing the Pueblo of San Francisco. On the 2d of January, 1835, Governor Figueroa decreed on this petition as follows:

"As it appears, from the preceding reports, that the land asked for by Jose Cornelio Bernal, is of the property of the Pueblo of San Francisco de Asis, to which it serves as *ejidos* for the common cattle, the petition is not granted, as it cannot be given in ownership, (*en propiedad*) but the party interested may keep his cattle there, the same as other citizens do," &c.

When the same party again applied, in 1839, for this grant, the authorities of the pueblo, and the person in charge of the Mission, were consulted, and both gave their written consent to the grant. Only a small portion of the grant falls within the pueblo limits.

January 25th, 1840. Governor Alvarado to J. J. Noe; 300 varas, called "Comaritos," "at the estero and embarcadero of the ex-Mission of San Francisco." It appears from the *expediente* in this case, that the consent of the municipal authority of San Francisco, and of the person in charge of the ex-Mission, was asked and given, before the grant, and that it was made subject to the rules of police which the town (*poblacion*) might afterwards establish; thus showing that it was considered to be within the pueblo limits.

February 27th, 1843. Governor Micheltorena to J. Y. Limantour; four square leagues, covering the largest portion of the lands of the Pueblo of San Francisco. This claim has been rejected on the ground of fraud, and under such circumstances as to remove all chances of its ever being again galvanized into life. Had the papers all been genuine, the very fact of the attempt on the part of the Governor to grant, to a single individual, nearly all the lands of the pueblo, without the knowledge or consent of that municipality, was sufficient evidence of illegality, if not of fraudulent intent.

May 1st, 1844. Governor Micheltorena to F. and R. Haro; one-half league, called "Potrero de San Francisco." The provisional title in this case is undoubtedly genuine, but it was made subject to the measurement of the *ejidos* of San Francisco. The subsequent title in full property is now generally considered to be spurious. At the time the provisional grant was made, the Governor and Secretary were evidently aware of the existence of this pueblo, and its right to lands; but they did not know the exact boundaries of the four square leagues, and hence the condition was inserted, and the grant made *provisional.* Perhaps this provisional grant, with occupation, constitutes a good *equitable* claim for the land, and if so, it ought to be confirmed. Upon that question we shall express no opinion.

December 23d, 1845. Governor Pico, to J. J. Noe; one square league. The petition in this case was referred to the municipal officer of San Francisco for report, and the grant made on his recommendation. Nearly one-half is within the pueblo limits.

February 10th, 1846. Governor Pico to Santillan; three square leagues. This grant is bounded on the north by Yerba Buena; northeast by the Presidio of San Francisco; west by the lands of Francisco Haro; south by a part of the rancho of the Sanchez, and east by the bay of San Francisco. It therefore includes nearly the whole of the pueblo claim, all grants to private individuals north of the rancho of Sanchez and De Haro, and probably a portion *pertenencias* of the fort. There was no expediente, and no reports of local authorities; nor was the consent of the municipal authorities of San Francisco ever asked or given. These facts, outside and independent of all other testimony, were, we think, sufficient to show great irregularity if not fraudulent intent on the part of the Governor, if he really made the grant at the time it bears date. But there are circumstances which prove that it could not have been made at that time. Moreover, the style and words of the grant itself, so different from the usual form, are sufficient, without any other evidence, to raise doubts of its genuineness.

May 6th, 1846. Governor Pico, to Jose Andrade; six hundred varas in front of ex Mission of San Francisco. The expediente in this case is found in the Archives, entirely complete, and there can be no question of the genuineness of the grant. There was no map, nor any definite description of the land in the petition or grant; the grantee was to have furnished a map, but neglected to do so. The claim was therefore rejected for want of any definite boundaries. It however was in front of the Mission, included the Mission garden, and was near the old Mission tannery. It was consequently included within the tract of land which it is pretended that the same Governor had previously granted to Santillan.

July 24th, 1846. Governor Pico, to Fitch & Guerrero; one-half a league, called "Parage del Arroyo." The expediente of this title is found in the archives, and its genuineness is beyond dispute. The petition bears date May 13th, 1846, and admits that the land asked for pertains to the *ejidos* of San Francisco; the consent of the municipal authorities was therefore asked and obtained. But the grant itself was not issued till July 24th, and approved July 30th, 1846, long after Governor Pico's authority in this part of California had been replaced by the conquering power. Although the title is, on that account, utterly null and void as against the conqueror, yet its genuineness is indisputable, and, together with the Andrade expediente, it furnishes the best possible evidence that Pico had not, at that time, made the Santillan grant; for otherwise, how could he have made these subsequent grants for lands almost in the middle of the tract which he had already granted to Santillan? There could have been no mistake by the Governor about localities. The Santillan grant included *all* the land formerly occupied by the *Mission* which had not previously been granted, being bounded by Yerba Buena, the Presidio, the Bay, and the Ranchos of De Haro and Sanchez. The lands granted to Andrade, Fitch & Guerrero were unquestionably within the limits of the tract which purports to have been granted to Santillan, and this fact must have been known, at the time, to the Governor, if he really had made the Santillan grant. It was impossible for him to have been ignorant of that fact. If the latter are genuine, and no one doubts *their* genuineness, the former must be a forgery or ante-dated. And yet this evidence and other official documents of equal importance, to be found in the archives, were never made of record in the Santillan case. It is said that the agent sent by the government to examine the archives with reference to this and the Limantour claim, reported that the archives contained nothing whatever against the genuineness of the Santillan grant! If this be so, why were these documents overlooked? Everybody at all acquainted with the records knew of their existence; copies of them were filed in the Land Commission, in the United States District Court, and in the office of the United States Attorney General! and yet it is said the government agent and government attorney knew nothing of their existence—could not find anything against the genuineness of the grant! All the records in California and Mexico could be searched for evidence to defeat a genuine grant to a poor Mexican, in some remote corner of California, where the land, even now, is not worth twelve and a half cents per acre, and thousands of dollars could be expended to accomplish this object for the benefit of some squatter whose only merit consisted in his controlling a dozen votes at an election; and yet, in this great Santillan claim, the fraudulent character of which has been proclaimed in all the newspapers for the last ten years, covering millions and millions of property held by thousands of people under titles derived from the municipal authorities of San Francisco, not a particle of documentary evidence could be found in the archives against its genuineness! Surely, in this matter of land titles in California, there has been, on the part of government officials, much straining at gnats and a most extensive swallowing of camels! This claim was confirmed by the Land Commissioners, and the United States Circuit and District Judges; but, notwithstanding the want of proper evidence against it, it has been finally rejected by the Supreme Court of the United States. Even if that tribunal had confirmed it, and a patent had been issued, no ejectment suit could have been sustained in the State Courts, with the evidence in the archives proving its fraudulent character, against any one holding under the pueblo or city of San Francisco. The Supreme Court of this State has plainly foreshadowed this result in the foregoing opinion.

It is to be hoped, that hereafter our citizens will learn wisdom from experience, and pay no more black-mail to speculators in such claims as these of Limantour, Santillan and Sherback. If they hold valid titles under the pueblo or city of San Francisco, they may rest secure in their possessions. Patents issued by the Federal Government to others will be of no avail against them. The Federal authorities have no more power to dispose of these lands than they have to deed away the lands of Astor, in New York, or Girard, in Philadelphia.

There are some half dozen grants of *solares* made within the pueblo by Governors, between 1835 and 1846. The reason of this is very obvious. One of these was to an Alcalde who, of course, could not grant to himself; two or three were on the beach, at the place where the Governor had prohibited the Ayuntamiento from making grants, at that particular time, and those at the Mission were of larger size than the Alcalde or Juez de Paz had been authorized to make. But not one of these is in the shape of a colonization grant, nor were they made of record in the Governor's office. They were signed by the Governor and sent to the municipal officers with directions to mark out the lot and put the grantee in possession. They therefore become of record in the pueblo, and were, to every intent and purpose, *pueblo titles.*

It is seen from this examination that there is nothing in the records of the proceedings of the former Government which is opposed to the view of the Supreme Court in this case, but very much to confirm and establish its correctness.

We had intended to refer to grants by Governors within, or partially within, the limits of other pueblos in California; but to do so would make this Note much longer than our space will allow. It may, however, be stated in general terms, that the records of other pueblos fully sustain the opinion of the Supreme Court on this point. Although the Governors and Deputations exercised the powers which unquestionably belonged to them, to grant lands within the limits of pueblos *for pueblo purposes,* they did so with the consent and approval of the municipal authorities, and the land so granted was made subject to the *canon* of the pueblo. We know of no attempt to dispose of such lands in violation of the object of their original assignment—the building up and support of the town. Grants for farming purposes on the outskirts of a town, and distant from the population, were probably at that time deemed as advantageous to the town settlements, as were grants of *solares* where the population was principally located. The former were probably at that time regarded in the light of *suerte* grants, which were always considered as one of the essential means of building up a pueblo, and providing for the support of its population. The Governor and Deputation or Junta were the proper judges of the propriety of making such grants and of their extent, provided they were not made in violation of the objects for which such land had previously been assigned and dedicated. If they violated their duty in this respect, they were subject to punishment, and the laws provided a mode by which their acts might have been declared null and void.

NOTE 14.

THE BURI-BURI RANCHO PAPERS.

The following is the substance of the papers connected with the juridical possession of the Sanchez or Buri-Buri Rancho. The meaning and effect of these documents are clearly set forth and explained in the opinion of the Court.

Jose Sanchez had petitioned for this Rancho in 1833, and Governor Figueroa referred the petition to the Commandant of San Francisco and the priests in charge of the neighboring Missions. The reports were favorable, and the land was subsequently granted. Sanchez, having received his grant, applied in November, 1835, to the Alcalde, Francisco de Haro, for the juridical possession. A notice was accordingly issued to Gumercindo Flores, Superintendent of Dolores, to appear at the Rancho of Buri-Buri in order that, representing the boundary rights of the pueblo, he might witness the measurement. Flores complied with this order, and in the proceedings of juridical possession, he is mentioned as appearing for that pueblo, as the only *colindante* or coterminous neighbor. This would make the extent of the pueblo lands considerably more than the four square leagues to which it was entitled by law, and would seem to require, in order to give the claim to the surplus any validity, a distinct grant from the Governor and Territorial Deputation. It does not appear that any such grant was ever made. Flores very probably then regarded the Buri-Buri Rancho and the Laguna de Merced as the southern boundary of the pueblo, and possibly may, as he has sworn, have so reported on the 4th of November, 1835, to the Governor, who was Jose Castro; but Castro himself swears that he never knew of any marking out of the pueblo boundaries. Moreover, if there had been any official action taken upon Flores' report, it would undoubtedly have been known to Jimeno when he reported on the petition of De Haro's sons for the Potrero in 1844. The probability is, therefore, that if Flores' report reached the Governor, it was never acted upon, and was afterwards forgotten even by the Governor himself.

While, therefore, it is possible that the copy sworn to by Flores may be a correct transcript of an original signed by him, yet, in the absence of any trace of such original and the positive testimony of Governor Castro, there is reason to doubt its genuineness. Moreover, the circumstantial evidence deduced from the archives is strongly opposed to the correctness of Flores' recollection of the real facts of the case. On the fifteenth of August, 1835, Jose Antonio Galindo petitioned to the Governor for a tract of land north of Sanchez's Rancho and adjacent to the Laguna de Merced. This petition was, on the fifth of September, referred by Governor Castro to the "Ayuntamiento of San Francisco," and also to Flores, as the person in charge of the Mission, for reports. The former reported that the land had previously pertained to the Mission, but made no objection to the grant, nor did that body say anything of its being within the pueblo limits; and on the thirteenth of September, Flores reported that he could not say if the land asked for could be granted, because the *ejidos* and *propios* of the pueblo had not been marked out. The records show that the place so asked for was granted to Galindo on the twenty-seventh of September, 1835. It is hardly probable that Flores was ignorant of this grant on the fourth of November following, at which time, he says, he reported to the Governor that he had established "as the boundary of this pueblo, the Rancho of Buri-Buri, from the port of San Francisco up to the Laguna of San Bruno, and thence to the Laguna of Merced, it being notorious that this lake reaches the sea." This boundary includes the tract just granted to Galindo by the same Governor to whom Flores pretends to have made this report, on the recommedation of De Haro, the Alcalde, who, with Flores, established this boundary on the south, and yet neither seems to have taken any notice of this report, if it was really made. It certainly was a somewhat strange and unusual proceeding to authorize Flores to fix these boundaries, without consulting the Ayuntamiento or Alcalde, his superiors in authority. The story of Flores about an order from the Supreme Government of Mexico, communicated to him by the Governor, respecting these boundaries, is evidently a fiction or an old man's dream; there is no trace of any such order. That read to him by De Haro was probably the condition about juridical possession contained in Sanchez's grant.

NOTE 15.

CONDITION OF ARCHIVES.

It is a notorious fact that since the evidence was taken in the claim of San Francisco to its pueblo lands, a very large number of documents belonging to the old Government Archives, have been discovered at Benicia, and restored to their proper place. The documents so found and restored, contained the most important evidence against the Limantour claim. Possibly an examination of these papers might bring to light something new connected with the City claim. But after all these recent restorations, the Archives, in charge of the Surveyor General, are exceedingly defective. Portions of some important public papers are wanting, and of others which are referred to in those now in the Archives, no trace can be found. There is no record of the correspondence of the various Governors, from 1832 to 1837, inclusive, except loose scraps of paper. Either the correspondence during this period was never recorded, or else the books of record are lost. But the greatest loss to San Francisco, is the disappearance of nearly all the old *pueblo* Archives. Those who were familiar with the Alcalde's office, on the *plaza*, in 1849, will remember the great mass of old papers which were stored away in a back room of that building. Of all these, only some books of record, and a few bundles of miscellaneous papers, now remain. What became of the others, no one seems to know. The probability is that they were destroyed by one of the numerous fires that swept over that part of the city. Possibly, however, more have been saved than we yet have any knowledge of; for some old papers which must formerly have belonged to the pueblo Archives, have since been found in the hands of private persons. It appears that the law of 1850, which abolished the office of Alcalde, made no provision for the custody of the miscellaneous papers which the Alcaldes then had under their charge. At San Jose they fell into the hands of the Mayor of that city, and at Monterey they were turned over to the County Recorder. But in San

Francisco, probably none of the new officers deemed it their duty to look after such papers. Each took out what he supposed to be assigned to him by law, and the remainder were forgotten or neglected at the time, and subsequently were either plundered, or destroyed by fire.

Fortunately, enough have been preserved to place beyond reasonable doubt the fact that a *pueblo* was organized here in 1834, and that it subsequently claimed and exercised *some* right in, and *some* authority over *land*. In the absence of positive testimony to show that this was a special exception, we must resort to the general laws to determine the character of such right and authority, and the extent and boundaries of such land. That they do so determine these matters, is, we think, most conclusively established by the decision of the Court in this case.

NOTE 16.

BOUNDARIES OF THE PUEBLO OF SAN FRANCISCO.

Judge Baldwin has proved, beyond any question, that the Pueblo of San Francisco was entitled by law, at the time of its organization at the end of 1834, to four square or common leagues of land, to be measured from the center of the Presidio square, as a starting point. He has also shown that the fort and its appurtenances, and the church, burying-ground, gardens, and priest's house, and the curtileges at the Mission, were reserved from the operation of the general rights of that municipality, and that although the "Mission lands" might, at the time, have been exempted from its right of *possession*, yet, when that establishment was secularized, such lands within the limits of the four square leagues, became subject to the ordinary rules governing pueblo lands. He has also indicated the mode of determining the boundaries of these four square leagues, according to the provisions of Spanish law. Let us examine the provisions of that law, applicable to this case, and see how these boundaries are to be determined.

The *Ordinanzas de Tierras y Aguas* contain instructions for surveying lands, both under municipal claims, and grants to private persons. In chapters eleven and twelve, referred to by the Court, we have directions for surveying out town plats. The example taken is that of the *Fundo legal* of a *Pueblo de Indios*, which was usually twelve hundred varas in each direction, although much larger dimensions were sometimes given. The directions for surveying out such a town or pueblo, are to be found on page ninety-six, of these Ordinances. It says that after giving the usual notices to the neighboring pueblos, and other near residents, and appointing the proper measurers, viewing the locality, &c., the Judge of the place, (*la Justicia del lugar*) is to determine the center, or starting point, conformably to the law which was in force at the time of the first foundation of each pueblo (*conforme a la ley que rigiese al tiempo de la fundacion primitiva de cada pueblo*); and having so fixed the central point, he is to measure six hundred varas to each wind, that is, east, west, north, and south, and at these points draw perpendiculars, so as to enclose the required area; vide fig. 11, p. 81, of same work. But the instruction goes on to say, that when the full six hundred varas cannot be taken in one direction, the deficiency must be made up in another, so that the amount of land included shall be equivalent to a square of twelve hundred varas on each side, or one million, four hundred and forty thousand *square* varas, the same as in measuring *sitios de ganado y caballerias* ("con advertencia de que los que les faltaren para un viento o rumbo, se les ha de compensar en otro; de manera que siempre queden reintegradas los seis cientos varas correspondientes a cada rumbo, en la parte donde tuvieren cabimento; y la practica de estas medidas, es en la misma forma, en cuanto a lo judicial, que los de sitios o caballerias, a la cual se arreglara, daduole al fundo la forma cuadrada, segun queda explicado en el capitulo anterior a este").

By referring to the modes designated for surveying such tracts or grants, (*sitios y caballerias*) we see that the general outline must be modified to suit the particular circumstances of each case, as where the lines so run meet the sea, a lake, the private lands of others, etc., always approximating, as nearly as the nature of the ground will admit to a square or rectangle. *Ordenanzas de Tierras y Aguas, cap.* 10.

It will be noticed that these instructions for marking out the *fundo legal* of a pueblo are not based upon the supposition of a special grant to such pueblo, but that the starting point and boundaries are to be determined *according to the law which was in force at the time the pueblo was first founded.*

It will also be noticed that, although the particular case of a *Pueblo de Indios* of twelve hundred varas square is here taken, by way of example, the instruction is intended to be general for all *fundos legales* of pueblos, and applies equally to those *Pueblos de Indios* which were entitled by law to a square league or more of land, and to *Pueblos de Espanales,* or of *Gente de razon,* which by law were entitled to four square or common leagues.

Let us now apply these rules to the measurement of the four square leagues which the Supreme Court has here decided to have been assigned to the pueblo of San Francisco by the law of its foundation. According to the order of the Commandant General to the Governor, directing the conversion of Presidios into Pueblos, the point from which the survey must be made, is the center of the old Presidio *plaza.* Beginning at that point, (which can readily be found) let us first run west; at a distance of say about one mile, we meet the ocean. According to the instructions, we now return to the point of beginning, and run in another direction, say to the east, so as to make up, wholly or in part, what was wanting of one league on the first line; but at the distance of say about a league and a quarter, we strike the bay of San Francisco. Again, running north we also strike the bay at a distance of less than a mile. We now run south a distance, say to the point marked A, (on the map facing title page) such that an east and west line drawn at that point from the ocean to the bay shall include just four square leagues of land, exclusive of the military reserve at Fort Point, and the church buildings, etc., at the Mission.

It is thus shown that the law itself fixed the boundaries of the *fundo legal* to which the pueblo of San Francisco was entitled at the time of its foundation, near the end of 1834; there was no need of a survey or actual designation of boundaries in order to "segregate" this quantity of land from the public domain, nor was there any "indefiniteness of boundaries," those twin phantoms which, like horrible nightmares, have, at periodical intervals, weighed so heavily upon the consciences of Land Commissioners and Courts.

NOTE 17.

STATEMENT TO THE JUNTA, FEBRUARY 16th, 1840.

The following paragraph is the only one referring to pueblo lands to be found in this statement. We give the original as well as a translation.

"*Ejidos.*—Ninguna de los indicadas poblaciones, a excepcion de Monterey tienen demarcardas los ejidos y terrenos de propios que a cada una de los municipalidades debe fijarselcs para que reconoscan su fundo legal, y por cuyo razon el Gobierno, al hacer los concessiones de terrenos en las immediaciones los ha adjudicada muy provisionalmente, a'la espero de dicho arreglo, y sobre este particular se han pedido repetidamente los informes convenientes V. E. a la vista de todo y haciendo uso de la facultad que le es concedida en la parte 1 del Art. 45, de la mencionada ley y de acuerdo con el Gobierno arreglara lo conveniente."

[TRANSLATION.]

"COMMONS.—No one of said towns, except Monterey, have surveyed out the *ejidos* and lands of *propios* which ought to be settled for each one of the municipalities in order that they may know their *fundo legal,* and for that reason the Executive, in making grants of lands in their vicinity, has made them merely provisional, waiting such settlement, and on this matter the suitable reports have been repeatedly asked for, so that your Excellency, in view of all, and using the power which is given in the first part of Art. 45 of said law, (of March 20th, 1837) and in concert with the Executive, will determine what is proper."

It will be readily seen that there is nothing in this statement respecting the granting or assigning of lands to pueblos, nor is there a word in it to authorize the inference that pueblos had no right or title to lands. It merely refers to the survey or marking out of lands of pueblos. If they then had no lands or right to lands, what lands were to be surveyed? If, as held by the Court, they were entitled by law to four square leagues, to be surveyed out according to ordinance, the language of this statement is sensible and proper; but if they had no right or title to land, it has no meaning whatever.

NOTE 18.

APPROVAL OF FIGUEROA'S ACT IN ESTABLISHING THE PUEBLO.

A number of authorities are referred to by Judge Baldwin, to sustain his position that, even supposing the approval of Governor Figueroa's act, in establishing a pueblo at San Francisco, by the Supreme Executive of Mexico was necessary, such approval must be presumed. We give some of these authorities.

In delivering the opinion of the United States Supreme Court, in the case of the United States *vs.* Clarke, 8 Peters' Rep. p. 452, Chief Justice Marshall says:

"It has been already stated that the acts of an officer, to whom a public duty is assigned by his King, within the sphere of that duty, are, *prima facie*, taken to be within his power. This point was fully considered, and clearly stated by this Court, in the case of Arredondo, and the principles on which the opinion rests are believed to be too deeply founded in law and reason, ever to be successfully assailed. He who would controvert a grant executed by the lawful authority, with all the solemnities required by law, takes upon himself the burthen of showing that the officer has transcended the powers conferred upon him, or that the transaction is tainted with fraud." * * * * "The Viceroys of New Spain and Peru, who were also Governors, possessed almost unlimited powers on this and other subjects; but in distant provinces, or where sea intervenes, the right of giving title to lands was invested in their Governors, with the advice of the King's fiscal ministers, and of the Lieutenant-General, where he may be stationed. No public restraint appears to have been imposed on the exercise of this power. The officer and his conduct were of course under the supervision and control of the King and his ministers, and especially of his Council of the Indies."

Again, in Delassus *vs.* the United States, 9 Peters' Rep., p. 134, the Chief Justice says:

"A grant or a concession made by an officer who is by law authorized to make it, carries with it *prima facie* evidence that it is within his powers. No excess of them, or departure from them, is to be presumed. He violates his duty by such excess, and is responsible for it. He who alleges that an officer intrusted with an important duty, has violated his instructions, must show it."

And again, in Strother *vs.* Lucas, 12 Peters' Rep., p. 437, the Court says:

"No principle can be better established by the authority of this Court, than that the acts of an officer to whom a public duty is assigned by his King, within the sphere of that duty, are *prima facie* taken to be within his powers." * * * * "Where the act is done contrary to the written order of the King, produced on the trial, without any explanation, it shall be presumed that the power has *not* been exceeded; that the act was done on the motives set out therein, and according to some order known to the King and his officers, though not to his subjects."

Moreover, the same tribunal has decided that where a law of Congress conferred upon the President only, power to do a particular act, and that act was performed by a subordinate officer, as the Secretary of War, it must be *presumed* that it was done by the orders of the President.

Suppose it be admitted that Governor Figueroa's act in establishing a *pueblo* in San Francisco, required the approval of the Executive of Mexico, it must be presumed, until the contrary is shown, that this act was so approved; such approval was very different from the passage of a law; it was simply an executive act, and might have been communicated verbally, or by a letter which never became a matter of record.

NOTE 19.

GRANTS BY MUNICIPAL AUTHORITIES OF SAN FRANCISCO, PRIOR TO JULY 7TH, 1846.

In order to show by whom, and in what manner, the power conferred upon the municipal authorities to grant lands in the pueblo of San Francisco was exercised, we subjoin a list of such grants made between 1835 and the date of the conquest of the United States. This schedule is taken in part from Wheeler's land tiltes, and in part from official records. It may not be entirely complete, but it is sufficiently accurate for our purpose. The figures in the column under the head of "quantity," represent Castillian varas.

It may be proper to remark that although the Ayuntamiento was organized at the end of 1834, and assumed the functions of its office in the beginning of 1835, it did not immediately begin to grant lots in private ownership to settlers. In fact, there were very few settlers who required grants. The pueblo was then formed mostly of the neighboring rancheros who lived a large portion of the year upon their farms, and who found sufficient accommodation in the vacant buildings of the old Presidio, when, as members of the Ayuntamiento, they were required to reside in the newly established pueblo. As shown in another place, some of them strongly objected to being required to remove here with their families. Some of the discharged soldiers had already received small grants near the Presidio, and some few lots in that vicinity were assigned to others by the Ayuntamiento, soon after its organization. But the latter were not granted in full property, but by a kind of provisional title, or permission to occupy, as the Ayuntamiento was then in correspondence with Governor Figueroa respecting their authority to make grants, and the manner of forming the town. The Governor postponed giving any instructions till he could consult the Deputation. That body acted upon this matter the 22d of September, 1835, and Castro, acting in Figueroa's place, who was then upon his death bed, transmitted that action to the Ayuntamiento on the 23d of September.

SCHEDULE OF GRANTS BY MUNICIPAL AUTHORITIES OF SAN FRANCISCO, BETWEEN THE YEAR 1835, AND JULY 7TH, 1846.

Date of Grant.	BY WHOM SIGNED.	GRANTEE.	Quantity	DESCRIPTION, &C.
1836				
June 2,	Estudillo, Alcalde	W. A. Richardson	100	No. In Yerba Buena
July 8,	" "	J. P. Leese	100	No. 56 "
1837				
Mar. 14,	Martinez, Alcalde	J. Fuller	100	No. 24 "
Nov. 8,	" "	F. Sanchez	100	No. 76 "
Dec. 7,	" "	J. Feil	200 x 50	No. ? "
1838				
Mar. 30,	De Haro, Alcalde	F. Casares	100	No. 49 "
Dec. 1,	" "	W. Gulnac	200 x 50	" "
1839				
Jan. 18,	" "	S. Vallejo		No. ? "
April 18,	" "	J. Pena		No. ? "
Dec. 1,	Guerrero, J. de P.	W. Hinckley	100 x 50	No. 19 "
Dec. 9,	" "	J. C. Davis	100	No. 18 "
1840				
Jan. 15,	" "	J. P. Leese	100	No. 7 "
"	" "	J. A. Vallejo	50	No. 3 "
"	" "	J. B. Cooper	100	No. 50 "
"	" "	J. Vioget	100 x 50	No. 23 "
Jan. 16,	" "	"	100 x 50	Back Leese house "
Aug. 4,	" "	G. Escolante		In Yerba Buena
Nov. 18,	" "	L. Galindo	50	At Dolores
"	" "	C. Valencia	50	"
"	" "	F. Gomez	50	"
1842				
Mar. 8,	Sanchez, J. de P.	W. Hinckley	50	"
"	" "	G. Allen	50	No. 21 Yerba Buena
May 1,	" "	P. Sherback	50	No. 20 "
Oct. 12,	" "	C. Moreno	50	M. Dolores
1843				
April	" "	V. Miramontes	50	No. 55 In Yerba Buena
"	" "	F. DeHaro	50	No. 31 "
April 14,	" "	J. Noe	50	No. 51 "
" 15,	" "	D. Felis	50	No. 32 "
" 15,	" "	J. Bautista	50	No. 33 "
July 3,	" "	W. A. Leisdesdorff	100 x 50	Nos. 49, 30 "
Aug. 15,	" "	B. Valencia	50	No. 16 "
Aug. 20,	" "	D. Felis	200	In Dolores
Oct. 15,	" "	G. Escolante	50	No. 15 In Yerba Buena
Nov. 15,	" "	F. Guerrero	50	No. 4 "
Dec. 15,	" "	T. Malla	50	No. 154 "

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Date of Grant.	BY WHOM SIGNED.	GRANTEE.	Quantity	DESCRIPTION, &C.
1843				
Dec. 15,	Sanchez, J. de P.	H. Bee	50	No. In Yerba Buena
"	" "	J. Castaneda	50	No. 53 "
"	" "	T. Maya	50	No. 54 "
Dec. 27,	" "	J. Martin	50	No. 35 "
1844				
Mar. 10,	Hinckley, Alcalde	C. W. Fluge	100	No. 26 "
April 1,	" "	J. Briones	50	"
July 12,	" "	R. Ridley	50	No. 139 "
"	" "	J. R. Berry	50	No. 138 "
July 19,	" "	B. Dias & J.P. Mesa	50	No. 17 "
Nov. 13,	" "	C. Glien	50	No. 7 "
Dec. 1,	" "	E. T. Bale	50	No. 136 "
" 15,	" "	J. Rose	50	No. 83 "
" 15,	" "	A. A. Andrews	50	No. 104 "
" 17,	" "	G. Reynolds	50	No. 84 "
" 17,	" "	E. S. Bernal	50	No. 37 "
" 21,	" "	J. P. Dedmund	50	No. 58 "
" 24,	" "	W. Johnson	50	No. 134 "
" 24,	" "	W. Richardson	50	No. 59 "
1845				
April 9,	Padilla, Alcalde	R. Haro	50	No. 174 "
" 18,	" "	T. Smith	50	No. 66 "
May 3,	" "	J. Pena	50	No. 161 "
" 10,	" "	E. Sota	50	No. 44 "
" 10,	" "	L. Pena	50	No. 86 "
Aug. 10,	C. Sanchez, Alcalde	F. Sanchez	50	No. 25 "
" 22,	" "	F. Le Page	50	No. "
Oct. 20,	" "	W. Fisher	50	No. 61 "
Nov. 25,	" "	P. Estrada	50	No. "
" 30,	" "	M. Pedrorena	50	No. 74 "
Dec. 4,	" "	S. Smith	100 x 50	No. "
" 7,	" "	G. Briones	50	No. 5 "
1846				
April 2,	" "	R. T. Ridley	100	In San Francisco
" 22,	Noe, J. de P.	W. Leidesdorff	50	No. In Yerba Buena
" 22,	Sanchez, "	J. A. Forbes	50	Nos. 183, 184 "
May 14,	Noe, "	H. Fitch	50	No. 22 "
" 15,	" "	F. Haen & G. Dopling	50	No. 189 "
" 20,	" "	W. Hinckley	50	No. 27 "
" 22,	" "	E. Grimes	50	No. 140 "
" 22,	" "	M. Fernandez	50	No. 195 "
" 25,	" "	Hensley	50	No. 191 "
" 28,	" "	Reading	50	No. 8 "
" 29,	" "	W. Hinckley	100 x 50	No. "
" 30,	" "	L. Galindo	50	No. 190 "
June 3,	" "	S. Smith	50	No. 52 "
" 6,	" "	J. M. S. Maria	50	No. 6 "
" 18,	" "	M. E. McIntosh		No. 196 "
" 19,	" "	D. Garcia		No. 273 "
"	" "	F. Hoen		No. 62 "
"	" "	J. Allig		No. 63 "
June 20,	" "	J. Yuvain		No. 60 "

It appears from this schedule, that from 1835 to 1839, grants of lots, or *solares*, within the pueblo limits, were signed by the Alcaldes; that from 1839 to 1843 such grants were signed by the *Jueces de Paz;* that from 1843 to 1846 they were signed by the *Alcaldes*; and again, near the beginning of 1846, by *Jueces de Paz.* Immediately after the conquest, the name of *Alcalde* was resumed, and continued till the change of the law, in 1850.

This corresponds, precisely, with the Mexican laws, and the decrees and orders of the Governors of California. So long as the Ayuntamiento existed, the Alcalde, as the head officer of the municipality, signed the grants made in the name, and by the authority of that body. When it was re-placed, under the law of 1837, by the *Jueces de Paz,* the latter assumed and exercised the powers of the Ayuntamiento. Again, in 1843, under the proclamation of Micheltorena, these were superseded by the *Alcaldes of first and second nomination.* And again, in 1846, the *Juez de Paz* officiated for a few months, till the new government restored the *Alcaldes* and *Ayuntamientos.* It is true that Mr. Justice Colton, at the end of 1849 and beginning of 1850, under the advice and direction of the Prefect, and during the existence of the Ayuntamiento, attempted to sell, or grant away the pueblo lands, until the one was enjoined by the courts, and the other suspended from office by the Governor. Of course, a Justice of the Peace had no power to make such grants during the existence of Alcaldes and Ayuntamientos. Not a cent of the money paid for these grants ever found its way into the municipal treasury. Neither the grantor nor the grantees had any faith or confidence in their validity. It was simply one of those schemes of plunder which have given such an unenviable reputation to office-holders in California generally, and more particularly in San Francisco.

NOTE 20.

RIGHTS OF MILITARY OCCUPATION AND CONQUEST.

The principles of international law applicable to the question here discussed, are so briefly announced in the opinion of the Court, that perhaps, without explanation, they are liable to be misunderstood.

Of course, the Court does not mean that the general public domain which had never been dedicated to particular purposes, or granted in private ownership, is subject to distribution by the local authorities, during military occupation, and without the license of the conqueror. To make disposition of such lands, is an act of sovereignty, and results from political, not municipal, law. But lands assigned to municipalities, corporations, or individuals, in trust, for certain uses and purposes, may be used and disposed of for such purposes during military occupation, or after complete conquest, precisely the same as before, unless there be an expressed or implied will of the conqueror, or new sovereign, forbidding or prohibiting the trustee from any longer exercising his trust in the manner originally authorized.

With this explanation, which may, by some, appear unnecessary, the opinion of the Court is fully sustained by the authorities there referred to.

NOTE 21.

CITY CHARTERS AND GRANTS IN MEXICO.

Perhaps the City of Mexico furnishes one of the strongest illustrations of the views of the Court on this question of special charters and grants. The Spanish and Mexican laws, orders, &c., relating to that city, have been collected and published at different times, with commentaries by the various compilers. These works refer to the *charter of nobility* which was conferred upon that city July 24th, 1548, declaring it "The very noble, notable, and very loyal and imperial City of Mexico," and contain numerous orders and ordinances relating to the powers of the Ayuntamiento over *propios, pastos,* &c.; and also to the decree of the Emperor, of October 3d, 1539, declaring the extent of its *terminos* to be fifteen leagues; but none of them make allusion to any *fuero,* or charter of incorporation, or grant of land to that city. If there had been any such charter or grant, would it not be quoted or referred to in these works, or in some of the collections of Spanish and Mexican laws? If any such special charter or grant had been requisite, would not that city have applied for one centuries ago? Moreover, if none but the sovereign power could have made legal grants of lands (*solares* and *suertes*) within such limits, would we not expect to find some orders, delegating that power to subordinate officers? If the United States had retained that city, in 1848, as they did San Francisco, would that municipality, and those holding under it, have been required, by the law of 1851, to produce a direct grant from the King of Spain, or the Congress of Mexico, under the penalty of having their lands preempted, and sold as the public domain of the United States? Or would it have been sufficient to show that the *city* existed, and was recognized as such, with a *termino* of fifteen leagues, measured from the center of the great *plaza?* But one answer can be given to these questions.

Manual de Providencias, &c., 1834.

Memoria de la Hacienda Municipal, 1830.

NOTE 22.

FUEROS.

Schmidt, in his "Civil Law of Spain and Mexico," pp. 64, 65, says:

"The term *Fuero,* which frequently occurs both in the ancient and modern legislation of Spain, has various significations, which ought to be understood in order to avoid confusion. In its most general acceptation, the word *Fuero* means a law, a code, and in this sense we say *Fuero Juzgo, Fuero Real,* etc. 2. It is applied to the general usages and customs of a province, etc., and in this sense it is used in the phrases, *ir contra fuero, quebrantar el fuero,* which means to violate received customs. 3. Grants of privileges and immunities, as *conceder fueros,* to grant exemptions. 4. Charters granted cities or towns, also designated by the term *cartas pueblas.* 5. Acts of donation made to individuals, churches, or convents on certain conditions. 6. Declarations of magistrates in relation to taxations, fines, etc. 7. Charters granted by the sovereign, or those having authority from him, establishing the franchises of towns, cities, etc., and in this acceptation it is synonymous with *Fuero Municipal.* It has, moreover, other significations, and is applied to the place where justice is administered, to the peculiar forum before which a party is amenable, as well as to the jurisdiction of the tribunal which is entitled to take cognizance of a cause. This latter distinction it is important to understand, because no country has so many special or privileged tribunals as Spain. Among these we need only advert to the *fuero ecclesiastico, fuero militar, fuero de marina, fuero de hacienda, fuero academico* or *escolastico, fuero de casa de real, fuero de correos, fuero de comercio, fuero de mineria,* etc., or the ecclesiastical, military, naval, fiscal, academical, etc., forum."

For a full understanding of the different uses of this word, we refer the reader to Escriche, and especially to his remarks on *Fueros Municipales.* The absurdity of attempting to apply the commentaries of Elizondo and others, on these ancient municipal *fueros,* to Mexican pueblos will then be plainly perceived. We have alluded in Note 10 to the origin of these grants of municipal franchises, called *Fueros.*

NOTE 23.

TRANSLATION OF LAWS AND LEGAL DOCUMENTS.

Every lawyer knows how difficult it sometimes is to correctly interpret our own statutes, even with all our knowledge of the language in which they are written, their intended operation, and the circumstances of their enactment. Courts themselves often disagree in such interpretation. How much more difficult the interpretation of foreign laws, written in a foreign language, and framed with reference to facts, customs and habits with which we are entirely unacquainted. It is frequently impossible to understand even the purport and object of such statutes, without a knowledge of the pre-existing laws which they are intended to change or to carry into execution. Add to these difficulties the impossibility of correctly translating the technical terms of one system of laws into the exactly corresponding terms of another system which is radically different, and we see abundant reasons for the greatest caution and the largest and most liberal views in interpreting and applying such foreign statutes.

The same remarks are applicable to foreign legal instruments and official documents. On this subject the Supreme Court of the United States very justly remarks: "Papers translated from a foreign language, respecting the transactions of foreign officers, with whose powers and authorities we are not well acquainted, containing uncertain and incomplete references to things well understood by the parties, but not understood by the Court, should be carefully examined before we pronounce that an officer, holding a high place of trust and confidence, has exceeded his authority." U. S. v. Perchman, 7 Peters' Rep., p. 95.

An examination of the numerous Spanish documents and laws filed in the Land Commission and the United States Courts, with reference to land titles in California, will satisfy any one who is familiar with the technical and local terms in which they are written, that not one in ten is correctly translated. Some of these pretended translations no more resemble the originals than they do the adventures of Gil Blas or of Don Quixote. Add to this the fact, that not one of the Land Commissioners, and only a single one of the Judges, who have been appointed to decide upon these titles, understood the language in which they were written, or the system of laws under which they were issued. And yet, under these circumstances, they have been required to measure the rights and determine the fortunes of individuals, families and entire communities in California!

Judge Story, in his Miscellaneous Writings, p. 586, has given us a striking instance of a wrong decision resulting from imperfect and incorrect translations. The Commissioners for the settlement of claims under the Treaty of February 2d, 1832, with France, decided that *neutral* vessels recaptured from privateers after twenty-four hours possession, belonged wholly to recaptors, relying upon an American translation of Azuni on Maritime Law, in which reference is made to the French Ordinance of 1779. A correct translation of this Ordinance shows that this rule applied only to *vessels* of *subjects*, and that a very different one governed in the case of *neutral vessels!* The Commissioners had therefore adopted a new rule of capture not recognized in international jurisprudence, and resting only upon a mistranslation of an Ordinance of Louis XIV.

And yet that translation was more correct than many of those embodied in the opinions of the Land Commissioners on the claim of the city of San Francisco.

NOTE 24.

POWER OF THE KING OVER LANDS WITHIN THE LIMITS OF PUEBLOS.

The Land Commissioners, in deciding that the pueblo had no *title* to land, seem to have relied mainly on the fact, as shown in the old laws and decrees, that the King retained a prerogative or control over such lands; and that without his license or authority, such municipality could not alienate them. The fact itself is not disputed; but the inference drawn by the Commissioners is by no means a logical conclusion from the premises. Lands granted to Indians could not be alienated by them, under the laws of the *Indies*, except by permission of certain royal officers. Does it follow that Indians had no title to such lands? It is true that it was so held by the author of the decision of Woodworth *vs.* Fulton; but the position was too absurd to be sustained by any other Court. The Legislature of this State has passed laws regulating the powers of the municipal officers of San Francisco, with respect to city lands, even prohibiting them from alienating such lands; would the Commissioners infer from this fact that the title to these lands was vested in the State of California? If the title remained entirely in the King, and the *pueblos* had no vested interest in the lands within their limits, or *terminos*, why was it declared that even the King himself could not, by grant, divert them from the object of their assignment or dedication? That the King could grant, or authorize others to grant them, *in accordance with that object*, cannot, we think, be disputed. This is the only sensible construction which can be put upon Law 2, Title V, Book VI, of the *Recopilacion*, which is copied in Law 1, Title XVI, Book VII, of the *Novisima Recopilacion*.

NOTE 25.

LAWS RELATING TO PUEBLOS AND PUEBLO LANDS.

Great errors have been sometimes committed by the Courts, respecting land titles in California, not only by applying laws which relate to one class of pueblo lands, to a class entirely different in its character, as alluded to in this opinion of the Court, on page , but also in determining the validity of Mexican titles by old Spanish laws which have not the slightest application to the agrarian system adopted in New Spain soon after the conquest, and continued in force after Mexico became an independent sovereignty. For example, the old laws relating to municipal *fueros*, alluded to in a preceding Note, have no more relation to land titles in Mexico, than to land titles in Massachusetts.

It would be as difficult to fully understand the titles by which land is, or has been, held in England, without going back to the history of the origin of these titles, of which we have an account in Book 2, Chapter V, of Blackstone's Commentaries, as it is to understand the exact nature of land titles in Mexico, without reference to the agrarian system of the Indians, upon which the old Spanish system was engrafted, and by which it was modified and changed in many essential particulars. This is more particularly true with respect to lands within the limits of cities, pueblos, and villages. Without some knowledge of the ancient Mexican laws relating to lands, it is utterly impossible to understand the purport of many laws found in the *Recopilacion de Indias* respecting *pueblos, poblaciones, reducciones*, &c. The limits of these Notes will admit but a brief allusion to this subject.

At the time of the conquest of Mexico by the Spaniards, that country was divided into three independent monarchies, each monarchy being subdivided into separate lordships, afterwards called *cacicazgos*, and the lands of each *cacicazgo* was divided into six different classes:

1st. Lands assigned for the support of religious worship, which were cultivated by the Indians *en comun*, under the directions of the priests, who also had entire control of the products.

2d. Lands assigned for the support of the government or administration. These were not grantable, but went with the lordship, or what the Spaniards called the *senorio*; they were called *Tlatacamilli*.

3d. Lands called *Tecpantlalli*, the income from which was devoted to the support of the *cacique*, but could not be alienated by him.

4th. This class of lands was considered as the patrimony of the *caciques*, and was granted by them to the subaltern chiefs called *Tecallec*, who could transfer them to each other, but could not alienate them to individuals of the common class, called *Macehualli*.

5th. Lands called *Pil-lalli*, which were rented or contracted out by the owners, to the lower classes, for cultivation, and other purposes.

6th. Lands called *Altepe-tlalli*, which were held by certain families, or communities, forming a kind of parish, town, or municipality, called *calpulli*. The lands of each *calpulli* were divided up into lots, and assigned to individuals for cultivation, and other uses. There were six classes of such assignments, according to the objects and purposes of their use. The last of these classes was the assignment of lots to individuals for their own use, each one being considered the owner of the lot which was so assigned to him. He could transmit it to his heirs, or exchange it for any other lot in the same *calpulli*, but he could not sell it, and his title was forfeited if he abandoned it for the term of two years. This class of lands was subsequently denominated by the Spaniards, *tierras de comunidad*, or, *tierras de Parcialidades*, and sometimes *tierras comunes*.

Such is a brief summary of the land laws of Mexico at the time of the conquest by the Spaniards. The latter were disposed to pay very little regard to the rights of the conquered, whether of community or of individuals. But the king soon came to the rescue of his new subjects, and issued various orders and decrees for the protection of their rights of property. Of this class are the *Ordenanzas de Poblaciones*, and other *Pragmaticas* and *cedulas*, afterwards embodied in the *Recopilacion de Indias*.

But while seeking to protect the rights of the Indians, it was necessary to provide also for the settlement of the country by the Spaniards, and to reward the early conquerors by grants of land. Of course, the conquest had conferred upon the news overeign all the rights of the ancient Mexican monarchs, and all lands not held by individuals or communities were deemed susceptible of grant by the crown. In order to reward individuals who had engaged in the conquest, or to confer favors upon others whom the king wished to benefit, large tracts were granted in private ownership, care being taken in making these grants, not to interfere with the individual or community rights of the natives.

Again, to carry out the general policy of settling the conquered country described in Note 10, dispositions were made for establishing *towns*, in which the Spaniards, whether holding rural grants or not, were to be collected for mutual security and defense. These towns were usually denominated *Pueblos de Espanoles*.

And again, another part of the general plan of civilizing the Indians was to collect together those who, driven by the conquerors from their ancient homes and means of subsistence, had taken refuge in the woods and mountains, and were forced to resort to predatory incursions upon the new settlements, in order to obtain the means of sustaining their precarious existence. These Indian settlements were called *Pueblos de Indios*, or simply *Poblaciones*.

Hence the two different systems of *pueblos* referred to in the laws of the Indies,—systems totally distinct in their nature and character, and well understood by Spanish and Mexican legislators and lawyers, but too often confounded, and too generally misunderstood by our own courts.

In carrying out both of these systems of town-settlements, great care was taken that no intrusion should be made upon the existing rights of the Indians, whether individuals or communities. Hence it was especially ordered, that, in establishing new towns, they must be founded in *vacant lands*, "sin perjuicio de los Indios y naturales, o sin su libre consentimiento." Vide Recopilacion de Indios, Lib. 4, Tit. VII, leys 1 and 23; Lib. 6, Tit. 3, ley 9, &c.

Having described the two classes of towns which were recognized in the Hispano-Mexican system of settlement, viz :—*Pueblos de Indios* and *Pueblos de Espanoles*—we will now refer to the various classes of land recognized by that new system of jurisprudence, including those within, as well as outside of the town limits.

Lands, as a general rule, were classed as *realengas, concejiles, de comunidad, de Indios* and *de dominio particular.*

Realengas were lands of the king, that is, lands of the crown or royal patrimony; *concejiles* were lands which belonged to towns, and were subdivided into classes according to the character of such towns and the purposes for which they will be used; *tierras de comunidad* were the lands granted to, or considered as belonging to the *Reducciones* or *Pueblos de Indios; Tierras de Indios* were those granted to Indians; and *tierras de dominio particular* were those which had been granted in individual ownership.

Each *Pueblo de Espanoles* was entitled to have for its administration a municipal organization or corporation, called an *Ayuntamiento,* which exercised a certain authority over the territory included within the limits of such pueblo. The land included within such limits was called *concejile,* and was usually divided into three different classes, as stated in the opinion of the Court, viz: *Ejidos,* which were lands for the common use of all the inhabitants, as streets, public squares, etc.; *Propios,* or lands, the products of which were for defraying the expenses of the municipal administration. These, says Ramirez, were "*de dominio comun, pero no publico.*" And lastly, the great body of the *tierras concejiles,* which were intended for division and assignment to the *pobladores* or *vecinos,* in lots called *solares* and *suertes,* and which, when so assigned or granted, become of private ownership, *de dominio particular.* There were other subdivisions which it is unnecessary to mention in this place. They are briefly referred to in the opinion and in Note 10.

These *Pueblos de Espanoles* were established under the orders of the Viceroys, and Presidents, and Governors of Provinces, and their boundaries were such as had been given by the general laws, or had been assigned by these officers, or by the municipal authorities themselves, and the expedientes of such demarcation submitted to such officers for confirmation, subject, of course, as were all such acts, to the approval or disapproval of the king. The assignment, distribution or grant of the lots—*solares* and *suertes*—in such pueblos was made by the *Ayuntamientos,* in conformity with the custom which had prevailed in Spanish towns, where no special charters or *fueros* had been granted to the lords who ruled over them. Perhaps there was at first no positive direct written authority for this, but it was exercised for so long a time that the usage acquired the force of law. But the abuse of this power finally called for remedial measures, and various orders and decrees were issued restricting its exercise. It was found that influential persons had contrived to obtain from Ayuntamientos large tracts of ungranted lands in pueblos which they reduced to *tierras de labor,* thus depriving other *vecinos* of their just rights and preventing the increase of population, as there were no lands to be granted in *solares* and *suertes* to new *pobladores* who might wish to establish themselves in such towns. This abuse induced the king in 1618 to declare the *Ley de Toledo,* first enacted in 1480, to be in force in America (*vigente para America*). Vide Recopilacion de Indios, lib. 4, tit. 12, ley 21; Nueva Recop. lib. 7, tit. 7, ley 3; Novis. Recop. lib. 7, tit. 21, ley 5. This law provides for the restoration of *tierras concejiles* which had been appropriated to themselves by individuals, or had been granted to them without proper authority and contrary to the object for which they had been assigned to such towns. Other laws, orders and decrees were subsequently issued for the same purpose.

In order to understand these laws and orders, it is necessary to know the circumstances under which they were issued and the object they were designed to accomplish. They were not intended to *confer powers,* but to restrict powers which already existed, or which at least had been long exercised with the tacit consent of the crown and royal officers.

Again, it sometimes happened that in organizing these pueblos, no lands were assigned for *ejidos, dehesas* and *propios,* and that the want of such lands was subsequently felt by the citizens and municipal authorities to be of serious inconvenience; consequently, special laws were issued, positively requiring that such assignment or designation be made.

And again, it not unfrequently happened that designing persons procured, by a misrepresentation or concealment of the facts, from the Viceroys or direct from the Crown, special grants of lands within the limits of pueblos already organized, against their consent and contrary to the interests of said towns and to the objects of their formation. To remedy these abuses, orders were issued declaring such grants to be null and void.

Without attempting to refer to all the laws upon this subject, we will merely designate a few which will tend to confirm much that we have here said.

Law 13, Title VII, Book IV, Recopilacion de Indias, directs that commons (*ejidos*) be designated for each town.

Law 14 directs that *dehesas* be designated next to the *ejidos* for common pasturage, etc., and also *propios.*

Law 1, Title XII of same Book, says: "It is our will that there be divided up and distributed houses, *solares,* lands, *caballerias* and *peonias,* to all those who shall settle (*pablor*) new lands in the pueblos and villages, etc." At the end of four years, the lands so distributed to persons living in the pueblos, were to be considered as in full ownership, and thereafter to be freely sold and transferred.

Laws 4, 5 and 8, provide that Viceroys may, by advice of the councils of cities and towns, grant lots and lands in such towns to *pobladores;* but that the petitions for such grants must be made to such town councils, who are to report thereon to the Viceroy or President and Deputies.

Law 1, Title XVI, Book VII, of the *Novisima Recopilacion,* says: "Our will and pleasure is, that our cities, towns and villages preserve their rights, rents and *propios,* and that no gift be made of anything of them; wherefore we command that all gifts of them, or of any part of them, which we may make to any person, be of no value." The gifts here referred to, are evidently such as are contrary to the object of the original dedication or assignment to cities, towns and villages; for not only the King, but also the Viceroys, Presidents, Governors, Deputies, councils and contractors, were authorized to grant and distribute *solares* and sowing grounds to the *pobladores* and *vecinos* of towns. The very next law so explains it, for the King there orders property and lands, pertaining to towns given away by him or his ancestors,—that is, given contrary to the object of their original assignment—to be restored. *Solares* and sowing grounds, as *caballerias* and *peonias,* given to the settlers, and which, by the laws, become in four years theirs in full ownership with right of disposition, were not of course to be restored.

With this brief notice of the *Pueblos de Espanoles,* let us now turn to those municipal establishments called *Pueblos de Indios.* The organization of the municipal administration of the latter did not differ very essentially from that of the former, but the rules which governed the disposition, and regulated the tenure of lands within their limits, were entirely dissimilar.

These *Pueblos de Indios* mostly originated in those regulations or *providencias* which were issued immediately subsequent to the conquest for the direction of the operations carried on, under Royal auspices, for the Christianization and civilization of the natives, known and designated in the laws as *reducciones.* Only a very limited quantity of lands was usually assigned to such pueblos. This, at one period, was limited to 1200 varas in every direction, and subsequently was extended to one square league, and in some special cases, a still larger extent was allowed.

The lands assigned to such *Pueblos de Indios*, partook somewhat of the legal character of the *ejidos* of the other class of Pueblos, and were sometimes so denominated in the laws. No part was set aside as *propios*, nor were any *solares* and *suertes* granted to individuals in full ownership. Those assigned to individuals for cultivation, &c., were called *tierras de comunidad*, and in their legal character, were closely assimilated to the ancient *calpulli*, already described. The title of the Indians to the lands of the pueblo, was regarded as in full property, but *pro indiviso*, and no individual could alienate the part which might be assigned to him for his use. Portions of this land were assigned to individuals, and families, for their separate use, while other portions were cultivated in common, for the common benefit. The latter were sometimes called *comunales*, and sometimes *tierras comunes*, the latter term being also applied to the *tierras de comunidad*, or general body of land within the limits of such *Pueblo de Indios.*

It may be proper to remark that Spaniards were sometimes permitted to settle in the *Pueblos de Indios*, but they could acquire no other title to the lands which they might occupy or cultivate, than that which was accorded to the Indians in like cases.

It was to these *Pueblos de Indios*, and their lands, called *comunales, de comunidad*, and *tierras comunes*, that many of the laws and ordinances were specially and exclusively directed, and not to the lands of pueblos established by Spaniards. Of this character are the ordinances of February 23d, 1781, found in chapter twelve of the *Ordinanzas de Tierras y Aguas ;* Article thirty-three of the *Ordinanzas de Intendentes ;* the decree of the *Consejo de Regencia* of May 26th, 1810 ; the decree of the *Cortez*, March 13th, 1811 ; that of November 9th, 1812 ; and many subsequent decrees and orders, as well as very many of the laws found in the *Recopilacion de Indias*, especially all those relating to *reducciones* and *poblaciones.* But the law of January 4th, 1813, according to commentators, refers exclusively to *Pueblos de Espanoles.* This is manifested by the terms used, as *propios*, which class of lands were unknown in Indian pueblos. But the decrees of April 15th, 1820, and November 24th, 1824, refer to the community lands of Indian towns ; vide the decree and regulations respecting the *Parcialidades de San Juan y Santiago.* And it is to this same class of lands that Article seventy-seven of the law of March 20th, 1837, refers. The *tierras comunes* mentioned in that Article, are neither the *tierras concejiles*, nor the *ejidos* of Pueblos of Spaniards, or *gente de razon*, but the *tierras comunes*, or *de comunidad*, of the Indian Pueblos, which were held by a tenure entirely different from the other classes of pueblo lands. This is the construction always put upon it by jurisconsults in Mexico, and we think it is obvious from the terms of the law itself. But this matter will be considered in the next Note.

We have deemed it necessary to give this sketch of the different kinds of pueblos, and their lands, even at the risk of repeating what has been said in other Notes, because the distinction is not clearly pointed out in the opinion of the Court, and consequently some of the references there made to laws, might mislead the reader, without this explanation.

NOTE 26.

POWER OF PREFECTS TO GRANT PUEBLO LANDS.

Although the Supreme Court declines to express any opinion with respect to the power of a Prefect to grant pueblo lands in individual ownership, yet it distinctly asserts "that such power is not expressly given by the Act of March 20th, 1837."

As this is the only law referred to by Judge Hoffman in his decision confirming a Prefect grant, in the claim of Sherback, it follows that the opinion of the Supreme Court of this State, with respect to the meaning and effect of that law, is directly in conflict with that of the United States District Judge. Which of these opinions is correct?

We have discussed, in the preceding Note, the two kinds of pueblos recognized in Mexican law, and the division or classification of the lands of each. We have also shown that the seventy-seventh Article of the law of March 20th, 1837, refers exclusively to *Pueblos de Indios,* and not to *Pueblos de Espanoles;* that the *ejidos* and *dehesas* of the latter were of *dominio publico,* and that the *propios* were of *dominio comun,* but not *publico;* while the lands of the former, called *de comunidad,* and sometimes *tierras comunes,* were almost precisely of the nature of the ancient *calpulli,* and were held *pro indiviso;* and that neither of the foregoing classes were grantable in special ownership, without special license from the crown, or supreme authority; in fine, that the authority to dispose of those particular classes of lands, was not included in the ordinary powers of Ayuntamientos and Alcaldes to grant *tierras concejiles* in private ownership.

Moreover, it is also shown in the opinion, that by Article eight of the same law, the Prefects were to report to the Governor with respect to the necessity or public convenience of allowing Ayuntamientos to alienate pueblo lands; and that Article nine authorizes the Governors of Departments to grant such permission, on the previous consent of the *Junta,* specifying at the same time, that any cession, donation, or contract made without such license, should be null and void (*nulo y de ninguna valor*). Would it not be a very strange thing, if a subsequent Article of that same law conferred upon the Prefect a power which the Governor himself could not exercise, except in subordination to the will of the *Junta?*

In order to fully understand this Article, we will copy, in full, both the original and the translation:

"ART. 77. Arreglaran gobernativamente y conforme a las leyes el repartimiento de tierras comunes en los Pueblos del distrito, siempre que sobre ellas no haya litigio pendiente en los tribunales, quedando a los interestados su derecho a salvo para ocurrir al gobernador, quien sin ulterior recurso decidira lo mas conveniente, de acuerdo con la junta departmental."

[TRANSLATION.]

"They (the Prefects) will regulate, executively and conformably to the laws, the distribution of *tierras comunes* in the pueblos of the district, provided there be no litigation respecting them pending in the tribunals; reserving to the parties interested their right to appeal to the Governor, who, without further appeal, will, in concurrence with the Departmental *Junta*, decide what is most proper."

Let us examine this Article critically: "They will regulate" (*arreglaran*); that is, they will prescribe rules. Chief Justice Marshall, in commenting upon the clause of the Constitution which empowers Congress to "regulate commerce," says, "the power to *regulate*, that is, to prescribe the rule by which commerce is to be governed." Gibbons *vs.* Ogden, 9 Wheat. Rep., p. 196. But the power to *regulate* is very different from the power to *make*. Will any one contend that because Congress may *regulate commerce*, it may also itself engage in trade, or monopolize it?

Again: "They will regulate executively (*gobernativamente*) and conformably to the laws, the distribution of common lands in the pueblos (*el repartimiento de tierras comunes en los pueblos*) of the district." They are, therefore, "to prescribe the rule by which this *repartimiento* is to be governed." They are not to make it themselves; but they are to prescribe the rule by which it is to be made by others. And in what manner are they to prescribe this rule? As legislators who make laws? Not at all. They are merely to act in an *executive* capacity, and must, in this matter, conform to the laws which the general Congress or Departmental *Junta* may enact. They have no other powers than such as the laws had, at that time, or might, thereafter, confer upon them. If no power had been, or should thereafter be conferred upon any one to make a *repartimiento*, there would be no one for whom the Prefects were to "prescribe rules." They had no legislative power to authorize any *repartimiento*. *Repartir*, according to the dictionaries, means to divide, to distribute, to apportion, to assess, to levy a tax. But what was the subject of this division, distribution, apportionment, assessment, or taxation? Common lands (*tierras comunes*). What common lands? The lands which were enjoyed by all the inhabitants of the district? Not at all. Only the common lands *in the pueblos*; that is, within the limits of, or appertaining to, *pueblos* in their district. We have already shown that a district, or even a *partido*, might, and often did contain a number of pueblos, each separated from the other by a great distance. The lands, then, which were the subject of this *repartimiento*, were simply those which had been devoted or assigned to pueblos, and were included in their respective boundaries.

But the question here arises, of what kind of pueblos? We have already shown that the Spanish and Mexican law recognized two classes of *pueblos*, essentially different in their character, and in their rights to the lands within their limits. And again: what are the lands here referred to, and called *tierras comunes?*

The pueblos here mentioned are, in our opinion, unquestionably *Pueblos de Indios*, and *tierras comunes* are the lands of such municipal establishments known in the ancient laws as *calpulli*, and in modern Mexican jurisprudence as *parcialidades, tierras de comunidad*, and *tierras comunes de Indios.*

This Article of the law of 1837 has been critically examined by a learned Mexican jurisconsult, the Licenciado Jose Z. Ramirez. We quote as follows from his remarks. In commenting upon this Article, he says:

"1st. What were the lands which are denominated *comunes?*

"2d. In what proportion were they to be distributed (*debian repartirse*)?"

In answer to the first question he says:

"Unquestionably this cannot refer to *tierras concejiles o del comun* of towns, because only that common thing is *partible*, the dominion or property of which pertains to a certain and determinate number of persons who possess it *pro indiviso*. None of these qualities are found in *tierras concejiles;* nor in *ejidos* or *dehesas*, because our civil law declares them to be of *dominio publico*, and not for the use or enjoyment of any particular class or certain number of persons, but for all the residents of the towns, without distinction of classes or persons. (Part. 3, Tit. 28, ley 9.) Nor are these qualities found in the lands called *Propios*, because, even when they remain common, individuals cannot exercise over them any right of dominion or possession for their exclusive enjoyment, as is also declared by our civil law. (Lei 10 Cod.) The Mexican municipal authority is only that of an administrator who has the care and government of these lands in the name of the Pueblo, employing their products and rents for the benefit of the *poblacion*. I conclude from what is before stated, that the *tierras comunes*, which Art. 77 of the *Reglamiento* of March 20th orders to be divided, are not *tierras concejiles*, for they were not *partible*. From this conclusion it is also deducible that those referred to are the *tierras comunes de los Indios*, known in common and legal language under the name of *tierras de comunidad*."

The second question, Ramirez says, is answered by the terms of the law itself; that is, the division is to be made "conformably to the laws," (*conforme a las leyes*). He then proceeds to examine what were the laws in force at that time respecting the dividing up of the community lands of Indian Pueblos, and says, that according to the federal constitution of 1824, the disposition of such matters in the States, belonged to the States respectively, while in the Federal District and the Territories it pertained to the federal government; consequently, in the Departments formed out of States, we must look for this matter in the laws and dispositions of the State governments, and in those formed out of Territories we must look in the acts of congress of the federal executive, and the consequent acts of the Territorial governments.

The Department of the Californias was formed out of the Territories of Upper and Lower California. In examining the decrees of the Spanish government and the acts of the Federal Congress prior to 1837, we find nothing to authorize the distribution of the community lands of Indian Pueblos in these Territories. The act of November 27th, 1824, refers only to the *Parcialidades* of San Juan and Santiago, and the distribution of even these community lands ceased under the Regulation of September 20th, 1835, which forbid any further *repartimientos* without the further action of Congress, (*sin que primero lo resolviera el congreso general*). As Congress never did pass any subsequent law on this subject, either before or after the 20th of March, 1837, Ramirezl concludes that Article 77 of the law of that date, was wholly inoperative in the Federal District and in Departments formed out of Territories.

But let us suppose that the construction put upon this Article by Mexican lawyers is incorrect, and that it refers to *Pueblos de Espanoles* as well as Indian Pueblos. The same question arises: what *tierras comunes* of such pueblos were subject to distribution, and in what manner did the laws permit them to be distributed?

We have already shown that the only lands of such pueblos in Mexico, to which the name *comunes* could possibly apply, were the *propios*, *ejidos* and *dehesas*. The former could be rented out for the benefit and support of the administration of the pueblo, but they could not be reduced to individual ownerships. The latter were, in no legal sense of the word, distributable, for they were not only *common* but also *public,* and the *public* use of these lands was under the direction of the municipal authorities. Thus the Ayuntamiento took care of the roads, parks, recreation grounds, threshing and watering places, and the public woods and pastures. With respect to the latter, they determined how many cattle each *vecino* could put in the common *pastos,* and how much fire-wood each one might cut in the common *montes.* In this sense, perhaps, these lands might be considered *distributable,* although the word *repartir* would scarcely be applied to such regulation or apportionment of their use. If such be the *repartimiento* referred to in the law of 1837, it gave to the Prefect power to form regulations by which the Ayuntamientos were to be governed in their apportionment or distribution of this use of the commons of Pueblos. And this is the full extent of the powers conferred upon Prefects by that law over the lands of *Pueblos de Espanoles,* even supposing it to refer to such pueblos.

To apply this Article to the general lands of a pueblo, not assigned for special purposes, as *ejidos* and *propios,* would be diverting it from its object, for according to its terms, its only object is *tierras comunes;* but the general lands of a pueblo are, in no sense of the term, *comunes.* Moreover, the laws confided the disposition of such lands to the Ayuntamientos and Alcaldes, under such authority as might be given to them by the Governors and Deputations. Here, then, was a direct conflict of powers; a limited authority to grant, in the Governors and Ayuntamientos, and an unlimited authority to grant the same thing, in the Prefect! As the latter was not a municipal officer, how were the Ayuntamientos to know what lands were granted by the Prefects, and what were left for disposition by them?

How incongruous and conflicting are the Spanish and Mexican laws made to appear by such interpretations; whereas, by a proper and reasonable construction, they ar found to form as complete and as well-adjusted a system as that of any other civilized people. Indeed, the Spanish civil code has always been held in high estimation by the ablest jurisconsults of the world.

But it is said that the authorities of California construed that law as authorizing Prefects to grant lands belonging to all kinds of pueblos. We are of the opinion that the Archives prove that such authority was never claimed or exercised by the Prefects themselves. Of the eight hundred and odd claims presented to the Board of Land Commissioners, only four grants purport to be signed by Prefects. Not one of these is recorded or noted in the Archives, or is preceded by the ordinary expediente; not one is in the usual form of California grants, or is made upon the kind of paper used for such purposes at the time they bear date; and only one of these was confirmed by the Commissioners, and that purports to be made by the Governor, and to be signed and issued by the Prefect *under the Governor's orders.* Admitting the papers in that case to be genuine, and not similated, they are no proof that the Prefect himself claimed or exercised the power to grant land. The second grant purports to be made by the same Prefect; but it was rejected by the Commission, and we think an examination of the original papers will convince any one acquainted with genuine California grants, that it ought to have been rejected. Its further prosecution was abandoned. The third one was also rejected by the Board. It does not even purport to be a grant in ownership, but is merely a permission to cultivate a tract of land not within twenty miles of any pueblo! The fourth and only remaining case, is the celebrated Sherback claim for some two hundred and fifty-six fifty-vara lots in the City of San Francisco, under a pretended grant from Manuel Castro, dated December 5th, 1845—not by order of the

Governor, but by Castro himself, in virtue of the seventy-seventh Article of the law of March 20th, 1837! This claim was also rejected by the Commission, but it has recently been galvanized into apparent vitality by a decision of the United States District Court.

We believe this claim utterly spurious, and that there is not a disinterested person in California, acquainted with genuine grants, who would not, at first sight, pronounce the Sherback papers fraudulent; the fraud is patent upon their face—so plain, that "he that runs may read."

But admitting, for the sake of the argument, that these papers are genuine, and entirely above suspicion: the construction of the law of 1837 in favor of the power of Prefects to grant pueblo lands in private ownership, and in unlimited quantities, as derived from usage and custom in California, is based, so far as the records of the Land Commission and the United States District Court show, upon this single grant, and upon this only! One single grant in all California, during nearly ten years from the passage of the law to the American conquest! Were all the different Prefects of the several Districts of California asleep during this long period of ten years, that they did not discover their rights and powers to grant lands? Was Manuel Castro alone awake, and possessed of sufficient sense to understand and correctly construe this law? It seems so. Fortunately, however, as soon as he had signed this paper for his friend Peter, he relapsed into the same Rip Van Winkle slumber as his brother Prefects; otherwise the whole Pueblo of San Francisco would now be plastered over with Prefect grants. This great effort seems to have exhausted nearly all the sovereign powers with which the law of 1837 had clothed him!

Another view of this case, which seems to have been entirely overlooked by the District Court, is, that if this was pueblo land, and as such was granted to Sherback under the law of 1837, the Court had no jurisdiction under the law of 1851. The words of that law are too plain to require comment.

But it may be said, will not the same rule hold with respect to grants by the Governor within pueblo limits? If such grants were made prior to the formation of the pueblo, the lands so granted did not become pueblo property, and the law of 1851 gave to the Commissioners and United States Court, jurisdiction over them. The same may be said of grants made by the Governor of land partly within and partly without pueblo limits, after its formation. The act requires their presentation to the Commission; and if finally confirmed, patents were to issue; but we think such patents for any land within the pueblo limits, will be of no avail against the pueblo, if illegally made, that is, made without the consent of the pueblo authorities, and contrary to the objects of their original dedication. We are of opinion that grants by the Governor, entirely within the pueblo limits, were not, by the law of 1851, within the jurisdiction of the Commission and Courts.

Again, it may be said, that inasmuch as the Prefect was an officer of the Mexican government, his acts must be *presumed* to have been by competent authority, till the contrary is shown. But the rule of presumption does not apply to this case, for the granting of pueblo lands in private ownership, was not assigned by law to the Prefect, nor was it within the sphere of his accustomed duties. The fact of his making the grant was, therefore, no more *prima facie* evidence of his power to make it, than if an Alcalde of San Francisco had granted a rancho of eleven leagues on the Sacramento river. In order to give any foundation for the doctrine of presumption, it was necessary to first show that the law had made it his duty to issue such grants, and this was attempted to be deduced from the law of 1837; with what success, we have already shown.

We must not be understood as denying any power in the Prefect over Ayuntamientos, or over the granting of pueblo lands by the Ayuntamiento. The laws gave him a certain supervisory control over *all* the acts of that body, and he was the organ of communication between it and the Governor. But he was not an officer of the municipality, and had no power himself to grant either municipal or other lands. The laws gave him none. Nor in point of fact, did any Prefect in California ever claim or exercise such powers.

The idea that Prefects were empowered by the law of 1837 to grant, or to authorize others to grant, in private ownership, the lands of a pueblo, originated in the great "Colton Grant project" of 1850, of which the early residents of San Francisco have a pretty distinct recollection! It is said that Colton, in his flight, left behind him a sufficient number of deeds, executed in blank, to cover every ungranted lot in this city! How desirable, then, to establish a principle of law which would give vitality to what are called "Colton Grants!"

The foregoing remarks on the Sherback claim are based entirely upon the case as decided by the Court; and no allusion is made to the new evidence of its fraudulent character, set forth in the application for a rehearing. Supposing that none of the statements there made should be established, we are certain that the claim ought to be, and we believe that in the Supreme Court it will be, rejected, for the want of power in the Perfect to make such a grant.

NOTE 27.

POWERS CONFERRED BY THE REGULATION OF 1828 COULD NOT BE DELEGATED.

In order to fully understand the reasoning of the Court on this point, it will be well to recur to fundamental principles. It is a general rule of law, so universally received as to have grown into a maxim, that a delegated authority to one, does not authorize him to delegate it to another. *Delegata potestas non potest delegari.*—Broom's Legal Maxims.

The sixteenth section of the law of August 18th, 1824, is as follows:

"SECTION 16. The executive, conformably with the principles established in this law, will proceed to the colonization of the Territories of the Republic."

This conferred upon the President of Mexico full power over colonization in California, under and conformably to the principles of that law. He, therefore, could himself grant in colonization, or make such regulations, and appoint such agents as he might deem proper for that purpose. Hence the regulation of 1828, the power to make which has never been doubted, appointing the political chief the agent for making grants of a certain kind, giving the Territorial Deputation a sort of supervisory power over this agent, and reserving certain cases for the immediate action of the President himself, such as empresario grants, and concessions made by the Governor to individuals, but disapproved by the Deputation. There was nothing in the law of 1824 which required the President to select any agent, or, if he did appoint an agent, to appoint the political chief. He might have appointed any one else, or any number of persons; or, having appointed one, he might have revoked that appointment, and delegated the power to others, or have exercised it himself. The law of 1824 conferred upon the Governor or political chief of territories no power to grant in colonization. They derived that power from the Executive of the Republic, and they were *his agents for that purpose.* But the instrument by which that power was conferred—the Regulation of 1828—contains no power of substitution. It therefore could not be, by such agent, delegated to another.

It is plain, then, that if the power of the Governor and Territorial Deputation of California over pueblo lands was derived solely from the law of 1824, and regulation of 1828, all authority conferred by them upon Alcaldes and Ayuntamientos to grant such lands in private ownership, would be void. But, as stated by the Court, and more particularly referred to in Note 14, this power existed prior to, and independent of, that law and regulation. Moreover, the law of 1824 was, from its very terms, inapplicable to pueblo lands. The old laws relating to such lands, recognized them as being dedicated to pueblos, for pueblo purposes, but the control over these pueblos was vested in the Governor, subject to a sort of supervision by the Deputation. The municipal officers of pueblos generally were authorized to grant certain portions of these lands in lots to private individuals. But this authority might have been restricted or abrogated by the Governor, as representing the political power of the State, or he may have exercised it himself, *provided* he did not destroy the uses and trust to which this land had been dedicated or assigned—the building up and support of a pueblo.

NOTE 28.

CHARACTER OF PUEBLO TITLES.

In order to fully understand the grounds of this part of the decision of the Court and its legal effects, we must refer back to other parts of the opinion, and to the laws which are there quoted.

According to the old laws, the municipal officers of pueblos could not, without the license or approval of the King, grant to individuals any lands within the pueblo limits; but with such license or approval, such grants vested in the grantee a full ownership with right of alienation. On the other hand, neither the King nor his officers could grant such pueblo lands to others not *vecinos*, and contrary to the object for which the pueblo was formed, and any such grant made by him was declared void and without effect.

Again, on page 28 of the opinion of the Court, it is decided that the pueblo had a certain right or title to the lands within its general limits, which lands could, under the authority shown to have been given to its municipal officers, be granted by them to individuals in private ownership. And the Court now says, that the title of the pueblo to these lands was *in trust* for the benefit of the entire community, or, in other words, for the special objects for which the pueblo was established.

We do not find anything contradictory in these conclusions.

It is very clear that all the land within the limits of the four square leagues to which each Spanish pueblo was entitled, was donated to some pueblo purpose, and was appropriated by the operation of general laws to such use exclusively. Whether this general tract of four square leagues was, in any particular pueblo, divided up into *propios*, *ejidos*, etc., and each portion singled out for its appropriate purpose, presents a question which has no bearing upon the property relation between the pueblo and the King, in any practical point of view. For these subdivisions and special assignments were matters of internal and domestic concern to the pueblo only, and touched the public interest only so far as that should be promoted by the prosperity and convenience of the pueblo itself. It was certainly for the interest of the townspeople that their commons and municipal reserves should be respectively marked and separated from that portion which was to be divided up and granted in *solares* and *suertes*, for building lots and cultivation; and, as regards the internal economy of the pueblo, such an arrangement was very desirable. But this subdivision was designed solely for setting apart a certain portion of the pueblo land for a special pueblo purpose. It was the allotment to a particular use of particular parts of the tract, the whole of which was appropriated by law to the general purposes of the pueblo. Sometimes no such subdivision and allotment was made. We have the authority of Jimeno and Arguello, that none had been made in 1840 for any pueblo in California, except Monterey. And if none was subsequently made for the Pueblo of San Francisco, and we have heard of none, then all its pueblo land was subject to be granted in *solares* and *suertes*.

But, as before remarked, such subdivision or allotment to special purposes of particular portions of the general tract, had nothing to do with the title of the pueblo to that tract of land. The appropriation or dedication which the law made, was sufficient to establish title in the pueblo or community to the entire tract of four square leagues; and it matters not whether the legal title passed from the King or government to the corporation known as the pueblo, or remained in him or it, subject to the uses and trusts to which the land had been appropriated by law. In either case the right of property in the pueblo is clearly shown.

But while the right of property was in the pueblo, it by no means followed that the control and disposition of that property was vested in the pueblo or its officers. It was not a corporation sole, but a political organization for municipal purposes, and the powers of this organization and of its officers were subject to the political sovereignty of the State. That might give or withhold the disposition of this property; it might confer this power upon others, or it might exercise it in any way it deemed proper, subject always to the uses and objects to which the laws had appropriated this land. It seems difficult for some to understand this distinction between the right of property in the pueblo, and the right of the pueblo to dispose of such property. And yet the two are entirely different.

We, therefore, can perceive nothing contradictory in the opinion of the Court, that while these lands belonged to the pueblo, the disposition of them was not exclusively in the pueblo or its officers, but was in certain respects subject to the will of the sovereign power of the State.

Nor, in our opinion, does it matter, so far as the general right of property in the pueblo is concerned, whether the title of the pueblo to this land was absolute with respect to its disposition, or whether it was burthened with a charge or trust, and devoted to certain pueblo uses. The title in the one case is as valid and perfect as in the other.

But was the title of a pueblo, under Spanish and Mexican law, to the lands within its legal boundaries of such a character that it could maintain its possession against others and eject intruders? It was so construed by Spanish and Mexican jurisconsults and courts. Even Elizondo, who was one of the strongest advocates of royal power and royal prerogative, holds that towns may sustain suit against all intruders within their *terminos*, and that the Courts must maintain such municipalities in all the rights which the laws have conferred upon them; and moreover, that the king himself can issue no valid grant or license which conflicts with these rights.

The same view of the law was taken by the Supreme Court of Texas with respect to the *ejidos* of the town of San Antonio. Lewis v. San Antonio, 7 Texas Reports, p. 288.

We are aware that some of our Courts in California have expressed the opinion that pueblos had only a *use* or *usufruct* in pueblo lands, and that it had no such title as would enable it to eject intruders under the license or authority of the Government, the legal title being still in the Government and not in the pueblo. Perhaps those opinions resulted from the character or defect of evidence in the particular cases decided, or from a misapprehension of the exact nature of the rights of pueblos under the Spanish and Mexican system of jurisprudence. But be that as it may, we are satisfied, after a careful and thorough examination of the laws and authorities on this subject, that our Supreme Court is right in its decision that the right of a pueblo to the land within its limits was not a mere *use* or *usufruct*, but was a right of *property*—a good, valid and perfect title to the land—although such land was held in *trust* by the pueblo for certain pueblo purposes; and that the fact that the sovereign power of the State might regulate and control these uses and the execution of this trust, is no argument against the legal position that the right of property in this land was vested exclusively in the pueblo.

NOTE 29.

CONCLUSIONS OF THE COURT RESPECTING TITLES HELD BY INDIVIDUALS WITHIN THE PUEBLO LIMITS.

The foregoing conclusions of the Court have been made the subject of much comment in the newspapers. It is very natural that a decision upon questions involving title to a large portion of the real estate in San Francisco, should not only cause dissatisfaction in some quarters, but should be made the subject of unfavorable criticism. So far as such criticism is confined to legitimate argument, we do not find it objectionable. Some think that newspaper discussions of judicial questions are not only wrong but injurious, as they are calculated to affect the independence of the bench, and subject the judges to the influence of popular opinion and popular prejudice. We are not of that opinion. On the contrary, we think that such discussions, when properly conducted, are beneficial, for they not only tend to elucidate the questions examined, but also to make our courts more careful in their decisions, knowing that if such decisions are clearly erroneous, their errors will be pointed out and exposed to public view. Truth suffers no injury from argument. A judicial decision which will not bear just criticism, ought never to be delivered.

But some of the newspaper criticisms upon the decision of the Court in this case have not been of that character, for they have misstated and misrepresented its conclusions. This is more especially true of those which discussed the opinion before it was published. Pretending to have obtained a knowledge of its contents, they boldly attempted to set forth its conclusions and to discuss its consequences, with the evident purpose of effecting some change in the result, or at least of producing a disagreement among the judges. But the published opinion showed that nearly all these statements with respect to its contents, were utterly untrue, and that the writers of the articles either knew nothing of the decision, or willfully misrepresented its purport. The most charitable, as well as natural, inference is that these writers knew nothing of the opinion or its contents, except perhaps the fact that there was some point of disagreement between the judges, and that two of them were writing out separate opinions, or that one of them had been exclusively engaged for months in examining this particular case. That fact alone was a sufficient clue to what the decision would be, for there is scarcely a member of the bar in San Francisco who did not believe that the Court, if not precluded by the decisions of its predecessors from examining into the merits of the case, would adjudge these sheriff's sales to be invalid. Such was the almost universal opinion. If precluded from this examination by the principle of *stare decisis*, the case might be disposed of in a few hours; but the examination being entered into, and months being spent in investigating Spanish and Mexican law books, the natural and almost necessary inference was that the Peter Smith titles were to be declared invalid. This we think accounts for all the pretended knowledge of the contents of the decision before it was rendered, especially as the statements in nearly every other respect were incorrect. But many of the erroneous statements then made have been repeated again and again since the opinion of the Court was published. A large portion of these newspaper articles are evidently written by the same hand as those which appeared before the decision was made. What is the object of this studied and continuous misrepresentation of the contents and purport of a judicial decision? We can see no other than that of creating alarm among property holders, and of destroying public confidence in the correctness and stability of the decision. There may be some hidden purpose to be subserved which is not known to the public. Such studied misrepresentations, coupled with personal attacks, would indicate something of this kind. In commenting upon these newspaper criticisms, we shall refer only to their statements with respect to the legal effects of this decision. So much of them as reflects upon the character of the individual judges, and charges political or mercenary motives, we leave entirely out of consideration. Such assertions and insinuations, whether true or false, are mere personal libels, and are utterly excluded from any forum of discussion into which gentlemen will consent to enter.

One point urged in nearly all these criticisms, is, that this decision virtually destroys the city's title, and makes all the land, not granted by Mexican Alcaldes, within the limits of the old pueblo, government land, or what we call *public domain;* in fine, that it overrules the doctrine of Judge Heydenfeldt's opinion in Cohas *vs.* Raisin.

We do not think so. On the contrary, we think this decision sustains every important point in Judge Heydenfeldt's opinion. Let us see what were the points decided in Cohas *vs.* Raisin, and in what respect they differ from the conclusions in Hart *vs.* Burnett, et al.

In the former, the Court concludes with the following propositions:

"1st. That, by the laws of Mexico, towns were invested with the ownership of lands.

"2d. That, by the law, usage, and custom of Mexico, the Alcaldes were the heads of the Ayuntamientos, or town councils, were the executive officers of the towns, and rightfully exercised the power of granting lots within the towns, which were the property of the towns.

"3d. That before the military occupation of California by the army of the United States, San Francisco was a Mexican Pueblo, or municipal corporation, and was invested with title to the lands within her boundaries.

"4th. That a grant of a lot in San Francisco, made by the Alcalde, whether a Mexican or any other nation, raises the presumption that the Alcalde was a properly qualified officer, that he had authority to make the grant, and that the land was within the boundaries of the pueblo."

In the latter, the Court concludes as follows:

"First. That San Francisco was, at the date of the conquest and cession of California, and long prior to that time, a pueblo, entitled to and possessing all the rights which the law conferred upon such organizations.

"Second. That such pueblo had a certain right or title to the lands within its general limits, and that the portions of such lands which had not been set apart, or dedicated to common use, or to special purposes, could be granted in lots by its municipal officers to private persons in full ownership.

"Third. That the authority to grant such lands was vested in the Ayuntamiento, and in the Alcaldes or other officers who at the time represented it, or had succeeded to its "powers and obligations."

"Fourth. That the official acts of such officers, in the course of their ordinary and accustomed duties, and within the general scope of their powers, as here defined and explained, will be presumed to have been done by lawful authority.

"Fifth. That these municipal lands to which the City of San Francisco succeeded, were held in trust for the public use of that city, and were not, either under the old government or new, the subject of seizure and sale under execution.

"Sixth. That this property, and these trusts were public and municipal in their nature, and were within the control and supervision of the State sovereignty, and that the Federal Goverement had no such control or supervision."

By comparing these two sets of conclusions, it will be seen that every proposition in the former is reaffirmed in the latter, except the statement, at the end of the fourth conclusion, of a presumption of law, viz: "that the land (granted by an Alcalde) was within the boundaries of the pueblo;" and upon this proposition we think the Court, in Hart v. Burnett, et al., had no occasion to express any opinion, as it says the land in dispute was admitted to be within the pueblo boundaries, even as confirmed by the Commission and United States District Court, under the law of 1851.

This last decision affirms that San Francisco was a Mexican pueblo, and it proves this by arguments and authorities infinitely more satisfactory and conclusive than those given in Cohas v. Raisin.

It affirms that this pueblo was invested with title to the lands within its boundaries; and moreover, it shows what these boundaries were, and the origin and nature of the title. This, Cohas v. Raisin failed to do, at least in a full and satisfactory manner.

It affirms that the Alcaldes and other officers, representing the Ayuntamiento or Town Council, had authority to grant these pueblo lands in private ownership, except so much of them as had been set apart and dedicated to common use or to special purposes. Certainly no one will deny the correctness of this exception.

It affirms the validity of grants made by the municipal authorities of the pueblo during military occupation and after complete conquest. This is plainly implied in the words, "those who had succeeded to its (the Ayuntamiento's) powers and obligations." If there be any doubt on this point it will be removed by reference to the body of the opinion where the Court discusses and distinctly sustains the proposition, said to be the only point really raised in Cohas v. Raisin, that "such power of conveyance continued in such municipal officers during the military occupation of California by the United States." Again, near the close, the Court says, the effect of its decision is "to declare valid Alcalde grants made before and after the cession of California; also the title to all lots held under sale by Commissioners of the Funded Debt."

It also affirms the rule that the official acts of Ayuntamientos and Alcaldes in granting pueblo lands, within the general scope of their powers, "will be presumed to have been done by lawful authority."

We thus see that every proposition of Cohas v. Raisin, with the single exception which we have mentioned, and which had no connection with the case of Hart v. Burnett et al., has been reaffirmed in the latter decision.

It is true that some have inferred from certain expressions used in Judge Heydenfeldt's opinion, that the pueblo of San Francisco had such a title to the land within its limits that its municipal officers could dispose of them according to their own will, and entirely independent of the supreme power of the State. We do not think that opinion sustains such an inference; and even if it did, we must remember that Judge Heydenfeldt's *opinion* was not concurred in by the majority of the Court. The other two Judges concurred in the *decision*, but for reasons which are given in *their* opinion, which differs from that of Judge Heydenfeldt in almost every essential particular. The decision of the Court in that case is stated in the conclusions, not one of which, as we have shown, is overruled in Hart v. Burnett et al.

In Cohas *vs.* Raisin it is decided that a Mexican pueblo was invested with *title* to lands within her boundaries, but no attempt is made to define the *character* of that title. In Hart *vs.* Burnett, et al., it was necessary to ascertain the character of the title, in order to determine whether the lands so held were subject to levy and sale under execution, for debts contracted by municipal officers, and it is decided that these lands were held by the pueblo *in trust* for certain pueblo purposes. So far from overruling, or even questioning the views expressed by Judge Heydenfeldt in Cohas *vs.* Raisin, the Court says, expressly, that it sees nothing in those views inconsistent with "holding the invalidity of the sheriff's sale. It does not follow, because the title was in the pueblo, or in the city, as its successor, that it was such a title, or so held that it might be disposed of by forced sale." We think, therefore, that the attempt on the part of the advocates of the Peter Smith titles to array these two decisions against each other, has proved utterly futile.

But it has been strenuously urged that the present decision has so reduced and limited the title or ownership of San Francisco in and to these lands, and so restricted the powers of its municipal officers with respect to their disposition, as to destroy the validity of all titles under sales of lots by the Ayuntamientos and Alcaldes.

We think these inferences are utterly unfounded, and that the suggestions are made merely to create alarm. Such sales are as fully sustained by this decision as they were by that of Cohas *vs.* Raisin. The prices paid for these lots have nothing to do with the validity of the titles issued by the Alcalde. So far as the validity of title is concerned, it matters not whether the grantee paid thirty dollars or three thousand dollars for his lot. Suppose an officer is appointed by law to issue grants or patents, and that the same law authorizes him to collect a fee of one dollar for each grant or patent, but he collects a fee of one hundred dollars: does this fact invalidate the patent or title which is issued in due conformity with law? The extra charge may be recovered, and the officer punished; but the title or patent is valid, at least in the hands of innocent parties. At any rate, the Court has decided in this case, that the official acts of the Ayuntamiento and Alcalde, in issuing these titles, "will be presumed to have been done by lawful authority," and it will rest upon those who impeach their validity, to prove that these officers exceeded their powers.

Again: attempts have been made to create alarm in the minds of those who hold lands granted by Governors, on the outskirts of the pueblo, in quantities greater than the ordinary size of town-lots. A reference to the opinion of the Court will show that all such fears are utterly groundless. The Court says: "If Governors of California have granted lands within the general limits of pueblos, it will be presumed, unless the contrary be shown, that such grants were made in accordance with the objects and uses for which such lands had been assigned and dedicated, by the laws, to the pueblos. The whole matter was subject to the control and direction of the Governor and Territorial Deputation, and the official acts of such officers, within the general scope of their powers, are presumed to have been done by lawful authority." Could plainer language be used?

But let us suppose that the construction which Judge Cope and those who sustain the validity of the Peter Smith sales put upon the decision of Cohas v. Raisin, had been sustained by the Court in Hart v. Burnett, et al., what would have become of all grants by Governors and Territorial Deputations within the limits of the old pueblo? We have already stated, that in our opinion there is nothing in the decision of Cohas v. Raisin to sustain the position that the Pueblo of San Francisco had an absolute and unconditional title to the land within the pueblo limits, with full and unrestricted power of disposition in its municipal authorities. It is there merely decided that the pueblo *had title* to these lands; but the character of that title was not in any manner considered in the conclusions arrived at by the Court in that case. It is true that in Touchard v. Touchard (5 Cal. R., p. 306) it was said, in reference to Cohas v. Raisin, that by that decision the right of towns to acquire and dispose of land, was placed "upon as high ground as that of natural persons—a right of property beyond even the reach of royal interference." A reference to the decision in Cohas v. Raisin will show that such a conclusion was never arrived at, or if arrived at, it was not announced. Moreover, such a conclusion was so entirely foreign from the question to be decided by the Court in that case, and so directly opposed to the authorities referred to in the opinions of the Judges, as well as to the spirit and purport of the whole system of Spanish and

Mexican jurisprudence relating to pueblos, that it would have been regarded in no other light than a mere *obiter dictum* of the particular Judge.

But let us suppose that the *theory* of that decision was as announced in Touchard v. Touchard, (an overruled case) and as contended for by Judge Cope; and then notice its effects upon titles in San Francisco, as compared with the decision in Hart v. Burnett, et al., and see which theory tends most to *settle* titles and to conserve existing rights.

If the lands within the limits of this pueblo were vested in its municipal authorities, the same as in natural persons, and placed beyond any control or interference, even by the sovereign power of the State, of course such title must have so vested at the time the pueblo was organized near the end of 1834; consequently every act of the sovereignty, as represented by the Governor and Deputation or Junta, respecting these lands, or their disposition, was utterly null and void. What then becomes of all grants made by Governors within these limits subsequent to 1834? What becomes of the *Suerte* of four hundred varas granted by Governor Gutierrez to Guerrero in 1836; of the *Solare* of one hundred varas by Governor Alvarado to Vallejo in 1839; of the *Suerte* of three hundred varas by Alvarado to Noe in 1840, and of two hundred varas to Felis in 1843; of the two fifty vara lots granted by Pico to Smith in 1845, of one fifty vara lot to Leidesdorff, and two fifty vara lots to Hinckley in 1846? And what becomes of such portions of the Bernal and Noe ranchos, granted in 1839 and 1845, as fall within the pueblo limits? All must go by the board, if the *theory*, incorrectly attributed to the Cohas v. Raisin decision, is established. And yet these grants may all have been made and received in good faith. Many of them have been occupied for years by the grantees and their successors; those presented to the commission have been confirmed and patented; some of them lie in the most improved parts of the city, and are covered with buildings worth millions of dollars, erected by such grantees and their successors. Indeed such titles have heretofore been regarded as the very best in San Francisco, and no one has supposed for a moment that they were declared invalid by the Cohas v. Raisin decision. And yet such would have been the necessary consequence of that decision, had it been as is stated in Touchard v. Touchard, and as is now claimed by Judge Cope.

How then can it be charged against the decision of Hart v. Burnett, et al., that it unsettles titles in San Francisco? It of course *unsettles* the Peter Smith claimants, but it *settles* their claims now and forever. Outside of their sheriff deeds, (in which no one had full confidence, for the land so held could never be sold for one-tenth its real value) every *bona fide* grant and title is virtually recognized and confirmed. The Court is particularly careful, in its opinion, to give no cause for alarm. It declares valid all grants by Governors or Alcaldes within the pueblo limits, made for the general purposes of settling and building up a town, and that the official acts of such officers will be *presumed* to have been done by lawful authority.

Considering it in all its bearings and consequences, we regard this as the most conservative decision which has been made by our Courts for years, and we are confident that such will become the settled conviction of all who will give it a careful and dispassionate examination.

NOTE 30.

THE VAN NESS ORDINANCE.

The decision of the Court in this case has also been strongly objected to, because it confirms the Van Ness Ordinance; and it is alleged that, while the holders under the Peter Smith sales did pay *something* for their titles, those holding under that Ordinance really pay *nothing* for large tracts of valuable land; that that Ordinance was designed to enrich a few individuals at the expense of all the tax-payers of San Francisco; and moreover, that its passage and ratification was obtained by fraud and corrupt means.

We do not see how the Court could have decided otherwise than it has on this matter, nor do we perceive what the justice of a law, or the means used to procure its passage, has to do with its constitutionality when passed, especially in a collateral proceeding like this. If the members of the Common Council which first passed this Ordinance were bribed, or acted from corrupt motives, why were not the proper legal proceedings instituted to restrain their action; and why was not this fraud exposed to the Legislature when that body made this Ordinance a law? With respect to the policy or justice of a law, the Court has nothing to do. It merely decides upon its constitutionality and the legal effect of its provisions.

The writer of these Notes opposed that Ordinance from its inception, because he believed its effects would be "to enrich a few individuals, at the expense of the whole city"—individuals who had squatted, without any right and contrary to law, upon land which belonged, not to the United States, but to San Francisco. But after that Ordinance has been passed by the municipal authorities of San Francisco, and made a law by the Legislature, he can perceive no reason why the titles of the grantees under it are not valid. Perhaps the Common Council and people of San Francisco acted unwisely and without due consideration; but that fact has nothing to do with the constitutionality of the law, or the validity of titles acquired under it. Suppose they did exhibit a want of wisdom in passing an ordinance "which enriched a few at the expense of the many;" this is not the only foolish act which they have committed within the last ten years, nor, in all probability, will it be the last one of the same character.

CONCLUSION.

The very short time allowed for the preparation of the foregoing Notes has not permitted any careful revision of the manuscript before placing it in the hands of the printer; consequently, some of the contents of one Note may have been repeated in another, and the same question have been discussed in several different places.

The object has been simply to furnish additional facts and authorities in support of so much of the decision of the Court in Hart v. Burnett, et al., as affects the title of the city of San Francisco to its municipal lands, and the validity of what are commonly called Alcalde titles. It is a matter of great importance to every one that litigation on on this matter should cease, and that full confidence should be felt in that class of titles under which the most valuable portion of real estate in this city is held. The author of these Notes has here offered his mite towards the accomplishment of this result.

With respect to the question more particularly involved in these two cases—the leviable character of these lands under execution for debts contracted by municipal officers, and the validity of sales by the Sheriff under such execution—the author will merely remark that he never had any interest in any Peter Smith title, or against it, and that he never had any occasion to investigate these titles or to form an opinion upon their validity. He therefore has made no comments upon that part of the opinion of the Court. Indeed, the question is there so elaborately discussed as to leave little or no room for comment; and certainly nothing which he could add in the way of Notes would give any additional force to the arguments and reasoning of the Court.

This remark is equally applicable to the question of *stare decisis*. The opinions of the Judges seem to us to have completely exhausted the legal learning upon that subject. We therefore leave the reader to form his own conclusions; and if these should differ from those of the Court, we think he will admit that the reasoning of Judge Baldwin's opinion is exceedingly able and well worthy of a careful perusal.

As the Van Ness Ordinance has become a matter of very general interest, the Act is copied in full.

CHAPTER LXVI.

An Act concerning the City of San Francisco, and to ratify and confirm certain Ordinances of the Common Council of said City.

[Approved March 11, 1858.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. *Whereas,* The common council of the city of San Francisco passed an ordinance approved by the mayor on the twentieth day of June, A. D. one thousand eight hundred and fifty-five, which ordinance is in the words and figures following, to wit:

Number eight hundred and twenty-two—Ordinance for the settlement and quieting of the land titles in the city of San Francisco.

The People of the City of San Francisco do ordain as follows:

SECTION 1. It shall be the duty of the mayor to enter, at the proper land office of the United States, at the minimum price, all the lands above the natural high-water mark of the Bay of San Francisco, at the time of the admission of California into the Union as a State, situated within the corporate limits of the city of San Francisco, as defined in the act to incorporate said city, passed April fifteenth, one thousand eight hundred and fifty-one, in trust for the several use, benefit, and behoof of the occupants or possessors thereof, according to their respective interests.

SEC. 2. The city of San Francisco hereby relinquishes and grants all the right and claim of the city to the lands within the corporate limits, to the parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, A. D. one thousand eight hundred and fifty-five, and to their heirs and assigns forever; excepting the property known as the slip property, and bounded on the north by Clay street, on the west by Davis street, on the south by Sacramento street, and on the east by the water-lot front. And excepting, also, any piece or parcel of land situated south, east, or north of the water-lot front of the city of San Francisco, as established by an act of the Legislature of March twenty-sixth, A. D. one thousand eight hundred and fifty-one; *Provided*, such possession has been continued up to the time of the introduction of this ordinance in the common council; or, if interrupted by an intruder, or trespasser, has been, or may be, recovered by legal process; and it is hereby declared to be the true intent and meaning of this ordinance, that when any of the said lands have been occupied and possessed under and by virtue of a lease or demise, they shall be deemed to have been in the possession of the landlord or lessor under whom they were so occupied or possessed; *Provided*, that all persons who hold title to lands within said limits by virtue of any grant made by any ayuntamiento, town council, alcalde, or justice of the peace of the former pueblo of San Francisco, before the seventh day of July, one thousand eight hundred and forty-six; or grants to lots of land lying east of Larkin street and north-east of Johnston street, made by any ayuntamiento, town council, or alcalde of said pueblo, since that date, and before the incorporation of the city of San Francisco by the State of California; and which grant, or the material portion thereof, was registered or recorded in a proper book of record deposited in the office, or custody, or control of the recorder of the county of San Francisco, on or before the third day of April, A. D. one thousand eight hundred and fifty; or by virtue of any conveyance duly made by the commissioners of the funded debt of the city of San Francisco, and recorded on or before the first day of January, one thousand eight hundred and fifty-five, shall, for all the purposes contemplated by this ordinance, be deemed to be the possessors of the land so granted, although the said lands may be in the actual occupancy of persons holding the same adverse to the said grantees.

SEC. 3. The patent issued, or any grant made by the United States to the city, shall inure to the several use, benefit, and behoof, of the said possessors, their heirs and assigns, mentioned in the preceding section, as fully and effectually, to all intents and purposes, as if it were issued or made directly to them individually and by name.

SEC. 4. The city, however, as a consideration annexed to the next two preceding sections, reserves to itself all the lots which it now occupies, or has already set apart for public squares, streets, and sites for school-houses, city-hall, and other buildings belonging to the corporation; and also such lots and lands as may be selected and reserved for streets and other public purposes, under the provisions of the next succeeding sections.

SEC. 5. The city shall have the right to proceed to lay out and open streets, as soon as the corporation may deem it expedient, in that part of the city west of Larkin street and south-west of Johnston street, and reserves the right to take possession of such lands as it may be necessary to occupy for that purpose, without compensation; and to assess, in the manner provided by the present or any existing charter of the city, upon the lands bounded on such streets, the whole expense of laying out, opening, grading, and constructing the same; and payment of the costs of said improvements shall be deemed a charge upon the lands mentioned in this section, to which the city of San Francisco relinquishes her right and title by the second and third sections of this ordinance.

SEC. 6. The city shall also have the right to select and set apart, from the lands west of Larkin street and south-west of Johnston street, as many lots, not exceeding one hundred and thirty-seven and a half feet square each, as the mayor and common council may, by ordinance, determine to be necessary for sites for school-houses, hospitals, fire-engine-houses, and other public establishments necessary and proper for the use of the corporation; and may lay out and reserve upon the said lands, at convenient and suitable points and distances, public squares, which shall not embrace more than one block, corresponding in size to the adjoining blocks; *Provided*, that the selection shall be made within six months from the time of the passage of this ordinance; and that the city shall not, without due compensation, occupy, for the purposes mentioned in this section, after the laying out of the streets aforesaid, more than one-twentieth part of the land in possession of any one person; and that such possessor shall voluntarily assent thereto; or, refusing to do so, shall not be entitled to the benefit of any concession contained in the second and third sections of this ordinance.

Sec. 7. The lots and lands reserved for the use of the corporation, under the provisions of the next preceding section, shall be selected in localities likely to be most convenient and suitable for their respective uses, and in such proportion to the quantity in the possession of the respective occupants as to make the apportionment as nearly equal as circumstances will admit.

Sec. 8. The selection of said lands and lots shall be made by a commission, to consist of three persons, who shall be chosen by the common council, in joint convention, who shall report the same to the common council for its approval; and, upon such approval, deeds of release to the corporation for the lands thus selected shall be executed, acknowledged and recorded, in which deeds shall be specified the uses for which they are granted, reserved and set apart, respectively.

Sec. 9. Although the city hereby renounces in favor of the actual possessors, in accordance with the provisions of section second, any right or claim of its own, nothing in this ordinance is intended to prejudice any other outstanding title to the said lands adverse to the said possessors.

Sec. 10. Application shall be made to the Legislature to confirm and ratify this ordinance, and to Congress to relinquish all the right and title of the United States to the said lands, for the uses and purposes hereinbefore specified.

Sec. 11. Nothing contained in this ordinance shall be construed to prevent the city from continuing to prosecute, to a final determination, her claim now pending before the United States Land Commission, for pueblo lands, for the several use, benefit, and behoof, of the said possessors mentioned in section two, as to the lands by them so possessed, and for the proper use, benefit and behoof of the corporation as to all other lands not hereinbefore released and confirmed to the said possessors.

Sec. 12. That all ordinances, or parts of ordinances, conflicting with this ordinance, or any of its provisions, be and the same are hereby repealed.

[Approved, June twentieth, one thousand eight hundred and fifty-five.

S. P. Webb, Mayor.]

And whereas, the said common council passed another ordinance, approved by the mayor of said city, September twenty-seventh, A. D. one thousand eight hundred and fifty-five, which last mentioned ordinance is in the words and figures following, to wit:

Number eight hundred and forty-five.—Ordinance providing for selecting and designating public squares and reservations for hospitals, fire-engines and school purposes, and for adopting the plan of streets in the western and south-western portion of the city, according to the provisions of ordinance number eight hundred and twenty-two, and confirmatory of said ordinance number eight hundred and twenty-two.

The People of the City of San Francisco do ordain as follows:

SECTION 1. Under and by virtue of the provisions of the ordinance of the common council, number eight hundred and twenty-two, entitled "an ordinance for the settlement and quieting of land titles in the city of San Francisco, approved June twentieth, one thousand eight hundred and fifty-five," the board of aldermen and board of assistant aldermen shall meet in joint convention, at their next regular meeting after the passage of this ordinance, and proceed to elect three commissioners, who shall have the powers, and proceed to discharge the duties specified in section eight of said ordinance number eight hundred and twenty-two.

SEC. 2. It shall be the duty of the city surveyor, acting in conjunction with the said commissioners, and with their concurrence, to furnish, by way of recommendation to the common council, within one month from the date of their appointment, a plan for the location and dimensions of the streets to be laid out within the city limits, west of Larkin and south-west of Johnston streets, upon which plan shall also be designated the lots and grounds selected by the said commissioners for the use of the city under the provisions of the aforesaid ordinance number eight hundred and twenty-two; *Provided,* that the compensation of said commissioners shall not exceed the sum of one hundred dollars each, payable when the common council may legally make an appropriation therefor.

SEC. 3. The said ordinance number eight hundred and twenty-two, referred to in the preceding section one, is hereby re-ordained, ratified and confirmed in all its parts.

[Approved, September twenty-seventh, one thousand eight hundred and fifty-five.
JAMES VAN NESS, Mayor.]

And whereas, in pursuance of the aforesaid ordinances, commissioners were appointed by the common council, who, in conjunction with the city surveyor of said city, agreed upon and reported, for the approval of the common council, a plan for the location of streets, public squares, and lots for public uses, to be laid out west of Larkin and south-west of Johnston streets, in said city, accompanied by a map of the same, which said plan and map was, by the justices of the peace exercising the powers of a board of supervisors of the city and county of San Francisco, adopted, approved and ratified by an order bearing date the sixteenth day of October, A. D. one thousand eight hundred and fifty-six, which is in the words and figures following, to wit:

The Board of Supervisors of the City and County of San Francisco, do ordain as follows:

SECTION 1. That the plan or map of the Western Addition, reported by the commission created under an ordinance of the last common council of the city of San Francisco, be adopted by this board, and be declared to be the plan of the city, in respect to the location and establishment of streets and avenues, and the reservation of squares and lots for public purposes in that portion of the then incorporated limits of said city, lying west of Larkin, and south-west of Johnston streets.

Be it therefore enacted, that the within and before-recited order and ordinances be, and the same are hereby ratified and confirmed; and all the land entered, or to be entered, in the United States Land Office, in pursuance of section one of the first recited of said ordinances, in trust, shall pass and inure to, and be deemed to have immediately vested in the occupants thereof, for their several use and benefit, according to their respective interests, in execution of the trust designated in an act of Congress, entitled an act for the relief of citizens of towns upon the public lands of the United States, under certain circumstances, approved May twenty-third, one thousand eight hundred and forty-four, as extended and applied by an act of Congress, entitled an act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for others purposes, approved March third, one thousand eight hundred and fifty-three; and it shall be the duty of all courts and officers to take judicial notice of the said order and ordinances, as hereinbefore recited, without further proof, as fully and effectually, to all intents and purposes, as if they were public acts of the State Legislature.

Sec. 2. That the grant of relinquishment of title made by the said city in favor of the several possessors, by sections two and three of the ordinance first above recited, shall take effect as fully and completely, for the purpose of transferring the city's interest, and for all other purposes whatsoever, as if deeds of release and quit-claim had been duly executed and delivered to and in favor of them individually and by name; and no further conveyance or other act shall be necessary to invest the said possessors with all the interest, title, rights, benefits and advantages, which the said order and ordinances intend or purport to transfer or convey, according to the true intent and meaning thereof; *Provided,* that nothing in this act shall be so construed as to release the city of San Francisco, or city and county of San Francisco, from the payment of any claim or claims due or to become due this state against said city, or city and county, nor to effect or release to said city and county any title this state has or may have to any lands in said city and county of San Francisco.

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10

THE MISSIONS IN CALIFORNIA,

AND THE

RIGHTS OF THE CATHOLIC CHURCH

TO THE PROPERTY PERTAINING TO THEM.

ARGUMENT BEFORE THE SUPREME COURT OF CALIFORNIA,

BY

HORACE HAWES, ESQ.

SAN FRANCISCO:
PRINTED AT THE DAILY EVENING NEWS OFFICE,
1856.

DEFENDANT'S BRIEF.

SUPREME COURT—JANUARY TERM.

JOHN NOBILI, Pastor of the Catholic Church of Santa Clara, Appellant,

versus

JOSHUA W. REDMAN, Respondent.

I. THE Plaintiff brought suit in ejectment to recover a lot of land known as the Orchard of Santa Clara, which formerly constituted a part of the cultivated lands pertaining to the Mission of that name. He exhibited no grant, conveyance or other paper title and pretended to no other right to recover except the fact that the land in question had always been occupied and cultivated by the Mission, and that he was now the regularly constituted Pastor of the Catholic Church at that place. On this state of facts, he was non-suited, and appeals. It is scarcely necessary to look into the record, for all the facts which the Plaintiff attempted to prove, are known in history, nd the Vicar General's legal opinions, however correct they may be, are superceded y the numerous works of authority which the Court have at their command. That he plaintiff has shown no right to recover seems to me to be too plain to admit of rgument. But yet a brief examination into the character and origin of the estabishments called Missions, and the legal rights of the Spanish and Mexican Churches seems to be called for, as this is the first case that has come before this Court in which such an investigation would be pertinent.

II. I propose to put the plaintiff's pretensions to the test of those laws alone under which the rights of the Catholic Church, such as they may be, originated, and by which they were governed in this country previous to the change of sovereignty, so that she may have no occasion to complain of the change, but may rest satisfied.

III. The authorities referred to will tend to establish the following

POINTS:

1. That the Church was originally incapable of acquiring, holding, or conveying landed property.

2. That subsequently, when this power to acquire and hold (not to alienate) worldly goods, so variant from the divine purposes of its establishment, was conferred upon the Church, it was under great restrictions, and could never be lawfully exercised without the express sanction of the sovereign power of the State to each acquisition.

3. That the *modes* by which the Church acquires property, or the *titles* and *documents* requisite to confer the right, are the same as those which are necessary in the case of individuals or other corporations, with the sovereign license superadded.

4. That unlike the case of individuals, however, the right of the Church to acquire property is not inherent, or of Divine origin, but is purely civil, created by the civil laws, and subject to the limitations which they may impose.

5. That although the Church as a mystic body restricted to the spiritual objects of its divine institution, exists independently of, and beyond the control of the state, yet considered as a corporation, and the possessor of temporal goods, it is a political community merely, a constituent part of the political organization of society, with only the rights of those of its class, and subject to all the changes and modifications that may be introduced.

6. That the acquisitions of the Church, like those of other political communities, and *unlike* those of corporations founded for commercial purposes, are never the property of its members in whole or in part, nor are destined to their individual benefit, but to fulfil the objects of public utility which the corporation is created to promote.

7. That the Church therefore, considered under the aspect given to it in the preceding propositions, is, strictly speaking, the simple administrator of public property placed under its charge for political ends, which, in case of a dissolution of its corporate or political existence, ordinarily returns to the general mass of public property, subject to any rights of reversion that may exist in favor of those who represent the donors.

8. That although the Church may acquire property by private donation under the restrictions alluded to, and by express grant, from the sovereign or legislative power, of that which pertains to the dominion of the state, yet there never has existed any general license to make or accept such donations, nor any authority given to governors, Territorial Deputations or other executive functionaries to grant public lands to the Church—and no general or special power to make such grants was ever possessed by any authority in California.

9. That the members of religious orders, called the regular clergy, who alone were employed as missionaries in the Indies, are considered in law as civilly dead, ("dead to the world,") and incapable of acquiring and holding property by any title.

10. That the Missions were not corporations, but establishments founded by the government for the advancement of population, civilization, and christianity. The ecclesiastical power had no control over them, nor any *possession* of lands or other property appurtenant to them, nor was such possession in the *Padres* or religious Missionaries. The only possession distinct from that of the members of the community, was the possession of the government, the Missions themselves, and the *Padres*, the military escorts and the *administradores* being mere instrumentalities and agents of the government. Secularization consisted in removing the religious missionaries, and allowing the Church to appoint Pastors of the secular clergy to administer to the spiritual wants of the community, when the natives had been so far enlightened in the mysteries of the Catholic faith as to be fit subjects for the ordinary ecclesiastical government. This change had nothing to do with rights of property.

AUTHORITIES.

4. Cavallario, Professor of Civil and Canon Law, in his "Institutes of Canon Law,", book 4, treats of the origin of ecclesiastical property. "Previous to the reign of Constantine, the goods of the Church were derived solely from the voluntary offerings of the faithful, and consisted in moveables. Then the Church was regarded by the civil law as an unlawful assembly, incapable of taking by gift or devise. The Church itself also placed but little value on immovables, because Christians then believed that the consummation of all things was at hand. Neither could Christians institute Christ as heir, because, according to Ulpian the gods could not be instituted heirs, excepting those whom the laws authorized to be instituted. But the Romans did not receive Christ as one of the gods so as to allow property to be devised to him (p. 67–8.) But after Christians came to enjoy peace, the Church made large acquisitions by means of testamentary dispositions, inheritance, and various titles. As respects acquisitions by testament, Constantine the Great first recognized the Church as a lawful Congregation, and conferred upon her the power to take by will, (p. 68.) This privilege, which was given to the Catholic Church only, did not extend to conventicles of heretics, and by a law of Honorious the property which heretics had donated to their conventicles was transferred to the Catholic Church, (*ib.*,) because these conventicles not being recognized by the civil power, were incapable of holding.

5. "For a long course of time the Church retained the liberty of acquiring fixed property, but at length, by the edicts of many Princes this liberty was restricted, and it was enacted that the Church or religious establishments should not acquire immovable property without the consent of the civil power. This consent of the civil power, by which the Church was indulged in its acquisition of landed property, was called *amortizatio—amortization*, which expression seems to be derived from the Gallic word *amortir*, that is, to extinguish. Because ecclesiastical property being wholly exempted from tributes and civil burdens, it would seem to be extinguished to the state and public uses; for which reason also the Church and religious societies are called *manus mortuae*, (*manos muertas mortmain.*) Assuredly it was the public good that induced the edicts of Princes prohibiting the transfer of immovables in mortmain. The Church is a corporation which never makes distribution, so that what it once receives it returns not, but holds perpetually, inasmuch as

the alienation of ecclesiastical property is prohibited, (p. 79.) In France, Spain, th republic of Venice, and other Christian countries generally, it is provided by statut that property in the soil can not be transferred to the Church or other religious establishments either by donation or contract *inter vivos*, or by last will, without th assent of the civil authority, (ib. p. 80.) Where this law of amortization prevails, th license, if granted, is paid for with a certain amount paid in money in compensatio to the public treasury for the advantages and revenues thence withdrawn, whic amount is by law arbitrary, although in many countries, as in France and Spain, th amount to be paid is fixed by law or custom. But these statutes, by which the Churc and religious places are prohibited to acquire property in the soil, have been enacte by the civil power in defence of its own right. Those who hold that the necessity o this assent of the sovereign authority to the acquisition of immovables by the churc is repugnant to ecclesiastical liberty and immunity, are certainly unjust towards th civil power which has been instituted by God. Most clearly has the civil authorit power over all temporal things, and the commerce therein is for the good of the stat rightfully restricted or extended by princes. It is by virtue of the laws of Christian princes, that the church herself enjoys the right of acquiring immovables: and so when the excessive acquisitions of the church prove pernicious to the State, the power of acquiring, conceded to the Church, has been rightfully restricted by princes within certain bounds. (ib.) Escriche Dic. de Leg. Tit. "Amortizacion Ecclesiastica ;" definition, "The acquisition of real property by Churches, Monasteries, and other pious places," remarks : "Churches, monasteries and other pious places are corporations which have a perpetual existence by means of the successive subrogation of the persons who compose or administer them; and the property which they once acquire never again returns to the commerce and circulation of the State, but it is enchained forever to their possession, depriving every citizen of the right or hope of aspiring thereto. These corporations therefore, are with reason denominated *cuerpos immortales*, because they never die, and in a species of contrary sense (*contrasentido*) *manos muertas*, because they are destitute of movement and action to give or alienate what they have received, although they might more properly be called *manos mortiferas*, because by the act of withdrawing from commerce the property that is transferred to them, they extinguish it in a certain mode and amortize it as to the State, which therein suffers the greatest injury. In effect, ecclesiastical amortization withdrawing from the hands of laymen the fixed or real property and monopolizing it in the hands of the clergy, is an abyss that is swallowing up the landed wealth; dispoils in consequence secular families of the most secure means of subsistence, produces poverty, mendicancy, and emigration, diminishes the number of citizens, and weakens the power of the State. For this reason God in the ancient law upon making distribution of property, left to the secular State, composed of the eleven tribes, the possession of all the real property, and forbade the acquisition thereof by *manos muertas*, reduced then to the Levites; so that it may be said that ecclesiastical amortization is contrary to the will and designs of God himself—the founder and preserver of societies. "And the Lord spake unto Aaron, thou shalt have no inheritance in their land, neither shalt thou have any part among them. I am thy part and thine inheritance among the children of Israel.

"And behold, I have given the children of Levi all the tenth in Israel for an inheritance for their service, which they serve, even the service of the tabernacle of the congregation.

"Neither must the children of Israel henceforth come nigh the tabernacle of the congregation, lest they hear sin and die.

“But the Levites shall do the service of the tabernacle of the congregation, and
ey shall bear their iniquity. It shall be a statute forever throughout your gene-
tions that among the children of Israel they have no inheritance. Numbers, cap.
8, v. 20, 21, 22, 23.

“The Priests, the Levites and all the tribe of Levi shall have no part nor inheri-
nce with Israel. They shall eat the offerings of the Lord made by fire and his in-
eritance.

“Therefore shall they have no inheritance among their brethren. The Lord is
eir inheritance, as he hath said unto them.” Deut., cap. 18, v. 1 and 2.

“For this reason also it has been the general practice in Catholic nations to pro-
ibit the transfer of real property to churches, monasteries and other immortal eccle-
astical bodies, which began in each country in proportion as the necessity was dis-
vered of putting limits to the unmeasured acquisitions of the clergy. Among us
is practice ruled already in time of the Goths, for the tax payers could not alienate
eir possessions in favor of the churches, nor even build them without precedent
cense of the king, or letters of amortization, which the Bishop must solicit occurring
the sovereign, as provided by canon 15 of the third Council of Toledo, held du-
ng the reign of Ricardo in the year 589. [illegible]

“The maxim that the churches and monasteries could not aspire to the acquisition
landed property was always preserved in subsequent times, and was adopted
ccessively, as well in the general code, as in the municipal charters (*fueros*) not
ly in order to avoid the diminution of the royal revenues, but also to prevent the
cumulation and monopoly of property; so that there was not a king who did
nfirm and re-establish it.

In effect Alonzo I of Castile and VI of Leon, not content with having previous to the
ar 1080, sanctioned the charter of Sepulveda, which incapacitates *manos muertas* for
ery acquisition of hereditaments, established in the year 1102 a general law (at the
nfirmation and promulgation of which there assisted, beside the Primate, the
ishops of Palencia, Burgos, Osma, Avila, Cuenca, Calahorra, and the Abbot of
alladolid, with many other secular persons) providing that no one should have power
ther by contract or free donation, to give or leave real property to the churches,
der pain of forfeiting them.

“This law was afterwards solemnly sanctioned for the kingdom of Castile, in the
ortes of Najara, convoked by Don Alonzo VII, in the year 1138, and for the king-
m of Leon, in the Cortes of Benavente, convoked by Don Alonzo IX, in the year
02.

“The law of the Cortes of Najara is law 75 of the *Fuero Viejo*, and declares as
llows: ‘This is the law of Castile, which was adopted in the *Cortes* of Najara, that
hereditament of the king’s jurisdiction (de realengo) shall pass to any Hidalgo or
onastery.’ The law of the Cortes of Benavente is referred to in law 231 *del*
stilo the which declares: ‘It was ordained in the Cortes convened in Castile, in
ajara, and in the land of Leon, in Benavente, that the *realengo* should not pass to
badengo.’ By the name *realengo* was designated the real property of secular tax
yers, and by the name *Abadengo*, the *manos muertas*. This disposition was
erwards extended to the countries which were successively conquered, as may be
en in the codes (or charters) which were given them, and especially in those of
ledo, Cuenca, Caceres and Cordoba, ‘Attending,’ says Alonzo VIII, of Castile, in
02, ‘to the damage suffered by Toledo, and the grievances which came upon the land,
established, with the aid of the good men of Toledo, that no inhabitant of Toledo,
n or woman, should have power to give or sell his estate to any order, unless he

should choose to give or sell it to Santa Maria of Toledo, because it is the Cathedra of the City; but of his movables he may give as much as he pleases accordin to the charter. And the order that shall receive any estate, given or sold, an he who may have sold it, shall forfeit the same and it shall pass to the neares relations of the vendor.' And the same Alonzo VIII, in the celebrated Charte which he gave to Cuenca, at the end of the year 1190 or that of 1191, declares in I 2 of Tit. 2: 'No man hath power to give or sell real property to hooded Friar (*cucullatis et seculo renuntiantibus*); for the order itself prohibits your giving c selling to these any real estate, and so do the law and the custom equally prohib it.' Alonzo IX, of Leon, before referred to, in the Charter which in the year 1229 gave to the *Villa* of Càceres and its territory, provided, among other things, that within its district any domiciled citizen should give, sell, hypothecate or by ar mode whatsoever transfer any estate, land, vineyard, field, houses, plazas, gardain mills, to any friars, the municipal council thall take all that he hath, and from tl friars all that hath been delivered to them, and the whole shall be applied to tl proper use and benefit of the Council.' San Fernando III, on the 21st of Januar 1222 confirmed the Charters of Toledo, on the 12th of March, 1231, that of Càcer and on the 8th of April, in the same year, 31, he established for the government Cordoba the same law in the terms following. [This being in the words of the law Toledo, above given, is here omitted.]

Pope Gregory IX. used great exertion to induce San Fernando to revoke the l of Amortization; but the pious king was unwilling to sacrifice the interests of t State to the Church, The king who unfortunately opened to her the liberal har was his son and successor, Alonzo X., called the Wise. This king permitted t compilers of the Partidas to substitute the ultramontane maxims of Gracian for t laws and customs of Castile; and thus it is that in the Alfonso Code* are found d seminated provisions contrary to the law that is now occupying our attention, whi are the following: 'Every one may leave as much of his property to the Church he pleases, unless the king have prohibited it,' (L. 55, T. 6, P. 1). 'If it should happen that the clergyman have no relations within the 4th degree, the church which he was beneficiated shall be his heir,' (L. 4, T. 31, P. 1.) 'The demand (suit) for a debt due to one who has entered a religious order, shall be made by Prelate or Superior of the order, because his property passes to the monastery which the latter is the Superior, (L. 10, T. 2, P. 3). 'May be instituted the heir another, the church, and every respectable place that may have been founded for service of God and works of piety, and any clergyman either secular or regular, (L T. 3, P. 6). 'Any man having entered upon a religious life can not make a will, all the property which he may have shall belong to that monastery or place i which he may have entered, unless he have children or other relations descending the direct line, who may inherit his property,' (L. 17, T. 1, P. 6).

But as the *Partidas*, although concluded in the year 1263, were not published the year 1348, the *Pueblos* adhered to their municipal charters, and the Fuero Vi of Castile, in which, as has been above stated, the law of amortization was conse ted. Thus it is that law 231 *del Estilo*, which, like all the rest, does no more t explain the practice of those times, explicitly manifests that real estate could not sold or transferred to *Abadengo* (in mortmain), neither could the *Abadengo* (ma muertas) purchase the same without having privilege from the kings therefor. onzo X. himself could not refrain from making this declaration, and moreover firmed in 1255 the charter of Toledo, in 1255 the *Fuero Viejo* of Castile, in 1 the charter of Cuenca, and in 1279 that of Sepulveda. The mode in which he explains the confirmation of the charter of Cuenca is very explicit and decisive. H says: 'We command and prohibit that no *realengo* pass to *Abadengo*, nor to mer bers of orders, or religion by purchase, nor by will, nor by exchange, nor in any po sible mode, without our mandate.' Moreover, on the 27th of Sept. 1269, he impose upon the *Pobladores* (settlers) of Baeza the same prohibition: 'and that they sha not have power to sell or give the same to any church, or men of orders or religion without our mandate.' Here then may be seen the appreciation in which the wis king held the laws introduced into his Partidas respecting the acquisition of propert by the churches and monasteries. The king, Don Sancho IV., commanded to mak inquisition (*pesquisa*) of the real property which, contrary to the dispositions of th law, had passed to Ecclesiastical hands, in order that the lands in the *villas* whic had been alienated should be returned to them.

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*See remarks as to the authority of the Partidas, part N.

Don Fernando IV., in the ordinance of the Cortes of Valladolid of 129 declares: 'We command to seize the estates which have passed from the *realengo* t the *abadengo*, as it was ordained in the *Cortes* of Haro, and that henceforth no transfer be made from *realengo* to *Abadengo*, nor from *Abadengo* to *realengo*, unless be in the manner ordained in the aforesaid Cortes.' And in the Ordinance of th Cortes of Burgos of 1301: 'I have thought meet and do command that the secula tax-paying property pass not to *Abadengo*, neither be purchased by Hidalgos, nc clergymen, nor by *Pueblos* nor by communities; and as for the passed since the or dinance of Haro hitherto, those who have purchased, or acquired by any other mod whatsoever shall pay taxes therefor; and henceforth they shall not have power t purchase nor acquire by donation, and if they do they shall forfeit the same and i shall be be seized by the Alcaldes and judiciary of the Place.'

Don Alonzo XI., informed of the inobservance of this disposition, annulled all th acquisitions of real property made by the Clergy, although he afterwards confirme such as were founded upon royal privilege. He prohibited the prelates to purchas others: he revoked acquisitions made with the object of founding Chaplaincies; an he commanded to make general inquisition, in order to return to secular families thos which had been transferred to the Church without royal authorization. See the Ordenamiento of Medina del Campo of 1326, and the petition 23 of the Cortes of Valladolid of 1345 and its response. It is true that this king sanctioned and published in the Cortes of Alcala of 1348 the seven *Partidas*, in which are found in favor of the Church the laws which we have above extracted; but he only invested it with the character of a suppletive code, leaving in their full vigor the laws of the country til then in use, and giving *the first grade of authority* to the ordinance made in the same Cortes of Alcala, (now constituting the code entitled "Ordenamiento de Alcala,") in which it was provided that real estate could not pass to *Abadengo* from *realengo*, nor *solariego*, (1) nor Behetria, (2.)

But if such repeated and decisive dispositions never entirely closed the door against the acquisitions of the clergy, they were yet more impotent against the irruptions of cupidity and devotion, during the terrible mortality which Castile experienced in the years 1349, 1350 and 1351. The faithful then, in order to appease the wrath of Heaven and merit the favor and protection of the saints, divested themselves freely of their property, making excessive donations to the churches, monasteries and sanctuaries, whereby the law of Amortization was again subverted. The kingdom assembled in the *Cortes* of Valladolid, 1351, complained energetically to the king, Don Pedro, of the conduct of the *manos muertas*, supplicating him that he would be

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(1.) Estates of Hidalgoes cultivated by their vassals.

leased to give vigor to that which relative to this subject had been ordained by his redecessors, and to command that the property acquired by the clergy in fraud of he fundamental laws of the monarchy, should be returned to its former condition. on Pedro readily acceded to the petition, renewing the law of the Cortes of Najara, nd adopting measures to repair the injury caused to the state by the *manos muer-as ;* but the events of his reign left him no time nor repose to carry into complete ffect the desires of the nation, and his brother and successor, Henry II., did not find imself in a condition to think of reforms, but, on the contrary, was under the neces-ity of alienating the greater part of his patrimony.

The salutary dike which the laws had thrown up against ecclesiastical amortization eing broken in, the wealth of the secular and regular clergy went on increasing to such a degree that in the beginning of the sixteenth century, it was calculated to amount to one third part of that of the whole Peninsula. 'The revenues of all Spain,' said Lucius Marineus Siculo, a writer who flourished in the time of the Catholic Sovereigns (Ferdinand and Isabella) 'according to my judgment and that of others, is divided into three parts nearly equal; of which one is of the kings; the other of the Grandees and *Caballeros ;* and the third of the Prelates and Priests.' (*'De las Cosas Memorables de Espana,' Lib.* 4.)

In this state of things the Cortes considered themselves obliged to elevate their clamors to the Throne, for the remedy of this evil; and upon petition of the Cortes of Valladolid of 1523, the sovereigns Dona Juanna and her son Don Carlos enacted, 'that estates and patrimonies and real property should not be alienated in favor of churches and monastries, and that no one shall have power to sell the same to them, for at the rate that the churches and monastries are purchasing, and that donations and legacies are being made to them, the greater part of the property of the kingdom would come to be theirs.'

The Cortes of Toledo, held in the year 1525, solicited that the king would appoint two Visitors, the one an ecclesiastical and the other a layman, to reconnoitre the monasteries and churches, and the property which they might be found to possess, over and above what might, by the Visitors, be deemed necessary for their expenditures, according to the district where they are situated, might be ordered to be sold, and that the Visitors designate how much shall be left for building and expenses of the said churches and monasteries and the persons belonging to them. The Cortes of Segovia of the year 1532, petitioned "that they might be prohibited the acquisition of any more real property, and that whatsoever should be sold or donated to them, the relations of the vendor or donor should have power to retract for an equivalent price within four years." To the same effect were the representations of the Cortes of Madrid of 1534, those of Valladolid of 1537, those of Toledo of 1539, all clamorous for the law of amortization, which they were enabled to re-establish, though in vain, because the laws are always less powerful than the efforts of cupidity and devotion concentrated in one and the same point, to contravene them.

"The Spanish statesmen who flourished from the 16th to the 18th century likewise manifested the necessity of putting bounds to the acquisitions of real property which the churches and monasteries were making; for, said they, if the abuse be allowed to proceed, all the houses, vineyards, landed estates and annuities, will belong to the ecclesiastics. * * * * and if a ship may at length be sunk by a single drop of water entering day by day, and a city may be involved in a conflagration by a single spark; so the abundance of temporal property, entering daily under ecclesiastical dominion, and being withdrawn from the temporal, weakens and destroys the monarchy.

Fortunately an institution which, on the one hand has caused the greatest injur to the State, has served on the other as a counterpoise to ecclesiastical amortizatio hindering from falling into this abyss, as it inevitably would have fallen, the greate part of the landed property of the peninsula. I speak of the Mayorazgos (entaile estates) which suggested by vanity or the desire to perpetuate in families the hono and lustre of the ancestors, put a rein upon indiscreet and unenlightened piety, an freed a great amount of real property from being engrossed in the churches an convents.

" It is certainly a very painful spectacle which is presented by this perpetual strif between the policy of the government and the cupidity of the ecclesiastics ; and th faithful cannot have been much edified by that pernicious disregard of a national la which had its origin almost with the monarchy, of a law so many times solicited, s many times re-established *and never abrogated*, of a law given, as observes Jovellanos, not in hatred of the Church, but in favor of the State ; not so much to hinde the enrichment of the clergy, as to prevent the impoverishment of the people who ha so generously endowed them. It will perhaps be said that the disposition taken b Don Juan II, in Valladolid on the 13th of April, 1452, (l. 12, T. 5, Lib. 1, N. R., providing that property alienated in mortmain should be subjected to the payment o the fifth part of its true value, over and above the *Alcabala*, supposes the revocatio or suspension of the general law of amortization. But it must be observed that thi imposition is not necessarily a condition under which the power to alienate in mortmain is conceded, but rather an inducement for the observance of the prohibitory law and a penalty for its infraction. This interpretation is not arbitrary, since it is deduced from the petition of the Cortes of Madrid of 1534. The *Procuradores* (deputies of the towns) made strong application for the punctual observance of the law o amortization, according to what had been accorded in the Cortes of Valladolid ; an and thus 'that orders should be given,' they said, 'that the churches and monasterie shall not purchase real property, and that your Majesty command to be observed th law 7th, made by Don Juan of glorious memory, which is the ordinance entitled, o donations and *mercedes ;* and forasmuch as the *penalty* expressed in the said law being light, has been occasion for its inobservance, they supplicate your Majesty tha instead of the fifth, the *penalty* may be made the third part.

"The royal Council. in consultations of the years 1677, 1678 and 1691, (note 3 t l. 12, T. 5, Lib. 1, N. R.,) manifested their conviction of the value and importance o the national law of amortization ; of its continued observance for the space of one hundred and thirty years, in view and with the knowledge of eighteen Pontiffs, wh never opposed it ; and of the necessity to re-establish and copy it.

" Notwithstanding as they were then treating of reforms in the secular and regula State, they were of opinion that it would be convenient to reserve this matter fo some period in which it could be agitated with greater hopes of success.

" This period effectively arrived—for afterwards various orders were issued directing that privileges of amortization should not be conceded, which presupposes the existence and vigor of the general law which prohibits it. 'It having come to my notice,' says Charles III, in the resolution of 10th March, 1763, (l. 17, T. 5, lib. 1, N. R.,) 'that for the non-observance of all the repeated orders which have formerly been given, providing that privileges solicited by communities and other *manos muertas*, for the acquisition of real property, should be absolutely denied, the injury to my vassals has been considerably augmented ; and wishing at once to attack this mischief, I have resolved that in no case shall applications be acceded to of *manos muertas* for the acquisition of property, even though they come invested with the greatest piety

id necessity ; and that the council of *Hacienda*, always whenever they see applica-
ons of this sort, or information on the subject is sought from them, before complying
informing, represent all the orders given to the contrary, and the intolerable mis-
iefs that result to the public interest, from which, under the name of piety miscon-
eived, the patrimony of laymen is likely to be swallowed up.

Ferdinand VI had already by a royal order of 20 Aug., 1757, commanded that the
ouses of Aranjuez, fabricated with ~~the royal permission and other requisites therein~~
~~xpressed~~, 'can not be sold, granted, exchanged, nor transferred by any title whatso-
ver, to communities—ecclesiastical, secular nor regular, nor shall there be founded
pon them, chaplaincies, anniversaries nor other perpetual charges, even though they
e destined for the royal court itself or the persons who there inhabit, or for its hos-
ital, so that they can in no case fall into *manos muertas ;* and any disposition what-
oever that may be made to the contrary hereof, be it gratuitous, or onerous, *inter*
ivos, or *ex testamento*, for pious use, or whatever end or destination, is hereby de-
lared null, *nunc pro tunc*, (desde ahora para entonces,) and the said house or edifice
hall, *ipso facto*, and without any further declaration, be forfeited,—falling into con-
scation, and remaining incorporated in the royal hereditaments.' (Note 5, tit. 17,
b. 10, N. R.)

Charles III, upon advice of the Royal council in cedula of 18th Aug., 1771, (l. 21,
t. 5, lib. 1, N. R.,) renewed and sanctioned the law of the *Fuero* of Cordoba, which
rohibits the alienation of real property in mortmain, as has been said above, adding
o the penalties contained in the *Fuero*, privation of office on the part of the notaries
fficiating in the premises, and nullity of the instruments, and the alienations. The
ame Charles III, disposed likewise in the instruction of 25th June, 1771, (l. 21, tit.
, lib. 1, N. R.,) that in the new settlements of Sierra Morena, the lands cannot be
lienated in mortmain, either by contract *inter vivos*, nor by last will, under pain of
onfiscation. (l. 3, tit. 22, lib. 7, N. R.)" So also by a law of Charles the Emperor,
f 1535, which is incorporated in the Code of the Indies, (l. 10, tit. 12, lib. 4,) it is
rovided that "Lands shall be distributed without excess among the discoverers and
ld settlers, and their descendants who shall remain in the country, and those most
it shall be preferred, and they shall have no power to sell them to any church or mon-
stery, or other ecclesiastical person, under the penalty that they may and shall forfeit
hem, and they may be [then] distributed to others."

The Mexican law of colonization of 18th Aug. 1824, provides (Art. 13) that "the new
ettlers (Pobladores) shall not have power to transfer their property in mortmain,"
manos muertas.)

The Decree of the Cortes of 4th January 1813, provides (Art. 18) that the conces-
ions of land made pursuant to Articles 9, 10, 12, 13 and 15, shall be in full property
&c. ; "but the owners of these allotments shall have no power to alienate them before
he expiration of four years from the time of the concession, nor ever to subject them
o entailment, nor to transfer them in mortmain, at any time nor by any title what-
soever." To bring these general prohibitions particularly to the notice of individuals
nd public functionaries, not to give them more binding force, they are renewed in
many *special* acts respecting the concession, conveyance, or distribution of lands, which
t would be tedious to refer to in this place.

It would be a singular inconsistency, if while the legislative power was employing such stringent and repeated prohibitory measures to prevent the transfer of landed property to the church, and thus, as far as possible, to repair the greatest damage which the State was suffering, it should have been left in the power of executive functionaries to transfer the public domain in *mortmain ad libitum*, and an inconsistency still more monstrous, if the church retained the power to make these acquisitions without an express concession of any kind, and by the pure force of *presumption* utterly repugnant to the most fundamental laws of the country.

In the Decree of the Spanish Cortes of 27th Sept., 1820, re-enacted in Spain 30th Aug., 1836, it is ordained, that 'the churches, monasteries, convents, and ecclesiastical communities of any kind whatsoever, as well secular as regular, hospitals, houses of refuge, houses of mercy and of instruction, associations, fraternities, commandries, and other permanent establishments, be they ecclesiastical or laical, known by the name of *manos muertas*, shall henceforth have no power to acquire any real or immovable property in any province of the monarchy, neither by testament, nor by donation, purchase, exchange, forfeiture in enfiteutic rents, adjudication or mortgage, or in payment of arrears of rents, nor by any other title whatsoever, be the same lucrative or onerous." (Art. 15.) The next Article provides that they cannot acquire any interest in monies loaned or secured upon real estate, nor in any incumbrance thereon, whether consisting in money loaned, or a part of the fruits, or any service growing out of the same. (*Decretos Vigentes p.* —.) Nor were these measures of the civil power in Spain to overcome what was deemed a great public evil, made the subject of opposition on the part of the Roman See. Arguilles, in his "*Diccionario de Hacienda*," Art. "*ventas*," indicates with reference to the memorials of Owvrard, printed in Paris in 1806, that in November, 1804, Pope Pius VII approved a royal cédula, signed by Charles IV, in which all the ecclesiastical property of Spain and the Indies was ordered to be sold.—(Escriche.)

It will of course be observed that the disposition of the Partidas in favor of the church and monasteries already cited in the extract given from Escriche, if they ever had any force, (as in truth they did not,) were abrogated by the subsequent and repeated legislative provisions to the contrary. But as this Code may be cited on other points, and relied upon in support of ecclesiastical privileges and immunities, it will be pertinent to inquire into the real motive of the enormous concessions which the author of it made in favor of the clergy, and the grade which has been given it in the scale of legal authority.

Alonzo the Wise, about the time he commenced this great work, was an aspirant to the imperial crown of Germany, in competition with Richard of England, brother of King Henry. The electors were divided between the aspirants. Both of them assumed the title, and the contest was referred to the court of Rome, where it remained pending for eighteen years. It was during the first seven years of this period that the Code of the "Siete Partidas" was framed. The Popes abhorred the family of Richard, because they had not been as compliant to the assumptions of the successors of St. Peter as some other christian Princes. On the other hand, the great power, erudition and sagacity of Alonzo X., his late conquests in Spain of the countries occupied by the Moors, his title to the two Sicilies and other States of Italy, inspired in the Popes the apprehension that the combination of so great strength in a single person might be unfavorable to the maintainence and increase of their preponderance in the political system of Europe. This apprehension, however, was concealed, and having attracted to that court the decision of this great contest, they amused Don Alonzo for eighteen years with the hope of success, until, after the death of Richard, and when there could remain no further doubt of Alonzo's right to the imperial crown, Gregory X. declared openly against him, and determined in favor of the election of another aspirant. (Sempere, Historia del Derecho Espanol, lib. 3, cap. III. Mariana Historia general de Espana, lib. XIII, cap. XXII.]

If human nature in the middle of the 13th century had some of the weaknesses that belong to it still, the obsequiousness to the clergy exhibited in the laws of the Partidas, so repugnant to the dispositions of other Spanish codes, may be readily accounted for. But however this may be, and whatever may have been the motive that influenced the Wise Legislator to introduce in his most famous code, the laws or maxims referred to, and to repudiate them in the ordinances and municipal charters sanctioned by him afterwards, it is certain that they never had the force of laws and were never observed as such. It is indeed doubted whether the Partidas was intended to have the force of a legal code, or is entitled to any higher authority than a mere doctrinal work. On this point the author of the History of the Spanish Law, before cited, Sempere, remarks: (p. 300–3,) "As I was meditating upon the improbability that a king as wise as Don Alonzo X, while he experienced the strongest opposition of his people to the admission of the little code of the *Fuero Real*, should attempt to give them another more voluminous and more opposed to their ancient uses and customs, I became satisfied that his intention in the compilation of the Partidas was not to publish them as a new general code, but to carry forward the project of his father, of enlightening the nation with a *doctrinal work* which should instruct, prepare, and place it in a condition to admit the convenient reforms in their government and laws.

"I am not ignorant that the imperative style in which many articles of the Partidas entitled laws are written is opposed to my opinion. But, notwithstanding this, I encountered and still encounter very strong reasons for adhering to it. In the prologue of that work we are given to understand that it was made more for the instruction of kings than for publication as a legislative code. 'And we make this book,' he says, 'to aid ourselves thereby, and those who shall succeed us,' &c. The context itself of the Partidas very clearly manifests that it is rather a doctrinal work than a legislative code. Very many of its so styled laws are nothing more than allusions to what was being and what had been practiced in various kingdoms; others are vain etymologies, and impertinent definitions of certain words; others a disconnected series of references to various authors, sacred and profane. And how can it be thought that a Catholic king should believe himself authorized to dictate and sanction religious laws not only upon matters of pure external discipline, but also upon matters of faith and the holy sacraments which is the character of many of the laws of Partida I?" After noticing the severe censures of Marina upon some of the ultramontane doctrines of the Partidas, he continues: "Is it credible that a wise king should attempt to sanction and promulgate as a legislative code, a work so monstrous, and a confused heap of erudition for the most part frivolous and inopportune, and an infinite number of foreign and contradictory laws heaped together, against the intention of the legislator and many of them opposed to his rights and prerogatives.

How much more probable are my new observations? I think that the real intention of Don Alonzo X was not to overthrow at a single blow all the ancient Spanish legislation, but to instruct and prepare the nation to receive with less repugnance the convenient reforms in their government and in their laws, placing before them the best models from other nations, and particularly the Roman, which were commonly believed, and not without reason, to have been the most excellent in the universe.

"The author may also have been greatly influenced in that grand enterprise by the well founded hope which he entertained when he commenced it, of seeing himself crowned Emperor of Germany, which affair was then being litigated in Rome; from those circumstances may have originated the exhorbitant amplification of ecclesiastical rights in order to secure the favor of the Pontifical Court.

"All these conjectures are less improbable than the four propositions set down by my censor [Marina]; and those that the Partidas were not promulgated in the time of their author, (nor for 100 years afterwards,] and that the work now known as such is not entirely conformable to that which was written by his order, far from deserving to be considered paradoxes are truths very clearly demonstrated in the *Ordenamiento de Alcalá*, of 1348. In this last code, which was promulgated by Alonzo XI at the same time with the Partidas, and to which he expressly assigns the *first grade* of authority, is found the explicit provision against ecclesiastical amortization before cited, which has been followed up by similar prohibitions in all subsequent codes. In confirmation of the opinion advanced by the learned jurist just cited, that the Partidas was not invested with the character of a legislative code, or if its doctrines have at length come to be regarded as just rules of decision where the authentic codes are silent, they can never have any other force than that of suppletory dispositions, it will only be necessary to refer to the fact that all accredited authors place it last in the scale of authority.

The following is the scale as given in the work entitled "Sala Mexicana," published in 1845, [vol. 1, pp. 158–159:]

"1st grade. National [Mexican] laws subsequent to the Independence, including those of the States of the Confederation given while the federal system ruled, which are not opposed to the system adopted in the Constitution of 1836, nor have been abrogated by subsequent general laws.

2nd. Spanish laws promulgated as well during the absolute as during the representative government, including the special ordinances of the different branches, with the cédulas and extraordinary orders Communicate to America, the Recopilation of the Indies and Recopilation of Castile, [*nueva*,] giving preference, among all these laws, to those of latest date.

3d. Ordenamiento Real.
4th. Ordenamiento de Alcalá.
5th. Fuero Real.
6th. Fuero Juzgo.
7th. Siete Partidas.

The same gradation is given by Alvarez, [*Derecho Real*, vol. 1, p. 58–60,] which is referred to in my brief in the case of City of San Francisco *vs.* The United States, [p. 7, § 7.]

"The Roman laws are not, and must not be denominated *laws*, but mere opinions of wise men which can only be followed in defect of law, and in as far as they come in aid of the law of nature and are in affirmance of the Royal law, which latter is properly the common law, and not that of the Romans, whose laws or any others foreign must not be used or observed." [L. 8, tit. 1, lib. 2, *Fuero Juzgo.*]

"The Supreme Pontiff, as visible head of the Church and Vicar of Jesus Christ, as well as the Assemblies [general councils] of the Church universal, are competent legislators in all that pertains to matters of faith, sacraments, and discipline: in the latter case provided they do not offend the rights and prerogatives of the nation. The State imparts to them its aid in all that is not offensive to the temporal jurisdiction. Beyond these limits of their authority they may be disobeyed with impunity. [1 Sala Mex., 159.]

All the provisions of the Popes and Councils, therefore, respecting the acquisition, control, or management of ecclesiastical property, which are subjects of temporal jurisdiction, are without force, unless they can be shown to have been recognized and adopted by the legislative power in Mexico. Hence the objection that was made to the testimony of the Vicar General, as to what the councils of the church had decreed on these subjects. All papal bulls, briefs and rescripts, and decrees of general councils, or other ecclesiastical provisions, even though they relate to subjects of faith and discipline, must be presented to and receive the *pase* of the government before they can be promulgated, and if they are found to contain encroachments upon the prerogatives of the civil authority they will be interdicted. It would be dangerous in the extreme to admit the right of the church to legislate about property in any way whatever. [See Const. of 1824 Art. 50, 4 Const'l law (of 1836) N. 17 attribution 24. Bases Organicas, Art. 66, attribution 10 and Art. 87, at. 18, 19. Spanish Const. (1812) Art. 171, at. 14, l 1, 2 and 3, tit. 9, lib. 1 R. I.]

Even the building of a church, the founding of a convent or other religious establishment, the appointment of Bishops, pastors, or dignitaries in the church, could not take place without a license or nomination of the civil power, which is called the sovereign right of patronage. This right always belonged to the Spanish crown, but is expressly recognized in the famous Bull of Julius II. [See Parras *Gobierno de los Regulares de la America* v. 1 p. 4 n. 2—7, l. 1 and 2 tit. 3, l. 2 and 43 tit. 6 lib. 1 R. I. *Instituciones del Derecho Publico general de Espana* [Dou.] p. 273, 286, 292—297, and the Spanish and Mexican Constitutions above cited, 2 Cavallario 162, 170—173 L. 1 tit. 15 lib. 1 R. I.]

Returning now to this great question of ecclesiastical amortization, we shall see that it was not regarded with so much favor by the constitution, the laws, and the political and the law writers, of the Mexican Republic, that the church or the clergy would be permitted to make available claim to real property upon any vague presumption or other doubtful title.

In the political works of Don Jose Luis Mora, published in 1837, who certainly occupies the first rank among the literary, political, and legal writers of the Mexican Republic, will be found, vol. 1, p. 177, a very learned dissertation upon the subject o "Ecclesiastical Property."

"Every Mexican," he says, [p. 179.] "who truly loves the religion of Jesus Christ and the prosperity of his country, must feel deeply interested in sustaining the one and the other. Without religion and religious worship there can be no society, no public morality in any civilized nation; but neither can religion exist and be respected when it is pretended to confound it with the abuses of superstition, with the ambition and cupidity of the ministers of the altar. Thus it is that a service is done to religion itself in separating it from all this, thus presenting it in its native brilliancy and splendor. As that which has principally afforded a pretext to the impious for discrediting it, has been the enormous abuse that has been made of ecclesiastical revenues, and the exorbitant pretensions of the clergy about this matter, whoever makes it clearly to appear that religion is no accomplice in this, leaves its enemies almost wholly disarmed; and at the same time firmly establishes the civil rights of nations and governments, and with them the public prosperity."

He observes that *property* of every kind, whether destined to religious and pious uses or other objects, is in its very nature temporal, and subject to the legislative control of the imperial power exclusively, and that all the most celebrated fathers o the church are perfectly agreed on this point—p. 180–185.

"The church may be considered under two aspects: either as a mystic body, or as a political association; under the first aspect it is the work of Jesus Christ, eternal and infallible, eternally independent of the temporal power: under the the second it is the work of civil governments, may be altered and modified, and even the privileges for which it is indebted to the social order, may be abolished like those of any other political community."

[If this political community, part and parcel, as it were, of the social organization under the Mexican government necessarily ceased to exist as such when that government ceased, when was it re-established and re-invested with that character in California?]

The correctness of these notions will be made evident to every one who considers and knows how to distinguish the two epochs of the Church, which are distinctly characterized in its history; the first, before Constantine, and the second, after that prince made public profession of Christianity. In the first, the Church only existed as a mystic body; the divine word was preached, the sacraments were administered, questions of faith and morals were decided, the incorrigible heretic was separated from the communion of the Church, and every thing was regulated relative to the form and mode in which worship ought to be rendered to the Supreme Being. This and this alone, was what the Church did in the epoch in which it existed only as a mystic body. When Constantine became converted to Christianity, the Church now appeared as a political community. Then began its ministers to acquire property, to have an external forum, and coactive jurisdiction; to enjoy the right to impose upon its subjects certain temporal penalties, and compel them by force to submit to them; then in fine they acquired the conveniences, honors and civil distinctions which they now enjoy.

"From what has been shown it is deduced that the only rights which belonged to the ministers of the Church, essentially are those which they enjoyed in the first epoch in which the Church existed only as a mystic body, and that those which it acquired afterwards in the class of a political community may be lost without any detriment to religion. For when Jesus Christ promised that his Church should be eternal and infallible, this was with the assurance at the same time that his kingdom was not of this world, that he had not come to found a civil empire, and that all his promises ended with the mystic body, which was the work of his heavenly father, and extended not to the political community created by civil governments, kings and emperors." (P. 184.)

He then proceeds to show that the *only* right of property that exists in the Church is purely civil in its origin, subject wholly to the dispositions of the temporal authority, and that this maxim has been recognized by all the ancient fathers, who admit that the ecclesiastical power has no right to intermeddle or legislate on the subject. (P. 185–200.)

"The most decisive proof of the incompetency of the ecclesiastical authority in the matter of which we are treating, is the low estimation that has been given to the conciliar dispositions, and the Bulls of the Popes which treat of external discipline, and ecclesiastical property in Catholic countries themselves, which regard the Church as a political community and concede to it the rights which belong to those of its class. The Council of Trent has never been received in France, and most of its dispositions in matters of discipline are not, and never have been in force in Spain, nor in most Catholic kingdoms. The Bull of the *Cena* has been generally repudiated in all of them: their governments do not permit that any rescript of Rome shall have any force or be admitted in them until after it has been examined, and the corresponding *pase* has been given to it; and in use of this power, they have frequently refused to receive the Bulls of the Popes, with the circumstance that the Popes themselves in the *concordatos* celebrated with Catholic sovereigns have recognized this right to retain and suppress them," (p. 201.) * * * * * "The Ecclesiastics put in practice every species of intrigues to seduce widows, and other weak and timid persons to institute them heirs: from which it came to pass, that they acquired the epithet of *solicitors of inheritances*, with which the abuses that were practised to procure them by testamentary legatees of the faithful without regard to the means, were ridiculed and censured. This furnished occasion for the laws of which we have made mention, issued by Valentiniano, Valente, and Graciano, numbers 20, 22 and 27 of the Theodisian code. by which that of Constantine was revoked, and they were prohibited from making the acquisitions which they had been empowered to make by the law of Constantine. This law revoking the power of the churches to acquire real property, is that which was considered by Saint Geronimo to be just as we have before said. Nevertheless the churches, with more or less opposition, with greater or less difficulty, remained empowered to acquire real property; but not without great opposition from the most celebrated Fathers and Doctors of the Church, who always regarded her enrichment with sorrow, and considered it as the origin of her decadence and relaxation. So true is it that the Church, far from losing, is a great gainer by the privation of temporal goods.

"St. Chrysostom in the 86th homily upon St. Matthew asks: 'Why did not the Church possess lands in the times of the Apostles? Because she was then more perfect. * * * By what principle of reason, of justice, and of equity, ought it to be allowed, that the founders, benefactors, (of the State) and principally their heirs, who should be found in a condition to serve the Republic, are seen obliged to suffer the want of everything necessary, or to beg? And why, on the contrary, have the beneficiaries (ecclesiastics) opulent, enriched by an excessive and improvident liberality, the ability to present themselves with coaches and horses, to eat excessively, and to array themselves in silk? In this, all order has been inverted; things demand moderation, and limits which ought to be established with prudence. The state requires it, and the necessity is urgent.' [He then proceeds with extracts from the writings of St. Geronimo, Sulpicius Severus, a Father of the fifth century, St. Bernard, and St. Ambrose, all of whom, with many other early Fathers whom he cites elsewhere, manifested their aversion to the acquisition of property by the Church and the clergy. "The wealth of the Church," says St. Ambrose, "is the faith, and she possesses none other," (p. 203–205.) "And he saith unto them, whose is this image and superscription. They say unto him Cæsar's. Then saith he unto them, render therefore unto Cæsar the things which are Cæsar's, and unto God the things that are God's," Math. XXII, 20, 21. "It is clear that Jesus Christ in a lesson, the only object of which was to distinguish temporal from spiritual things, reckoned among the first money, which represents all goods which are material in their nature; and as those which are destined for the support of religious worship are of this class, it is likewise clear, according to the doctrine of the divine Author of the Evangelist, that these are in their essence and nature temporal. All the Fathers and Doctors of the Church are agreed in giving to this text of the Evangelist the same application." Cites particularly St. Chrisostom, (p. 180–1.)]

"It has been proved that the property which bears the name of ecclesiastical is by its nature and essence temporal, the same after as well as before it has passed under the dominion of the Church; that it cannot be spiritualized; that the Church considered as a mystic body can have no title thereto, nor can governments or individuals be under any obligation to concede it; that the same Church, the mystic body of Jesus Christ, may take, and in fact has taken the character of a political community, and that in reason thereof it has had the power to acquire, and has acquired the property which the laws permit to those of its class, but under the civil law and with total subjection to the temporal authority; finally, that in the nature, administration, and appropriation of its property there exists abuses that demand a remedy, and that it is absolutely necessary to apply it. Once prove that the Church which possesses temporal property is a political community, with the actions and rights of those of its class, it only remains for us to examine into the power which the civil authority possesses over the corporations which it has created and over their property. That this power, be it whatever it may, is exclusive, or what is the same thing, may be exercised without the intervention of any authority foreign to itself, is a thing very clear. If the temporal authority has power over the property of political bodies, and if the Church is one of these, there is no doubt that it may be exercised over the Church without any necessity of the concurrence of its Pastors, who by their spiritual mission, are entirely foreign and incompetent in civil subjects, and consequently in those which belong to the Church itself under the aspect of a political community, which is that under which we are going to consider it. It is necessary, however, not to confound *communities* or *moral corporations* with *associations* of *individuals* for enterprises of industry or commerce. The acquisitions which the former make are never the property of their members in whole nor in part, nor are destined to benefit them individually, but to fulfil the ends of public utility, which the corporation ought to accomplish. These corporations then are, rigorously speaking, mere administrators of the property under their charge, which belongs to the public, and is consequently found submitted to the authority which represents the public. It is not so with respect to industrial and commercial societies; in them there exists a common fund, the component parts of which preserve the character of private property, which the share-holders recover upon the dissolution of the company, dividing the profits and sharing the losses in proportion to the amounts which they have introduced. The funds of these companies, as has been said, preserve the character of private property, and have no qualities in common with those of hospitals, houses of refuge, colleges, benevolent associations, regular institutes, ecclesiastical *cabildos*, *Ayuntamientos*, &c., &c. Such institutions, which nobody will confound with the others, are called moral bodies, (*cuerpos*, or corporations,) and to them must be understood to be applicable what we shall say in regard to the rights of *communities*.

"There is no doubt that the Church has a civil right of property over its possessions (*bienes;*) but this right is that of a community, wholly distinct from that of an individual in its nature, origin and extent. The laws have always distinguished the property of the person from that of the corporation; and while to the former they have given an unlimited amplitude, they have much restricted the latter. The right of acquiring property in individuals has never had any limits; it has always been lawful to increase it by new acquisitions, even though these should be added to a fortune already too great. With corporations, a contrary procedure has always been taken, for limits have constantly been fixed to their acquisitions, with the prohibition to transcend them. Sometimes the amount has been designated to which their property might be extended; sometimes they have been declared incapable of acquiring certain kinds of property, and not unfrequently, the usufruct only has been conceded them. The reason for this difference is very clear, and is deduced as well from the origin of property as from its consequences and results. The right which an individual has to acquire it is natural, anterior to society, belongs to him as a *man*, and society does no more than to secure it; on the contrary the right of a community to acquire is purely civil, posterior to society, created by it, and consequently subject to the limitations which society may think proper to impose. There are, moreover, other reasons of sufficient weight for placing limits to the acquisitions of communities or corporations, and not to those of individuals.

"All are agreed that a large fortune which has been excessively augmented is a ante p. 16

very great evil to society; for as property is limited, if one only absorbs the whole the rest remain destitute of any. But this very grave evil has a natural limit in the individual who necessarily must die some day, but it has none in a corporation or community which is essentially immortal. An individual, however large an amount of property he may have accumulated, within the term of a hundred years, the utmost to which his life can extend, must necessarily distribute his property among his heirs, and in this way a fortune remains destroyed which can never become colossal; a community, on the contrary, as it never dies, if it is permitted to acquire without limits *ad infinitum*, may go on successively accumulating property until it shall have acquired all, or so considerable a part as to produce a state of public misery. The civil authority then has proceeded legally and justly, when it has assigned limits to the acquisitions made by corporations or communities; legally, because being itself that has created them and conceded the right of property, it may amplify or limit that right as it may deem meet; justly, because as it ought to take care that the property destined to the subsistence or comfort of man be distributed, if not with the equality that could be desired, at least without a monstrous disproportion; it ought to prevent the existence of this, as it infallibly would exist if any community or corporation, which however great it may be supposed, is but a fraction of society, might go on accumulating property upon property, without term or measure."

[We have seen frequent examples of the dangerous influence of corporations which have been able to control an unlimited amount of money, extend their agencies through all parts of the country, and bring their power to bear upon all classes. Such an institution was the United States Bank, to the "ignoble domination" of which the American government and people might have been subjected for ages, had not God raised up another Sampson to beard the lion in his den. How much more dangerous would be a religious corporation, with unrestricted license to accumulate lands, money, and every species of property, extending its agencies throughout the State, and exerting the tremendous power of unlimited wealth, combined with the religious motives and influences which a degenerate and crafty priesthood has employed with such efficacy in all countries, Christian and pagan.]

"All these rules are applicable to the Church, which, as has been said, can make no acquisitions but in its character of a political community; thus it is that civil governments without the necessity of consulting her in any thing, not only has the power but ought to fix limits to her acquisitions, and the more so, inasmuch as the clergy are under a law or an inviolable maxim never to alienate the property that has once entered under their dominion. If the simple capacity to acquire *ad infinitum*, and not be under the necessity to alienate, would present a sufficient motive to apprehend that any community would monopolize all, or a very considerable portion of social property, it is altogether evident that a corporation such as the Church is, which holds to the principle to acquire all, and the obligation to alienate nothing, would infallibly, in the end, bring all under its dominion. * * But if it is very proper to fix limits to the amount of property applicable to communities, or political corporations, it is not less so to prohibit their acquiring certain kinds of property, which can never be administered but by individuals, nor render all the products it is capable of, and which the public prosperity exacts, but under the powerful resort of individual interest. Of this class is real property, which consists in landed estates, rural or urban.

"When the territory is distributed among many proprietors, it receives all the cultivation of which it is susceptible. Then the plantations of trees, the copious supplies of water, the rearing of cattle and domestic animals, the building of habitations spread joy and vitality through all points of the country; the products of agriculture are aug-

[illegible] 1837 [illegible] 16

mented, and with it the population flows out through all parts, which is the basis of the power of nations and public wealth. Just the contrary succeeds, when the territory is divided among few and powerful proprietors; then the lands are seen sterile and uncultivated, habitations are scarce, as is likewise the population itself, and the miserable day laborer, slave of the soil and of the lordly proprietor, being able scarcely to snatch a miserable subsistence, thinks of nothing less than marrying and multiplying his species, and employs no other labor for the cultivation of the land upon which he lives, and regards not as his own, but what he is forcibly compelled to perform. ~~Well now~~, if the accumulation of lands by one rich and powerful individual is an evil so great with respect to population and public wealth, in spite of the fact that it can not exceed one hundred years, what ought we to say of a community or corporation, which has it in its power to go on adding to those it already possesses, others without limit or measure? Capitals may be created and multiplied unto a degree of which the human understanding can yet form no conception, and however great those existing may be supposed, others may yet be formed; but lands are not susceptible of augmentation, and must forever remain the same in extent; from which it results that if a powerful and respected community, as the Church is, be capacitated to acquire them, the time will arrive in which she will make herself owner of all, and give a mortal blow to population and public wealth. If then, there is reason to fix the amount of capitals to which her property may be extended, there is greater and stronger reason to prohibit her acquiring lands and real property.

"The force of these reasons and many others which are omitted, have obliged the most Catholic and Christian Princes, among which there is not wanting a canonized saint, to prohibit the Church from the remotest antiquity from acquiring lands and real property, without having consulted her in this matter, since they have proceeded against the positive repugnance of her ministers. In Spain especially her kings have repeated this prohibition many times, under the gravest penalties. The Canon, Marina, assures us that it was a fundamental constitution of the ancient Spanish law, "that no one could at his decease dispose of his property in favor of the Church, nor give for pious uses, or as it was then expressed, *mandar por el alma,* (bequeath for the soul,) more than the fifth of his movables. The king Recisvinito permitted to leave only movable property to the Churches, because the real property, according to the fundamental law," must remain in the possession of the tax payers." Law 231, del Estilo, an ancient Spanish code decreed the confiscation of property left to the churches. In the 12th century, Alonzo II, in the charter given to Baeza inserted the following law; "No person shall have power to sell or give to monks or men of orders any real property." The sainted king Don Fernando, in the charter given to Cordova, conquered from the Moors, and the date of which is March 12th, 1241, says thus: "I establish and confirm that no inhabitant of Cordova, man or woman, shall have power to sell his estate to any order," &c., (the same as heretofore cited,)

"The complaints of the Spaniards about the accumulation of real property in mortmain, (*manos muertas*) were continual and frequent; the *Procuradores of the Cortes* (representatives of the towns and cities,) and the writers of this nation from the remotest antiquity, solicited earnestly from the kings the prohibition against the acquisition of real property by the Churches. In the year 1351, the Cortes of Valladolid made application to Don Pedro, surnamed *the Cruel,* to renew the laws of amortization which incapacitated the Church to acquire real property. The Cortes of Toledo and Segovia convened in the years 1525 and 1532, made representations upon the accumulation of real property, praying that limits might be put to the acquisitions of the clergy, and that Visitors might be appointed to examine into their property, and that whatever it might appear to the Visitors that they had in excess should be ordered to be sold, and that the Visitors should signify how much should be left for the Church buildings; that they should be prohibited from acquiring any more real property, providing by law that whatsoever should be sold or donated to them might be retracted for the equivalent price by the relations of the donor or vendor within four years.

"As respects America, the Kings of Spain, in the laws of the Indies dictated for the Spanish Colonies, prohibited the acquisition of real property by the Churches. 'Let the lands be distributed,' (says law 10, tit. 12, lib. 4, of the *Recopilacion de Indias,*) 'without excess, among the discoverers and old settlers and their descendants who are to remain in the country, and let the most fit be preferred, and they shall have no power to sell them to any Church, Monastery, or other ecclesiastical person, under pain that they may and shall forfeit them, and they may be distributed to others.'

"After the independence, the civil governments of Mexico established in consequence thereof, have prohibited acquisitions in mortmain, (*manos muertas,*) without consulting the ecclesiastical authority or regarding it in any thing.

"Article 13 of the general law of Colinization says, "The new *Pobladores* shall have no power to transfer their property in mortmain." The 9th Article of the Constitution of the State of Mexico provides: "The acquisitions in *mortmain* remain prohibited in the State for the future, and in the greater portion of the States the same or similar laws have been dictated." (p. 222--229.)

[We have already seen that the Decree of the Cortes of 4th January, 1813, which provides for the reduction to private property of all the public lands in Spain and the Indies, contains the explicit provision that they can never be transferred in *mortmain.* If then the legislature was so careful to prohibit the acquisition of lands by the Church and the clergy, under *express title*, is it conceivable that it was left in their power to acquire them without any title, to acquire by presumption of title, to acquire all whereon the imprints of a friar's footsteps could be traced? Was the contiguity of a Church or Cemetery sufficient to sanctify and legalize what the law abhorred—ecclesiastical amortization? But one response can be given to these queries. Ecclesiastical amortization was the giant evil that had reduced both Spain and Mexico to the lowest depth of social misery. It had paralized the government, and impoverished the people. With the conviction of this truth all their statesmen were deeply impressed. It was intended effectually to arrest its progress, and if possible, to bring about the alienation and distribution among the industrial classes of the laity, the immense landed possessions which the Church and religious orders had already acquired, and in most cases, in contravention of the laws. One thing, however, must be admitted—and it shows how dangerous are the consequences of allowing a corporation, body, or community, such as the Church is recognized in Catholic countries, to acquire property without limit—that the immense religious and pecuniary power of clergy, and the imbecility and venality of those who were intrusted with the application and execution of the laws, paralized, in many cases, the provisions of the legislature. Here, however, we may safely trust, neither the one nor the other will produce this result. The law will be applied as it is found written in the Codes and Statute books of Mexico, to all cases, yet undetermined, arising under them.]

But let us pass to the right of administration which the Church has over its property.

It being proved that she can only acquire it by virtue of the civil law, and in the character of a political community, it now remains to demonstrate, that neither can she administer it upon any other principle, nor in any other aspect. The word to *administer property* imports to maintain or advance it. Nothing of this can be done but by acts essentially civil, which suppose rights of the same class, from whence they must necessarily emanate. One cannot conceive the administration of any thing without contracts, without mutual obligations, nor without action upon persons or things. And all their rights, and actions, are they not purely civil? Have they not been exclusively regulated by the temporal authority in all times and countries? Nobody can doubt it, and consequently, neither can any body refuse to confess that if the Church administers its property, it must of necessity do it by virtue of the civil law, and in the character of a political corporation or community. We have already said that the rights of communities, unlike those which pertain to individuals, may be amplified or restricted by the authority which conceded them, without the intervention of any other; and as the Church is only a community, its right of administration is subject to the authority to which it is indebted for that right, which is no other than the civil.

"In exercise of this authority which belongs to the Supreme power, the laws of the Indies determined that in America, the mayordomos or administrators of the property pertaining to church buildings should indispensably be laymen; and Charles III, by his Cèdula of 11 Sept. 1764, ordered that the regular clergy should retire to their cloisters, and committed the administration of their estates to laymen, Charles IV, by his cèdula for the consolidation of exchequer bills, deprives the ecclesiastics of the administration of all property belonging to pious establishments (*obraspias*), which it was provided should enter into the consolidation fund. His words are as follows: "My authority being indisputable to direct public establishments to the advancement of these and other objects of State, I have resolved after a mature examination, to order the alienation of all the real property pertaining to hospitals, houses of refuge, alms houses, houses of reclusion, and foundling hospitals, anniversaries, *cofradias*, [certain associations formed generally for benevolent objects, under the patronage of some saint] pious establishments, and advowsons of laymen." This proceeding was justly censured as ruinous and impolitic, but nobody has dared to impeach it on the ground of *illegality*, but all have recognized the authority of the government as competent in the case, without there having been one who would venture to censure it as a usurper of the rights of the church. On the contrary, the estates which were sold in order that the value thereof should enter into the consolidation fund, have remained with the purchasers without any one having disputed their right; which would not have been the case had he by whose order they were alienated really been a usurper, for then, they would have been revindicated by those who had lost them. Kings and governments, in permitting or denying to the church the authority to administer its property, have never entertained the slightest doubt about the competency of their authority, and have operated without consulting her on this point further than they have deemed consistent with convenience and public utility. And who doubts that the public interest requires that communities, among which the church must be recorded, shall not administer their property themselves?"

[What has the council of Baltimore or of Trent, or the Pope of Rome to do with the establishment of laws for the State of Mexico or of California, regulating the acquisition, enjoyment, or administration of property? These are purely temporal matters. The sovereignty and independence of the State is gone, if it suffer in respect thereto, the intervention of any foreign power whatever. And upon this principle the Spanish and Mexican legislation has always proceeded.]

"It is a principle recognized by all economists, and confirmed by the most constant experience, that direct and personal interest alone is that which can make estates and capitals productive, under which name are comprehended every species of property; but this direct and personal interest can never exist in any community, from which by its nature and constitution, the unity of purpose, of action, and will is banished; if the estates are rural, the fields are found without cultivation, without population, without the suitable work-shops, and even without agricultural instruments; if they are urban estates, no improvements are made upon them. All is left to the charge of the tenant, who is often careless, by which in a few years, the edifices are deteriorated, ruined, and disappear, and there remains only the *solar* [lot] which is then abandoned, so that it is unknown even to whom it belonged. * * * * * * * * This proves that the property administered by communities or corporations not only produces little, but that it is necessarily lost; and as society can not but feel the effects of the ruin of fortunes, especially those which consist in great and valuable estates, such as those of corporations, hence it is that the public authority ought, as a general rule, to refuse them its permission to administer them, and even if necessary, oblige them to alienate them, providing that they take only the usufruct, reserving the property in them to individuals who alone are capable of improving and making them productive."

[The views of this author, as to the baneful effects upon society, of amortization of property, both ecclesiastical and civil, and the immense advantage to the state of individual ownership and possession in lands, are in perfect conformity with those expressed in the elaborate *Informe* presented to the Spanish government in 1793 by *Don Gaspar De Jovellanos.* The uniform policy of the government, the whole course of legislation, and the legal presumptions being against the right of the church and the clergy to acquire property, on which side would the judge lean in a contest between the ecclesiastics out of possession, demanding against an individual in possession, and in whose favor the laws raise the presumption of ownership? Surely he would require the clearest evidence of express title with all the legal formalities, sanctioned by the Sovereign.

"What then, may corporations or communities be deprived of the property which they possess? And in case that there exists the right to do so, ought there not to be an exception in favor of the Church? We have arrived at the final question in this matter, and in order to resolve it, it is necessary to consider that all the rights of a corporation or political community, without excepting that of *its own existence* are purely civil, that is to say, they are of value so far as they may be deemed useful to the entire body of society. The rights of individuals are of another origin and nature, belong to them as men, and are anterior to society; hence it is that ~~the latter~~, being established only in order to preserve ~~them~~, no one can be despoiled thereof without just cause duly proved, which can be no other than the personal dereliction. Well now, the Church, as the possessor of temporal goods is nothing else, as has been already proved, but a political community, it is therefore certain that she may be deprived of the administration and even the property thereof, whenever the public convenience requires it. If the civil authority has an indisputable right politically to terminate the existence of corporations or communities, why has it not the lesser power to deprive them of the administration and property of those possessions, which perhaps it might have been convenient that they should have at one time, but which in the usual course of things is so pernicious to society? The difficulty is not in the principle but in the application which may be made of it; not in the right, but in the convenience of time and mode in exercising it. But this being supposed, the civil authority is under no obligation to consult nor secure the concurrence of the community whose property it proposes to occupy, even though it be the Church herself, (p. 230--32.)

[This right has been repeatedly exercised, not only in the instances already cited, but many others, by the Spanish and Mexican governments. "In Spain, all the Convents, Monasteries, and other religious houses being suppressed, the State took possession of the property of the regular and secular clergy, destining the product thereof to the liquidation of the public debt." In 1849 the government assigned to defray the expenses of religious worship and the subsistence of the clergy, such property of the secular clergy as had not been sold. In the year 1753, the Bishop of Segovia obtained license from His ~~Highness~~ Holiness the Pope, to sell certain possessions, and build an episcopal palace, and by virtue thereof, actually executed some sales.—The proceeding was arrested by the King, and the Bishop was notified that in such subjects he must apply to the Royal Council and not to the Pope. (See notes to l. 1 and 2, tit. 5, lib. 1, N. R., in 7 *Codigos Espanoles*, p. 24.) By a Decree of the "Sovereign Constituent Congress" of Mexico, of 16th March, 1822, the "temporalities" of religious orders were directed to be sold, and the product applied to the maintainance of the troops. By another Decree of the same Congress, of June 30, 1823, it is ordered, "that the estate of San Lorenzo, ancient possession of the Jesuits, shall be delivered over to the citizens of Chachapalcingo, under a just and useful mode of distribution;" that the recipients of the property should severally pay two and a half per cent annually on the value of their respective shares, which should go first, to discharge existing incumbrances, and the overplus into the public treasury. By a Decree of the same Congress, of 18th December, 1821, it was ordered, that the "temporalities" destined, by the founders, to the support of hospitals, and the friars who had been employed in their service and management, should be placed under the administration of the Ayuntamiento of the City of Mexico. By another Decree of the same Congress, of May 5th, 1823, it is ordered, that the real property of the extinguished Tribunal of the Inquisition, and of other extinguished communities, should be disposed of in small parcels. On the 16th of the same month, the order is renewed, and extended to all "temporalities." By the general law of 4th August, 1824, it is declared that the "temporalities" (of the extinguished orders and ex-Inquisition,) belong to the nation. By a Decree of the Mexican Congress of Dec. 24th, 1833, it is declared, as a principle, that no real property or capitals of *manos muertas* should have been, nor can be occupied, sold, or alienated, without the resolution of the general Congress thereon.

The *Fondo piadoso de Californias* consisted in several valuable estates, urban and rural, situated in different parts of Mexico, originating in private donations and testamentary dispositions, the products of which were destined for the propagation of the Catholic faith in the Californias. By a Decree of the general Congress, of 25th May, 1832, the possession and administration of this "pious fund," was placed exclusively in hands of the government, the products to be placed on deposit in the National Mint. Numerous other instances could be cited in which the practice of the government has been in conformity with the views expressed by Mora, hitherto cited. The truth is, the Church, and other communities—parts only of the general public organization—which could at any time, be dissolved politically by the power which establishes, alters, and abolishes governments, were never regarded as the owners of property in the sense in which individuals are the owners of what belongs to them; but they were, as Mora expressly says, regarded as the "mere administrators of certain funds placed under their charge, which belong to the public, and which are consequently subject to the authority which represents it."]

"But it will be said," continues Mora, (p. 235,) "is not the right of property sacred and inviolable? Does not social order rest upon it? Is it not the broadest and firmest basis of all society? Do not governments themselves owe their existence to it, being many times victims of a revolution produced by having made an attack upon it? All this is true, and nobody doubts it; but it is not likewise so, that political corporations have a right of property distinct from that of society itself. Indeed, they are rather usufructuaries than proprietors; that is to say, their right is rather that of receiving the fruits of the property that has been consigned to them, than that of disposing of the property itself. The latter right corresponds properly to the entire body of society, which has the power to transfer it to communities, and recover it again when it may deem meet. If society, or the public authority which represents it, dare to violate the right of individuals to their property, it commits an injustice, and exposes itself to great risks; the injustice consists in depriving them of what it has not given, and the risk in alarming them against it by this proceeding."

[He then proceeds to show the intimate connection between the Church and the State, of which the Church, considered as a political community, in which character alone it can acquire property, is but a constituent part, and the protection and support due to it from the State.]

"These notions are sufficiently simple, so that nobody can fail to acknowledge the truth and correctness of them, and they must be applied to the protection which civil governments dispense to the church, in virtue of which they ought to provide for the expenses of divine worship. It is then clear that such protection imports the right to fix those expenses, the obligation to pay them, and the exclusive right to designate the funds therefor. From the days of Constantine to ours, civil governments,—the protectors of religion,—have discharged these obligations, and exercised the rights enunciated. They have founded all the principal churches, designating the property in lands or contributions for the sustentation of ministers, and the expenses of worship. The Roman law, and the codes in which its dispositions are found recorded, present in every page decisive proofs of this truth. In the archives of all the churches are found very many documents, by which it is made to appear that the king or duke N. commanded to erect such a church, with such a number of ministers, and applied for their dotation such and such lands, revenues or slaves. The literary history of France, written by the monks of St. Mauro, and the 'España Sagrada,' of Father Flores, abound with respect to these nations in notices, inscriptions and monuments that the kings and sovereign Princes have always fixed the expenses of worship in the erection of the churches, and designated the means of paying them, now in tithes, now in lands, sometimes in slaves, and other times in seignorial tributes. In America, as appears from the laws of the Indies, all the foundations of cathedral and parochial churches, and of the principal convents of regulars of both sexes, have been established by the government and with its funds, although upon petition of the Bishops, and it has designated the number of ministers, the dotation which they are to enjoy, the obligations to which they remain subjected, and even the sacred vessels which are to be procured at the expense of government. The Indian Monarchy of Torquemada, and the life of the illustrious Prelate, Don Vasco Quiroga, contain literally very many cédulas, and in both, notice is given of other royal dispositions, by which the government of its own authority has created, suppressed, or transferred churches, has endowed them with commanderies (encomiendas) or with tithes, has deprived them of the latter, and the former; in one word, has fixed the expenses of worship and the means of defraying them. The right of patronage which the Popes and the clergy have recognized in governments, what other origin has it but the erection and founding of the churches, and the dotation which the kings have assigned to sustain them? And what else does this recognized right import but to fix the expenses of worship and means of defraying them?

"The clergy, however, do not yet acknowledge themselves vanquished by such palpable demonstrations, for they allege that neither have all the churches been endowed from the revenues of the government, nor has all the ecclesiastical property issued from the national treasury, since many of the former, and much of the latter have been establishments founded from the revenues of individuals. But to this we reply by repeating what has been before said, to wit: that without the capacity to acquire conceded to the churches, individuals would not have had the power to establish such foundations, and that when they did establish them, either in their life time or by testamentary legacies, it was with the understanding that they should be subjected to the changes or alterations, which might be made in them in future by the civil authority, to which they were indebted for the right to make a testament, or to transfer their property to a political corporation, which exists only by the law, and has no other rights but what the law has conceded to it, (p. 240–241.)

[But this law, to which it owed its rights and its very existence, was repealed, if not before, on the 22d of April, 1850, by the act which declares that all laws then in force in California, except those passed or adopted by the Legislature, are repealed. It provides, it is true, that no rights acquired shall be affected thereby. And so they were not, in this case; for if a political community which existed only by virtue of the law, lost its own existence with the entire abrogation of the law by which it lived and moved and had its being, it had no longer any rights to be affected. It became defunct, and left no heir. It ceased to be what it before was, a part of the social organization, a part of the State. When and how has it been re-created? And if it has not been re-created, as it certainly has not, what rights can a body or corporation have which no longer exists? To suppose that it has any rights of property would be "as extravagant as to suppose that a fictitious person whom I shall figure in my imagination, might be the owner of lands." The Catholic Church is now presented to us in its primitive aspect, as a mystic body. It is known to and recognized by Christians, but it is not known to or recognized by the State, by the laws.]

"And how shall a corporation or community be able to acquire, sell, exchange (or recover in law) property, (an orchard, for instance,) whose existence is not recognized by the laws, or authorized by them? This pretension would be as extravagant as that a fictitious person, whom I should picture in my imagination, might be the owner of capitals or estates," (p. 196.)

"And does the 184th section of the compiled law upon which the plaintiff here relies, get rid of this difficulty? That confers no right of property. It grants none, and confers no capacity on anybody to inherit or take by succession what formerly was administered by an extinguished community. The Bishop, Chief Priest, or Presiding Elder, (the plaintiff is none of these,) may become a sole corporation, that is where the rules of his denomination require it, not otherwise. What then? All property held by such Bishop, &c., shall be in trust for his Church. But he must get the property before it can be "held" by him. It must come to him in some of the legal modes, gift, grant, or succession. The legislature have said nothing about a right of succession except as to the future. But if they had, to whose right does the plaintiff succeed, supposing him to be a Bishop, Chief Priest, or Presiding Elder? His predecessor was a friar, and could hold no property. Did he succeed to the right of a former Bishop? Did he succeed to the right of the Church universal, or that of the local congregation of Santa Clara? The legislature have made no provision for succession as to the past. If there was any right of Church property under the Mexican government, it was not in the Priest, Bishop, or any Minister. It was in the

Church—the Church universal—the Church recognized by the laws of Mexico, as a political corporation and community; and "the rules, regulations, and discipline" of that Church did not then and do not now require or allow any Bishop or other Minister to become a sole corporation and hold its property in his name, nor regard him as a corporation in any sense. *Sane beneficiarii domini non sunt redituum ecclesiasticorum, sed nudam habent administrationem.* Cavallario, v. 4, p. 219, and he likens it to the *peculium* of the servant, who has the use and administration only, the dominion remaining in the master. Some canonical writers say, the dominion of ecclesiastical property is in Christ, but none say that it resides in the Bishop or other clergy. New additions to Coverrubias, Various Resolutions, note to Num. 2 cap. 16, lib. III., Molina in Tract. II., Disput. 142 and 143, explains very fully this question. He shows that the Bishops and clergy have no dominion in ecclesiastical property.—That they have respectively only the naked administration even of the rents growing out of it—that the dominion (such as it is) resides in the universal Church, of which the Supreme Pontiff is the head. He arrives at this conclusion by considering the particular congregation of Christians to whose religious use any portion of ecclesiastical property may be dedicated, only as component parts of the whole body of the Church. *Cavellario* in chap. 40, § 1, explains the matter in a few words. The title of the chapter expresses his conclusion: "*Penes Ecclesiam est dominium rerum ecclesiasticarum.*" (*The dominion of ecclesiastical property is in the Church.*) and he gives the conclusive reason. "*Porro civiles leges, quarum auctoritate in civitate dominia continentur, collegio catholicae ecclesiae donari and reliqui permisserunt: ut hinc plane constet, penes collegium christianorum esse rerum relictarum and donatarum, seu alias quaesitarum, proprietatem.*" (For surely the civil laws by the authority of which the dominion in things is acquired, have permitted to donate and devise to the Church. Hence it clearly appears that the property of things so devised and donated or otherwise acquired, is in the congregation of christians.)—And the "rules and regulations" of the Church, or the canon law, so far from requiring that Bishops or other clergy shall receive in their own names the title to property belonging to the Church, anathamatize all those who shall be guilty of so doing. The legislative provision referred to, does not remove the difficulty suggested in the passage from Mora, last cited. How can property be recovered then by a community or corporation whose existence is not recognized by the laws?

The trustees, bishop, chief priest, (not the simple parish curate which the plaintiff is,) or presiding elder may become a corporation (which, however, does not appear by the evidence to have been done in this case,) and all property *held* by them shall be in trust, &c. But the rights of property which once belonged, but which had long before ceased to belong to their religious denomination by the entire abrogation of the laws under which that denomination was empowered to hold property, and the extinction of its political existence, cannot be "held" by such bishop, &c., until the title has been *conveyed* to him in the form required by law; and no such conveyance could be made, because there was no grantor, or party capable of granting, in existence.

But if it can be conceived that the Church, as a political community, a part of society, a branch of the State, as it was, survived the fundamental changes in government and the laws that gave it being, where and which is that church, and who represent it now? There certainly was but one church here formerly. It was a unity. The laws recognized no sects, no conventicles of heretics, no seceders of any class. There was but "one Lord, one faith, one baptism." This ecclesiastical unity was the State church. Which is the State church now? It is evident that our Constitution and laws do not recognize the church in any other aspect than as a mystic body, disconnected from all things of a temporal nature, and so far restored to her "native brilliancy and splendor." Hence the necessity of empowering individuals to incorporate themselves and hold property for religious uses, the church being restricted to subjects purely spiritual, and being subject to the law of Christ alone.

Having clearly shown that under the laws of Mexico the Church could lay no claim to real property but what she had acquired by express title in some of the ordinary legal modes, with the sovereign permission, and that the policy and the presumptions of the law being against ecclesiastical amortization, any asserted title on the part of the Church or other *manos muertas*, must be established by the clearest proof, and having, as it is respectfully submitted, substantiated the first nine points proposed, the remaining authorities to be adduced, will tend to illustrate and establish the several propositions embraced in the tenth, relating to the

MISSIONS.

The character of these establishments is exactly stated in the official report to the United States government, made by Wm. Carey Jones, Esq.. in 1849, from which the following extract is made: (p. 11.)

"The right, then, to remodel these establishments at pleasure, and convert them into towns and villages, subject to the known policy and laws which governed settlements of that description, we see was a principle of their formation. Articles 7 and 10 of the same letter of instructions (of the viceroy to the commandant of the new establishments of San Diego and Monterey,) show also that it was a part of the *plan* of the Missions that their condition should be thus changed; that they were regarded only as the nucleus and bases of communities to be thereafter emancipated, acquire proprietary rights, and administer their own affairs; and that it was the duty of the Governor to choose their sites, and direct the construction and arrangement of their edifices, with a view to their convenient expansion into towns and cities. And not only was this general revolution of the establishments thus early contemplated and provided for, but meantime the Governor had authority to reduce their possessions by grants within and without, and to change their condition by detail. The same series of instructions authorized the Governor to grant lands, either in community or individually to the Indians of the Missions, in and about their settlements on the Mission lands; and also to make grants to settlements of white persons. * * * * In brief, every fact, every act of government, and every principle of law applicable to the case, which I have met with in this investigation, go to show that the Missions of Upper California were never, from the first, reckoned other than *government establishments*; or the founding of them to work any change in the ownership of the soil, which continued in and at the disposal of the crown or its representatives. This position was also confirmed—if it had needed any confirmation—by the opinions of high legal and official authorities in Mexico."

In the case of the United States *vs.* Ritchie, the Supreme Court say: "Under these laws the authorities empowered to grant the public lands, have dealt with these mission establishments the same as with any other portions of the public domain, the clergy who previously had the charge and control of them, being confined simply to the ecclesiastical and spiritual direction and government of the missions. We could refer, had we time, to a body of authority on this point of the case; but we deem it unnecessary, and shall close by affirming the decree of the District Court."

The fact that religious instruction, and the members of religious orders were connected with the Missions, has given rise to a very natural mistake respecting their real character among dissenting protestants, who can not conceive how the government could have anything to do with religious missionaries and missions. But the advancement of religion was no less the proper care of the Spanish government, as well as the Mexican, than the advancement of education or commerce.

"Forasmuch as *the principal end* which moves us" (says Philip II, in ordinance 32 and 33 for settlements, which is l. 1, tit. 1, Lib. 4, R. T,) "to make new discoveries is the preaching and extension of the holy Catholic faith, and that the Indians be taught and live in peace and good order, we ordain and command that before conceding power to make new discoveries, order be given that the parts which are already discovered, pacific, and obedient to our holy mother Catholic Church, be peopled, established, and perpetuated for the peace and concord of both republics, (church and state,) as is disposed in the laws which treat of settlements," &c. And in ordinance 27, in the following law in the Recopilation, it is ordained "that the persons charged with making new discoveries be persons of approved christianity, good conscience, and zealous for the honor of God and our service, lovers of peace and desirous for the conversion of the Indians, so as to give assurance that they will do them no harm in their persons or property, so that by the exercise of virtue and good faith they shall satisfy the obligation which we are under to see that this (the enterprise of discovery) is done with all christian prudence, love and moderation." Ordinance 140 (l. 2. tit. 4, lib. 4,) provides that when peace has been secured with the Indians, the faith shall be preached, proceeding at first gently and gradually and not commencing by reproving their vices or idolatries, nor taking away their women and idols, lest they be scandalized and estranged from the Christian doctrine. Ordinance 29, which is the law of the Recopilation next following the one last cited, provides that "there being members of religious orders which are allowed to pass over to the Indies, and who, with the desire to serve the Lord our God, wish to go out in the discovery of land (or unexplored regions) and publish the holy gospel, let license be given them, and let them be encharged with the discovery, and be favored and provided with every thing necessary for so good and holy a work, at the expense of our royal revenues, (hacienda,) observing the order and all that is ordained in the laws of the title which treats of members of religious orders, (*religiosos.*)

Ordinance 147, which is placed in the Recopilation next following the last mentioned, provides, that "where the preachers of the holy gospel are sufficient for the pacification and conversion of the Indians, consent shall not be given for the entrance of other persons, who may impede the conversion and pacification."

The monks of that period, (16th century,) by their rigid discipline and self-denial, and promptness to undergo all dangers and hardships for the propagation of the faith, were peculiarly well fitted to be pioneers in the reduction of the Indians and the settlement of the newly discovered countries. From the value of their labors God forbid that we should wish to detract.

"The religious monks in America are as ancient as its conquest. The first conquerors knew that without them, it was impossible to arrive at the projected end. To the four orders of Santo Domingo, San Francisco, San Augustin and our Lady *de la Merced,* God confided the great work of converting the new world. It is sufficient for me to say, that first it was proposed to send religious monks, and immediately conquerors, and all together departed to serve God, the king, the church and religion. * * * * Here we have in those deserts, the first laborers in the vineyard. Behold, if it can be found that any living being prepared for them a hospitable reception. The conquerors opened roads; the religious monks advanced to the woods, caressed the natives, and by their gentle treatment subdued their ferocity. They acquainted themselves with the different idioms, forming then some imperfect dictionaries with inconceivable labor. They placed elevated crosses upon all the heights, and this was the only signal which they left for those who followed them with the same destination. They received the proper orders from the chiefs of the expedition: by virtue of these they were distributed and detached to different climes and regions." (Parras—*Gobierno de los Regulares de la America*, v. 2, p. 454--55.)

The author just cited treats largely of this whole subject of Missions, in which the regular clergy, or monks, were employed. As the whole work is divided into distinct paragraphs or short sections, numbered consecutively through both volumes, it will be convenient that the references shall be by numbers.

In Chapter 8, Part II., he points out "the difference which there is between the *curatos* (curacies) and *conversiones* (missions not secularized,) according to the royal laws." After observing that the two things, which are quite distinct, are too frequently confounded, he observes, (N. 405:) "Before the sacred Council of Trent, the essential difference of which we shall here speak, could not be perfectly known.—In the times which preceded it, when the missionaries gathered out from the woods, some families or an entire nation, they delivered them over to the monks, who in the place where they formed their *Pueblo*, proceeded to catechise and give them the needful *doctrina*- (instruction in religion.) These monks, who had not gone out into the field, (of new religious conquest) but who upon a footing established were encharged with their education, were commonly called *doctrineros*, and hence originated the appellation of *doctrinas* given to those *Pueblos*, in which they administered the cure of souls, independently of the Bishops; so that although the *Pueblo* were ancient, numerous, and regulated by the laws and customs of police, those *Pueblos* and the care of the Indians were under the sole inspection of the regular clergy (or monks,) in all that related to the administration of the sacraments, and in general, the administration of temporal affairs was likewise under their control, in the form which we shall afterwards explain. These were the *doctrinas*, and are now so, although with a different form; and forasmuch as with respect to them, we have to write the whole of the third part of this work, we omit for that place, the present state of them and their mode of government; it being sufficient for the present to premise, that whatever may be found inthe royal laws and cedulas, under the title of *doctrinas*, they are certain *Pueblos* formed, in which the regular clergy had, or have the cure of souls, or the ministry of parish Priests; and the laws declaring that such or such *Pueblos* are *âggregations* or *doctrinas*, by virtue of this single declaration, they cease to be *conversiones*, [or active missions,] as appears from the clause of a royal cedula, which says thus: "And forasmuch as hitherto they have administered the *doctrinas* with the name of *reducciones* or *misiones* without observing the form of my royal *patronazgo*, [advowson,] by the present I have resolved to declare, as I do declare, that from henceforth the said *reducciones* and *misiones* must be administered with the name of *doctrinas*," &c.

And the difference is so essential and notable, that the government of the doctrinas must be regulated necessarily by the laws of the royal patronage with total dependence upon the Bishops, in that which regards the office and quality of parish priests, from all which those which are only *conversiones* (active missions) are exempt, as will be delared." (N. 406.)

"Suppose now that a complaint of a like nature" [as to the right of the Bishop to interfere in the spiritual government of a mission] "comes directed against certain religious monks who are in their actual destination of active missions [*misiones vivas*]. They have reduced in the year, 70 for example, one hundred and twenty families.—

With them they have formed their little *Pueblo* (*Pueblecito*) with its chapel, cabins, school, and other convenient shops, suitable to the straightened condition and poverty that belong to a settlement, which is directed to protect the Indians provisionally against the severities of the climate, and make them feel as far as possible the advantages of society. Suppose also that the missionaries have dedicated themselves with so much pains and activity to the education of those natives, that in four or five years they have some neophytes, others catechumens, and all assemble at the instruction and exercises of the church, some being disposed for baptism, while others already receive the Holy Sacraments, for which they are fitted."

"Things being in this state, there is a bishop who wishes to visit that field which promises a prompt and seasonable harvest; to give his orders regulate its affairs, register the people (pueblo) form for them their books, and assign them a parish priest, and, in a word, exercise over them his jurisdiction in the mode that he does, and has power to do, in the other curacies; and this, as before said, in four or five years after their reduction. The missionaries in charge resist his measures; the diocesan exerts himself to carry them all into due effect. The former direct their complaint to the general prelate (of the order.) The bishop usually directs his complaints, likewise full of bitterness, and if in the meantime the strong hand of the vice patron, to whom the missionaries ought to direct their first recourse, is not interposed, the Indians are lost. This case has succeeded many times, and may easily take place with some new bishops who arrive in those parts, full of theology, canons, laws, and all the good endowments which make them worthy of their dignity, but who have not yet studied the municipal law of the State of the Indies.

"For such cases as this, the general prelates of all orders must know that the Missions, reductions and conversions, which are all one, are all subject, *pleno jure* to the regular clergy (the monks) for *ten years*, which is to be counted from the day that the formation of their *Pueblo* was commenced. In these ten years the kings of Spain have wished to deprive themselves of all cognizance of them, and have inhibited the viceroys, presidents and governors, bishops and other superior functionaries of the Indies, to intermeddle in the government of them, and ordered that they be left entirely to the discretion of their converters. So that even the small tribute which every vassal ought to pay as an acknowledgment that he is so, the king wills that it be not demanded, until the above mentioned term being fulfilled, they commence being governed by the laws, for which condition the missionaries themselves are going to prepare them beforehand. [N. 110, 111, 112.]

"If yet, in some *reductions*, within the term of ten years, it has not been possible to put all equally in a state to receive baptism, neither his majesty nor the supreme council of the Indies are inexorable, but will easily be persuaded to prorogue the time, so that they shall continue under the sole direction of the missionaries." [N. 415.]

"Our converters and missionaries by virtue of a statute, which will be given literally in the following chapter, must themselves advise the Bishops and governors, that their reductions are in a convenient state to be declared Pueblos or doctrinas, and to have their affairs regulated by the legal dispositions of the royal patronage, supplicating to be relieved from the charge, in order to attend to the more important business of conversion; and it is necessary that they do so; for otherwise they would soon find themselves embarrassed with this work, for which any others are competent, and the seminary [of *propaganda fide*] would find itself without subjects for the exemplary life and labors, and without missionaries for the chief end of carrying forward the conversion of the Indians." [N. 416.]

The missionaries were always regular monks, and could not discharge the office of parish priests, except provisionally, where fit subjects from the *secular* clergy could not be procured, (see Chap. 7, pt. 2, same author.) When the conversions or missions were in a fit state to come under the ordinary ecclesiastical and civil government, secular priests were appointed to the churches, and the monks returned to their cloisters, or were transferred to new missions, which were also in their turn to undergo the same change. So that *secularization*, which consisted in nothing else but the erection of parishes and curacies in the place of missions, and installing the regular pastors under the ordinary or Episcopal jurisdiction, instead of that of the general prelates, was a matter of course. This change did not in all cases take place precisely in ten years, as the laws contemplated it should, but many of the missions continued under the charge of the converters or monks for over half a century.

" In the royal " Regulation for the Presidios of the Peninsula of Californias, erection of new Missions, promotion of population and extension of the establishments of Monterey," approved by the king October 24, 1781. will be found the most minute provisions relative to the missions then already founded, and others which were to be founded in Upper California, by consulting which, particularly Title XV, it will be seen that all the missions in this State were, in the strictest sense, government establishments, founded, regulated and governed in the minutest details by the civil power, and supported exclusively from the royal treasury. So by reference to Palon's Life of Father Junipero, (p. 53--55, 63, 64, &c.) we shall see that the missions erected prior to the date of that regulation, of which Santa Clara was one, established 12th January, 1777, were all founded under express royal orders, and wholly at the expense of the crown.

In the report of a special commission, appointed by the Mexican government to present a plan for the regulation of the missions of the Territories of Upper and Lower California, dated the 6th of April, 1825, the following extract is made :

" One of the points which the superior order of 17th July, of the year last past, recommended to this *Junta* that it should take into consideration, with all preference, was that of the regulation of the missions of the Californias in a manner that, promoting the civilization of the Indians by the possession of landed property, they might be made less expensive.

" The Junta, in the different sessions, shown by the annexed extract of the respective acts, has heard, meditated and discussed the opinion which upon this grave subject was presented by its first Committee.

" Following with it the different steps in the history of that Peninsula, the Junta has acknowledged, that to the missions it owes the beginning of its political existence ; *that the missions constituted its primitive government ;* that these have ever been considered as united with the subsequent forms of administration, and that in any event, the system which in regard to the missions may be adopted, will constitute a most essential part of that which will have to be established for the prosperity and advancement of those territories.

" In effect the dscoveries were much advanced, which since the year 1532, were made upon the coast of the Peninsula of Californias ; but until the end of 1697, at which time Father Juan Maria de Salvatierra, of the Company of Jesus, made his first entrance into it, all the attempts made to occupy it had proved ineffectual. As this entrance and occupation had the denomination of a spiritual conquest, so the government which was established in the first *reducciones*, (missions,) was a government mixed, of monastic and military. The missionaries solicited the authority to take soldiers to escort them, with the pre-eminence that the services performed by this escort should be considered as if rendered in actual war, to elect the *cabo* or chief of this escort, to remove him, giving advice to the Viceroy, and to appoint judges for the government of the country; and all this was conceded them without any other condition, but that the expenses should be on their account, and that they should take possession of the country in the name of the king."

[By ordinance 25 *de Poblaciones*, which is l. 17, tit. 1, lib. 4. R. I, it was provided that discoveries and settlements should not be made at the king's expense. That ordinance provided for *capitulaciones*, or contracts with individuals for making discoveries, and founding towns and settlements. It will be observed that the *capitulacion* of the Jesuits related to Lower California, Upper or New California not having been settled till 1769, under the lead of Father Junipero.]

"In consequence of this *capitulacion*, (contract or treaty) the military authority, the ecclesiastical and regular were combined in such mode that the latter became paramount exercising the superior government. The Captain of the Presidio was the Superior Judge, with plenitude of jurisdiction, civil and political. He had power to hear every species of causes, and proceed to the definitive sentence and execution thereof. He was in the military department a Captain General, not only in the interior of the country and on the coasts, but on sea, with complete jurisdiction over the vessels that might trade in the gulf. In his hands was reunited the superintendence of the pearl fishery; and the judicial authority within certain limits was communicated to each soldier of the missionary escort. But the captain and soldiers were subordinate to the religious President of the Missions, and nothing could be done without his direction and mandate.

[In the early system adopted by the King of Spain for the prosecution of discoveries, and the founding of towns and settlements, the principal contractors and adventurers might, among other stipulations, be empowered to govern the countries and places discovered or settled by them. [See the laws referred to in my brief, in case of the City of San Francisco *vs.* The United States, § 74. 77.] "The cedula of Philip V., of 1744, repeated 4th of December, 1747, confirmed this authority still more, for in it was commanded that in the escorts, as well the soldiers, as the Cabo who commanded each, should be subject to the orders of the Jesuit missionaries, so that they could make no entrance among the Indians, do them any violence, inflict upon them any castigation, nor do anything else but what the monks themselves commanded, and that in order that this subordination should be more secure, the salaries of the escorts, which, by this time, were supplied by the treasury, should be delivered to the missionaries, in order that the same should be distributed from their hands, and in order that if any soldiers should be riotous or of evil habits, the missionaries might send him away, and demand another in his place.

"Upon the expulsion of the Jesuits, 25th of June, 1762, the Viceroy, Marquis of Croix, commended twelve of the missionaries who had been already established in Old or Lower California, to the College of San Fernando, of this Capital, thinking that the other four missions more advanced might be placed in charge of secular Priests. But the formation of these four curacies not having gone into effect for want of clergymen who were willing to serve them, and on the other hand the occupation of the port of Monterey and establishment of its Presidio having been effected, the planting of the Capital of Upper or New California was begun, the monks of San Fernando (of the order of San Francisco) remaining in the newly established missions of Upper California, and those of Lower or Old California being put in charge of the Dominican monks.

"For the new missions the same order and government was prescribed which had been observed in those of Sierragorda, which included the notable circumstance that the administration of the *temporalidades* (temporal goods, or *property*) should be under the charge of the missionaries; although in the point of the political and military government of the missions (*reducciones*) and *presidios*, the system followed by the Jesuits till their expulsion had been varied; in all else a similar regimen was adopted which was ordered to continue as it now exists, by the regulation of the 10th of September, 1772, for the *presidios* of the Frontier.

"Afterwards, by a royal order of the 21st of March, 1775, the provisional regulation of California was commanded to be varied, and in effect there was formed that of the 1st of June, 1779, which was approved by the King on the 24th of October, 1781. This regulation is the one which has ruled until these last times, and in it are seen very remarkable provisions, which decidedly evince the plan of uniting throughout the whole extent of the country, the *rancherias* (hamlets or pueblos) of the gentile indigines, and occupying them by means of missions and presidios, without varying in any respect the interior order and regimen of the missions of the Neophytes and Catechumens dependent upon them.

"The Junta acknowledges that the great progress made by the missions established by the Jesuits in Old California, and by those established in the New by the *Fernandinos*, [or Franciscans] is attributable to the Spanish system of discoveries and spiritual conquests, and is aware of the eulogiums that these establishments have merited, not only from the Spaniards, but from some enlightened foreigners. * * * *

"The state in which the present missions are found does not correspond to the great progress which they made in the beginning. This decadence is very notable in those of Lower California, and would be enough to prove that the system needs variation and reforms. But among these, in the opinion of the *junta*, that is indispensable, which is demanded by the diversion which missionaries have suffered from their essential ministry, occupying themselves with the temporalities of each mission, and with its administration and government, because besides being prejudicial to their PRINCIPAL DESTINATION AND OBJECT,' (which was altogether political and temporal,) this can not be done without a material relaxation of the vows which the sons of San Francisco have professed, and without being opposed to the spirit and letter of the Bull of Urban VIII., of the 22d February, 1633, which ordained that the missionary monks should abstain from every thing that might have the odor of business, merchandise or trafic."

[So the general laws contained in the "*Recopilacion de Indias*," are equally adverse to clergymen of all denominations intermeddling in any business affairs whatever, and must have been considerably relaxed, probably from the necessity of the case, in the system of economy adopted by the government relative to missions.

L. 1, T. 12, Lib. 1, R I., provides that no clergyman shall be alcalde, advocate, or notary public, which prohibition is likewise contained in the laws of the Recopilation of Castile.

Law 2dd of the same title provides that clergymen and priests shall not be capable of being factors of any persons whomsoever, nor contract, nor trafic in any kind of merchandise by themselves, nor through intermediate persons.

With respect to the regular clergy or monks called *religiosos*, their utter incapacity to trade, trafic, acquire, or hold property, without a special dispensation of the laws, is notorious. The following on this point, from Escreche's Dictionary of Legislation, title, "Religioso," will suffice:

"RELIGIOSO—He who has taken the habit in any of the regular orders, and made the three vows of obedience, poverty, and chastity. As the *religiosos* of both sexes, dedicating themselves entirely to God, have solemnly renounced temporal goods, matrimony and their liberty, they are considered as dead to the world, so that the religious profession is regarded as a species of civil death. (l. 8. T. 7. P. 1.) Hence it is that the *religiosos* cannot succeed to their relatives, dying intestate, as results from the positive provisions of L. 17, T. 20, Lib. 10, Nov. R., which is as follows," &c.: "Neither can the *religiosos* be *tutors*, nor obtain public employments, nor enter into contracts, nor mingle in any affairs or dependencies of the world, nor in temporal suits under any pretext, even though it be of piety, unless it be a thing affecting their respective religion, and with written license from its Prelate. * * There are some who hold that *religiosos* can not be witnesses to testaments or other acts of last wills, because they are not citizens (*vecinos*) of any *Pueblo*, neither are they regarded as living, for being found in a certain mode out of society; but others opine that testaments to which *religiosos* are witnesses would not cease to be valid, considering that the laws do not prohibit their being such, especially if care is taken to express in it, that other persons could not be had." By express provision of the Constitution of 1836 and that of 1843, the rights of citizenship are lost by taking the habit in religious orders. (1 Consti. law, Art. 11, frac. 6. *Bases Organicas*, Art. 22, fr. 4.

It will be observed, also, that the civil incapacities of *religiosos* cannot be removed by any *ecclesiastical* dispensation merely, inasmuch as they grow out of the *civil* laws, without the existence of which, any violation of their vows or the rules of their order would expose them to ecclesiastical censure, but not to any temporal penalties or consequences.]

"Notwithstanding, the Junta has given due attention to the fact that the backwardness of the neophytes in their civil and religious education, exacts that we proceed with great care and circumspection. For this reason it has thought it necessary that the existing Missions remain in the class of new conversions, and that the *religiosos* in whose charge they are found remain with the faculties which for the spiritual administration is conceded by the Bull of Pius V, of 24th March, 1567, of which mention is made in the municipal law 47 tit. 143 lib. 1, which was confirmed by that of Gregory XIV, of 16th Sept. 1551, and to which is likewise conformable the Bull already cited of Urban VIII, of 22d Feb., 1633; all this, meanwhile that these reductions are put in a state to be formally erected into parishes and delivered over to the diocesan prelate of Sonora, in compliance with the disposition of Innocent XI, of 8th May, 1682, by which the seminaries of missionaries are regulated." (This erection into parishes and delivery over to the jurisdiction of the secular prelate or bishop is precisely what is meant by secularization, and was in due time a matter of course.)

"For the same reason, although the *Junta* considers that the government ought to resume the administration of the *temporalities* of the Missions, it believes that in order to this it is indispensable that before putting its hand thereto, it proceed by means of those rules which may appear most appropriate to establish a good administration and the greatest advancement of agriculture in the lands of the Missions, and that the subsistence and government of the neophytes be guarded against all prejudice, preparing them, so that as soon as they are found in a state to govern themselves, there may be granted them the possession of a competent landed property."

This *Junta* was composed of eight individuals, whose names are signed to the report, three or four of whom were Advocates. Among these names are Pablo Vicente de Sola, who had filled the office of Governor in California, and Juan José Espinosa de los Monteros, who, according to the opinion of José Maria Luis Mora, was recognized without dispute as the first jurist of the Mexican Republic.

In the report of a committee of this same *Junta*, dated 13th May, 1827, respecting the regulations to be adopted for the government of the Californias, it is said:

"Even the order of government with which this delicious country began to be ruled, was original: the missionaries were at the same time the *civil governors andspiritual fathers;* they established the ascending scale of reductions, Missions and *Pueblos,but in all of them they were the governors, and the Superior of the missions under his bonnet reunited, the civil authority, the ecclesiastical and the military;* the troops which supported it being subject to his dispositions, so that it would have been nothing strange, if the catastrophe should have been repeated which was experienced in Paraguay." Such was the position which the *Padres* occupied in the missions, and such the *possession* which they held They were the governors, and administrators of the temporalities committed to their charge, under the political system which was established by law. *Their possession was that of the government.* In the year 1844, Manuel Castañares was residing in the City of Mexico, in the capacity of deputy elected to the general Congress for the Department of Upper California. Several of his speeches and communications addressed to the supreme Government were published in Mexico. In a very elaborate communication which he presented to the government, treating of all the various topics which he regarded as most interesting to his department, dated 13th May, 1844, are found the following observations, treating of the *Missions:*

"There can be no doubt that to these establishments, that peninsula owes the beginning of its *political* existence; that the *missions constituted its primitive government; that they have always been considered as united with the posterior forms of its administration,* and that in any event the system which may be adopted with respect to the missions, will make a most essential part of that which may be established for the prosperity and advancement of that country. The greatest evil that could have been done to my department, was the alienation of the property pertaining to the piety fund (fondo piadoso) of the Californias by the provisional government. This fund by itself alone was a lever sufficient to give to that country a general impulse, without neglecting on this account the original object of its institution."

This *fondo piadoso,* it will be recollected, consisted of old landed estates, which had been actually cultivated, some of them more than a century, and been administered by the religious missionaries. Yet it was thought to be in the power of the government to administer, control and alienate this property. It was so deemed by that government which was, more than any other, partial to the religious orders, which could not be accused of impiety or indifference to the rights of the Church, but which, on the contrary, as Micheltora expresses it in his decree of 29th March, 1843, given in evidence in the case at bar: "prided itself in being religious." Nor does Castanares complain of the act of alienation on the ground of injustice to the Church, or to the religious orders to whose charge the property was originally committed, but on the ground alone of injustice to his *department,* and he says: "the Department of California supplicates and hopes from the government to be reinstated in the possession of this property, *which belongs to it exclusively,* and from the legislative branch, the abrogation of Article 6 of the law of 17th Sept., 1836, which subjected the administration of the fund to the sole hands of the bishop of that diocese; conferring, in consequence, upon the Assembly and Government of said Department a most just intervention in all that concerns the before-mentioned fund."

Again, in the same communication under the head of "Mexican Colonization," the importance of promoting which he represents in most eloquent terms, he says: "I will give to your Excellency (the Minister of Relations) another indication of the funds which in part may be destined to this measure, which is the salvation of the national territory: *All the temporalities (temporalidades) of the Missions are certain property which belongs to them in common, and in which the missionaries and the religious orders upon which they are dependent, have nothing more than the charge of their administration by commission from the Government.* No more useful inversion can be given to this property than that of promoting the settlement and cultivation of the lands of the same Missions, and others which form the occupied portion of the Californias, because, from this will result a positive benefit to the neophytes and catechumens, and the political reduction of the gentile tribes."

Neither the Mexican nor Spanish government ever hesitated to exercise its absolute control in the disposition of the mission *lands*, whether consisting in those which had been occupied merely for grazing, cultivated fields, gardens, orchards, or otherwise, nor was it ever pretended that the church or religious orders had any shadow of right to any portion of them, although it was sometimes doubted whether those which were actually occupied by the missions ought not to be considered as the property of the Neophytes and Mexican settlers. Hence in the general regulation on the subject of colonization of Nov. 21st, 1828, Art. 17, it is provided that, "In those territories where there may be missions, the lands which these occupy shall not be colonized at present, and until it be resolved whether they ought to be considered as *property of the reducciones (missions) of Neophyte, Catechumens, and Mexican settlers.*" This temporary suspense was removed by the Act of Congress, of 26th November, 1833, which provides that "The government is empowered to take all the measures which may secure the colonization, and carry into effect the secularization of the missions of Upper and Lower California, being authorized to this effect, to use in the manner most convenient, the estates of *obras pias* (the piety fund) of said territories, in order to furnish resources to the commission and families who are now in this Capital, with destination thereto."

Under the authority conferred by this law, the government appointed D. José Maria Hijar, Director of Colonization of Upper and Lower California, and *Gefe Politico* of Upper California, (his commission in the latter capacity being subsequently countermanded,) and committed to him a series of instructions, consisting of 15 articles, dated 23d of April, 1834, in which (Art. 1.) he is ordered to "make a beginning by occupying ALL the improved property [*bienes*] belonging to the missions of both Californias, and the military commandant, under his responsibility, to lend, whenever required, the necessary aids for the said occupation." The lands were to be divided out among Mexican colonists and civilized Indians, mixing both races in one and the same settlement, and the movable property and cattle were to be distributed to a certain extent, among settlers, native and Mexican. The half of the overplus of goods and stock was to be sold, and the remaining half preserved on account of the government, and to be applied, as occasion might require, to the expenses of divine worship, support of the missionaries, salaries of masters in primary schools, supply of useful articles to children of both sexes in the schools, and the purchase of agricultural implements which should be distributed to the colonists gratis. Hijar arrived here with his instructions, and Figueroa, who then filled the office of Governor, expressed his readiness to co-operate in carrying them into execution, but desired to consult the Territorial Deputation which was accordingly convoked by his order. In all the heated controversy which followed, chiefly confined to the question whether the Director of Colonization or the Governor and Deputation had the superior authority in the matter, it is not once insinuated that the church or the clergy ought to be consulted, or had any rights of property to be affected, although *all* the property (bienes) of the missions, including even the movables, without any exception whatever, was to be occupied for the purposes specified in the instructions. It was contended, however, that the rights of the Indians would be violated by the literal execution of the orders of the Supreme Government, on which point the Deputation in the elaborate report of their Committee, which was adopted, say:—

"Senor Hijar being invested with the double employment of *Gefe Politico* and Director of the colony which he has brought along with him, we see that the superior government withdraws from him the authority annexed to the former office, and takes no notice of the latter. "The committee might consider it as inherent in the former, and that he was divested of both at the same time by virtue of the before-mentioned order of the supreme government (the order revoking his appointment as Gefe Politico;) but attending to its literal tenor, they are of opinion that he has power to continue in the special commission of Director of the colony which he has brought, as his appointment expresses, for which purpose the Gefe Politico may extend to him from the Missions such aids as he can do without prejudice to the Indians, and the other purposes connected with said establishments; for the expenses of the colony ought to be borne either by the *fondo piadoso*, so called, of Californias, according to the decree of 26th Nov., 1833," (the law copied above) which authorizes the government therefor, or by the confederation, according to the decree of 6th April, 1830, which we pray may be read; but by no means from the property (*bienes*) of the Missions, which is the exclusive fruit of the laborious toil of the neophytes of the Missions, and the only patrimony which they have to expect in remuneration for an age of slavery. * * *

"Having set down these principles, the committee is of opinion that the execution of the instructions given to Senor Hijar be suspended in that part which commands to take possession of the property (*bienes*) of the Missions, to distribute and convert them into money; and that a representation be made to the supreme government, including this report, praying that it may be pleased to revoke the order; that the property (*bienes*) of the Missions may be distributed to the Indians and applied to objects for their advantage, *they being the sole owners*." (See "Manifiesto" of Figueroa, published in 1835, p. 11–33; and translation, p. 10--22.)

[To avoid any question that might arise in regard to the import of the word *bienes*, which is the term employed to designate the property or effects of the Missions, and which certainly includes gardens, orchards, vineyards, and improved lands only, the following definition is given from Jose Maria Luis Mora, in his published works, vol. 1, p. 202: "The word *bienes*, in its rigorous acceptation, signifies that re-union of values which constitute the permanent and durable means of supplying and satisfying human necessities. Lands which produce fruits, capitals which yield income, and the revenues which consist in perpetual imposts upon the population which those who compose it have to pay, are all so many species of *bienes* in the rigorous acceptation of the word, and these the church did not begin to possess legally, till after the peace of Constantine."]

The act of Congress of 17th of August, 1833, for the secularization of the Missions of Upper and Lower California, although it does not recognize the religious missionaries or their order, much less the Church as owning anything attached to the Missions, very distinctly designates and limits, in articles 4, 5 and 7, what the government was authorized to—but which, so far as appears, it never did—assign to the newly erected parishes.

"There are destined for each parish the Churches which have served in each mission with the sacred vessels, ornaments and other fixtures, (*enseres*) which each one now has, and besides, the apartments annexed to the same Church, which in the judgment of the government, may be deemed necessary for the more decent use of the same parish." (Art. 4.)

"For each parish the government will order to construct a burial place outside of the town (*poblacion.*") (Art. 5.)

"Of the edifices pertaining to each mission, the government shall assign the most suitable for the habitation of the curate. annexing thereto (*agregandole*) land which shall not exceed two hundred varas square, and the remaining edifices shall be specifically adjudicated for a town hall, (*casa de Ayuntamiento*) primary schools, public establishments, and workshops " (Art. 7.)

So then the very Churches which had served the missions. the apartments annexed thereto, and the mission buildings, were all considered as subject to the disposition of the government, and by its authority were to be given, some to the use of the parish, that is to the Church, which now for the first time, makes her appearance in these matters, and the rest to municipal uses, primary schools, and workshops. But *nemo dat quod non habet.*

What then was the condition of the vineyards, orchards, and lands which had been cultivated by the common labor of the Indians? They remained at the disposition of the government, as they always had been before. They were not assigned to the use of the curate, because his occupation was not agriculture, or horticulture, or the cultivation of vineyards. He was to be employed, not with the cares of business, but with the care of souls.

In the provisional regulations adopted by Figueroa, 9th Aug. 1834, for carrying into effect the law of Congress. it is ordered that the vineyards, orchards, and corn fields shall be cultivated by the Indians in common, which for the present remained undisposed of, till the resolution of the supreme government. (Rockwell's Sp. and Mex. law, v. 1, p. 458. Jones' Report, p. 16.) It is unnecessary to notice specifically all the acts of the general and departmental governments and of Congress on this subject, the several regulations of Figueroa, of Alvarado, of Micheltorena and Pio Pico, the more important of which will be found at length in Rockwell, (p. 455–477,) and referred to substantially in Jones' Report, (p. 8–22,) proving beyond the slightest doubt, that neither the missionary Fathers nor the Church ever had any claim to, or possession of *any* of the lands of the missions, but that the former administered them, to use the very words of Castanñares, above cited, "by a commission from the government," and as Mr. Jones observes in his Report, (p. 17,) that "all the tracts of land pertinent to the missions, but not directly attached to the mission buildings, were, (after the secularization) granted as any other lands of the territory, to the Mexican inhabitants and to colonists, for stock, farms and tillage."

The decree of Micheltorena, of 29th March, 1843, which is given in evidence in this case, only goes to confirm these positions. Article 1st provides that the missions specified in it, among which Santa Clara is included, "shall in future continue to be administered by the very reverend *padres*, (the monks,) *as tutors to the Indians*, in the same manner as they held them formerly," and that was, "by commission from the government." It is certain that their commission has *now* expired; that they can no longer administer them "as tutors to the Indians;" that the system under which they administered them formerly, is repugnant to our Constitution and laws; that they can no longer, as they did formerly, exercise the functions of governors in these establishments, nor can the Superior of the missions as he did formerly, "reunite under his bonnet the civil, ecclesiastical and military authority."

By art. 4, "The Departmental government, *in whose possession the missions have* *been up to this date*, by virtue of the most ample powers with which it is invested AUTHORIZES the reverend *Padres* to provide," &c.

What is there in all this, but an evidence that Micheltorena, carrying out the policy of Santa Anna's government, always partial to the religious orders, wished to continue them in charge of the temporal authority and administration in the missions, which they had exercised from their foundation, but which the Junta from whose report large extracts are given above, say that they "have not been able to reconcile with the principles of our independence, and political constitution, nor with the true spirit of the gospel."

It has been asserted that the mission of Santa Clara continued under this regimen while the Mexican government existed, and that it was never secularized. If so, then there was no parish, no curate, and of course no rights acquired by the Church, nor any parish priest. The only rights of property that could have existed would have been those of the religious order to which the *Padres* belonged, the monks being themselves incapable of acquiring or holding property. And to these rights the Church could not succeed in any legal mode. The Bishop or secular clergy could acquire no control or jurisdiction over property, or rights of property belonging to religious orders. They were exempt from this jurisdiction, both spiritually and temporally. They were subject only to their own Prelates and Superiors, in all things. Nor indeed, if these *padres* or their religious order had been in possession of any rights of property in or about, or any way appurtenant to the missions which they served, could any act of secularization that was ever adopted affect these rights, or transfer them to the secular clergy or the Church, or invest the Bishop or any parish curate with any possession of, or control over it whatever? By what process, of which we have any evidence in this case, could real estate have been transferred from one distinct religious corporation to another? No such transfer did, or could take place, whether Santa Clara was secularized or not, and in either case there is no possible mode by which the present Bishop or curate could, so far as regards property, set up any rights in representation of the religious *padres*. But by the law of secularization of 17th Aug., 1833, the government was authorized to set apart for the use of each parish, the church building, convenient apartments adjoining, one of the mission edifices for the curate's dwelling, with 200 varas square of land annexed, and land outside the town for a burial place. If Santa Clara was never secularized, this property could not have been and never was thus set apart to the use of the parish which was not erected, and in that case the Church has no right even to the ground upon which the temple of worship stands.

The Document bearing date Nov. 17th, 1840, purporting to be an order of the President, made on application and representations presented by the Bishop of California, even if its *authenticity* had been duly established by legal evidence, is irrelevant, and on that ground alone should have been excluded. It will be observed that this paper bears no signature, nor any seal. The words following it: "It is a copy, Mexico, Nov. 21, 1840," signed "J. Yturbides," also without any seal, throw no light on the subject, and the same may be said of what follows this, signed "Jose Ma. Duran," and the certificate of Arroyo to the genuineness of Duran's signature, which certificate of Arroyo, although it purports to be on stamped paper, does not bear the seal of the Department of Relations, nor any other seal. There is nothing connected with the paper which shows in an authentic form whence it is obtained. There is no certificate from the proper officer, under the proper official seal, stating or showing that the paper is an authentic copy of a record or document remaining in the Department of Relations, the Department of War, the Department of Justice, Treasury Department, the *Archivo General*, or any other public archives; and besides, there does not appear to have been any signature, either of the President or any minister or Secretary, to the *original* of which this purports to be a copy. Under such circumstances, it was offered in evidence without any proof to explain it, and was properly rejected.

But it is chiefly on the ground of irrevalency to the question of property, that it is proposed to consider this Document. Here it is: "Nov. 17, 1840. The Most Excellent President has been pleased to order in conformity with all that is prayed for by the Reverend Bishop of Californias in this note, (letter or memorial) so far as the attributions of His Excellency extend, and authority is given by the decree of 7th Nov., 1835, which ordered to restore the missions to their ancient condition, to which end a general order shall be issued to the Governor of the Californias, so that through the medium of the subordinate authorities, there be restored, without delay or hindrance, to the Missionary Fathers, the possessions (*posesiones*) and property (*bienes*) which they used to administer for the conversion of the infidels." This extract contains all that is material to the present question, and it will immediately be noticed that the order does not profess to go beyond the action which was expressly authorized by the act of Congress of 7th Nov., 1835, to which it refers, and which act is in the following words: "Until the Curates, of which article 2d of the law of 17th Aug., 1833 speaks, shall have taken possession (of their parishes), the government shall suspend the execution of the other articles, and maintain things in the condition which they had previous to the said law."

Article 2d, of the law of August 17th, 1833, here referred to, provides, that, "In each one of the said missions a parish shall be established, served by a parish priest, of the *secular clergy*, with the dotation of from two thousand to two thousand five hundred dollars annually, at the discretion of the government."

The law of 17th August, 1833, requiring the missions to be converted into parishes, and the religious *padres* to be re-placed by parish priests under the Episcopal jurisdiction, was in no way disadvantageous to the church, but for want of secular clergymen who were willing to serve in these new parishes, it was found impracticable to carry out immediately all the provisions of this law, and therefore Congress, in the Act of 1835, still adhering to the plan adopted in the law of 1833, authorized the government temporarily to suspend the execution of the other Articles, until the secular curates, spoken of in Article 2d, should take possession of their offices. The law of 1833 was not abolished or modified, but remained in full force, and that of 1835 only prescribed to the government, the order of proceeding under it. It is very clear that the President did not possess, nor assume to exercise any powers on this subject but those granted by Congress, or at least that he did not arrogate to himself the power to issue any orders in contravention of the law. He decrees "in conformity with the Bishop's petition *so far as he is authorized to do by the law of 7th of November*, 1835, *which orders that the missions be restored to their former condition;*" that is, that they be maintained in that state, till the secular curates shall be appointed and enter upon their charge, after which the government would be obliged to carry into complete effect all the provisions of the law of 17th of August, 1833. It must also be observed that the Act of Nov. 7th, 1835, relates simply to the subject of *secularization*, and temporarily suspends, or rather directs the government to suspend the measures to be taken on that subject till it should be found practicable to supply the places of the religious *padres* with secular curates. It does not suspend the Act of Congress of 26th November, 1833, which empowers the government to take all the necessary measures for the *colonization* of the missions of Upper California. In fine, it had nothing to do with the disposition which the governmen might think proper to make of the *lands* of the missions. It related solely to th *ecclesiastical* system. In "maintaining things," however, "in the state which existe previous to the law of 17th August, 1835, the religious *padres* would still be allowe to administer the temporalities of the missions, "by commission from the govern ment," and "as tutors to the Indians" as they had previously done, and these *padre* would eat the fruit of the orchards in common with the Indians, and drink of the win which the vineyards would produce. They would subsist upon the products of th land, because they had now no salary assigned nor other mode of living, as the parisl priests were to have when they should be installed. The only power which th President possessed, or pretends in this order to exercise, is that which is given him i the said Act of the 7th of November, 1835—that is to maintain things under th ancient system of Missions till the secular curates should be appointed and enter upo their charge. He could neither confer upon nor legally recognize any rights of property in the *padres*. The act of Congress did not authorize him to do that, for not only the acts of Congress, but all the laws and all the rules of their religious order contemplated that they should be removed and be replaced by the secular clergy, and therefore no provision of landed property was necessary or could be made for them. They must retire to their convents, or enter upon a new field of conquest, among the unconverted gentiles, always strictly adhering to their three solemn vows of obedience, chastity and *poverty*. Neither could he, nor does he pretend to recognise, any right of property which was to vest in, or descend to the Bishop or other secular clergy or the church, or the parishes which were eventually to be erected. On this subject the legislative will was explicitly declared, and the powers of the government defined and limited, setting forth precisely what was to be set apart for religious uses, in the act of 17th August, 1833, which was *never repealed nor modified*.

The acts of the Departmental government subsequent to Micheltorena's decree, among which may be referred to, Decree of the Departmental Assembly of 28th May, 1845, which provides for renting some of the missions. Pio Pico's for the sale and renting of the missions, Decree of Departmental Assembly of 3d April, 1846, (Rockwell, 371--376,) and another Decree of the Departmental Assembly, of 24th August, 1844, (which will be found in the Archives,] *passed on the recommendation of Micheltorena himself*, providing for the sale, renting and hypothecation of the real estate, and cultivated lands of all the missions, all show that these establishments, with their vineyards, orchards, gardens, buildings and appurtenances, were regarded as public property, and in no public act will it be found that the Church, or religious orders, or the clergy were recognized as having any right of property in any thing appurtenant to them, and it is believed that no instance can be found in which any existing right of property was asserted on the part of the Church prior to the American occupation.

On reference to the decree of 24th Aug., 1844; in the records of the Sessions of that period, it will be found to be declared in the report of the Committee which was, as is stated, approved with absolute unanimity, that *the missions are the property of the nation*, and the government is empowered to offer for sale, mortgage, or lease, all *fincas raices* [improved real estate] and *terrenos de labor* [cultivated lands] of the missions of Upper California, comprehended in the distance from San Diego to Sonoma, and dispose of the proceeds for the expenses of the war which was anticipated with the United States, paying first the debts of the missions in preference. This excepts no orchards, vineyards, or gardens, for these were the only improved real estate and cultivated lands that belonged to the missions, and comprehended all that was valuable on which money could be raised. Article 2nd excepts the mission of Santa Barbara, for the Episcopal palace, that of St. Ines for a college, and some other one which the government was to reserve as a national farm, for subsistence of the troops. Art. 5 provides that " the missions sold shall have the character of *Pueblos*, and those rented, mortgaged or occupied by the government, that of Departmental estates."

[The word *finca*, above applied to the property which the government was to sell, mortgage or to lease, and which it will be seen is also used with the same application in the decrees that will presently be referred to, is never employed to designate wild and uncultivated lands, but according to the brief definition given by Escriche which is a copy of that given in Salva's dictionary of the Spanish Academy, *finca* is "the *heredad* (estate) or possession whereof some one has a right to receive the income, (renta) or some determinate amount." In the Spanish and English dictionary of Velazquez, it is defined "any kind of property, but especially land which yields a regular income; tenement, building, house, landed property." "In the acquisition of urban *fincas* in the cities, villas and *Pueblos*, as well as of the lands (terrenos) adjoining, in which it is desired to construct new *fincas*," &c. [Decree of 11th March, 1842, art. 4.]

By the act of 28th May, 1845, Art. 1, the Departmental government was to call together the Indians of the missions of San Rafael, Dolores, Soledad, San Miguel, and La Purisima, which were abandoned by them, by means of a proclamation to be published, calling upon them to return within one month and cultivate them, and that if they did not, the said missions would be declared to be *mostrencas*. (without owners, or escheated,) and the assembly and Departmental government will dispose of them as may best suit the general good of the Department.

Article 2d provides, that the missions of "Los Carmelos, San Juan Bautista, San Juan Capistrano, and San Francisco Solano, shall be considered as *Pueblos*, which is the character they have at present, and the government, after separating a sufficient locality for the curate's house, for churches and appurtenances, (*suspertinencias*,) and a municipal hall, [*casa municipal*,] will proceed to sell the remaining premises, [*lo demas*,] at public auction, in order to pay their respective debts, and the overplus, if any shall remain, for the benefit and preservation of divine worship. The only reserve here made for the use of the Church, is precisely what is authorized by the act of Congress of 17th August, 1833, and of course the only reserve which could lawfully be made for any such purpose, that being determined by the supreme law of the land. Art. 3d provides, that all the rest of the missions, as far as San Diego inclusive, may be rented out at the option of the government. The only exception made from the renting, is the principal edifice of the mission of Santa Barbarbara, in which the Bishop was to reside. What is particularly worthy of note in this Decree is, that the ecclesiastical authorities and Ministers residing in the missions mentioned in Article 1, or those in the nearest missions were requested by the government to see that the proclamation mentioned in that Article was duly published. Yet we hear of no complaint or reclamation from that quarter. It will also be noted, that Article 8th makes mention of and expressly recognizes as being in force, the Decree of the Assembly of 24th August, 1844, above cited, which does not appear to have been published in any late works, but which will be found in its place in the archives.

So by the decree of Pio Pico of 28th Oct., 1845, it is ordered:

"Art. 1. There will be sold in this capital, to the highest bidder, the missions of San Rafael, Dolores, Soledad, San Miguel and La Purisima, which are abandoned by their neophytes." [This decree was made after due proclamation, made as provided in that of May 28, 1845.]

"Art. 2. Of the existing improved property (Fincas) on the *Pueblos* of San Luis Obispo, Carmelo, San Juan Bautista, and San Juan Capistrano, there shall be separated the churches and appurtenances, (sus purtenencias,) one part for the curate's house, another for a municipal hall, [casa municipal,] and place for a school, and the remainder of the said edifices shall be sold at public auction."

The missions of San Fernando, San Buenaventura, Santa Barbara and Santa Ines were to be rented out to the highest bidder for nine years. It is expressly declared [Art. 10] that the renting shall include "all the lands, out door property, [bienes del campo,] implements of agriculture, *vineyards*, *orchards*, *workshops*, and whatever, according to the inventories made, belongs to the respective missions, with the mere exception of those small portions of land which have always been occupied by some of the Indians of the mission. *The buildings and improved lands* [las fincas] *are likewise included*, excepting the churches and their appurtenances, [sus pertinencias,] the part destined for the curate's house, municipal hall, and place for a school." The principal edifice in the mission of Santa Barbara is also excepted.

Art 14. The renting of the missions of San Diego, San Luis Rey, San Gabriel, San Antonio, *Santa Clara*, and San José, will take place when the difficulties shall be got over which at present exist with respect to the debts of those establishments, and then the government will inform the public, and all shall be done agreeably to these regulations." The Departmental Assembly again in a decree of 3d Aug., 1846, which as evidence of the light in which the subject was regarded, is just as valuable as if made prior to the raising of the American flag, reaffirm the decree of 28th May, 1845, and expressly recognize and sanction what the governor had done on the subject.

Thus it will be seen that every act of government from the earliest period, not excepting the decree of Micheltorena and the alleged order of Bustamente's government, of 17th November, 1840, and the uniform acquiesence of the clergy, go to confirm and establish beyond any room for cavil, that the mission lands, of every kind, improved and unimproved, gardens, orchards, and vineyards, and the buildings too, were the property of the nation, subject to be administered, rented, sold, distributed to settlers, or otherwise disposed of by the government, in conformity with the laws; and, moreover, that the *Padres*, or the secular clergy, or the church, not only never had, nor ever claimed to have, any property in them, but that they never had any *possession* of them, or of anything pertaining to them, or, to express this conclusion still more clearly, in the very words of Castanares, which are only a reiteration of those of the learned *Junta* before cited, that "the missionaries or the religious orders upon which they depend, had nothing more than the charge of their administration by commission from the government." [See Collection of his Official Documents, p. 35.]

But why was this recourse to so many documents necessary in proof of the light in which the subject was regarded by the government? Is it not a very simple and almost self-evident proposition that the Plaintiff, or those for or under whom he claims, could acquire landed property only by express title, and it is not admitted that no such title has been adduced or even alleged? Is it not also abundantly established by a long train of authority, reaching back during a period of almost fourteen hundred years, that the church or the clergy were incompetent to acquire such property by *any title*, without express license of the sovereign or legislative power? And in addition to all this, has not the Act of Congress of 17th of August, 1833, before cited, precisely determ and limited the provision which was to be made for the churches and curates, and fixed the amount of land that was to be set apart for their use?

The meritorious labors of the *Padres* have sometimes been invoked in aid of the new pretensions of the secular Clergy, who can not be considered as the successors of the *Padres*, nor any more like the *Padres*, "than I, like Hercules." But this attempt to associate the names of those pure men with the idea of temporal rewards, what is it but a libel upon the motives which led them to forsake and renounce the world, and take upon them the solemn vows of their order? What is it but to depreciate and degrade them from their holy calling? They were not of this world. They had been chosen out of the world. They had forsaken father, and mother, and houses, and lands, and renounced all the treasures of earth, that they might lay up for themselves treasures in heaven. They came hither, not as squatters upon the public domain, but to "look after the lost sheep of the house of Israel." The only wealth which they esteemed was the faith; the only fields which they wanted for cultivation were those in which they might sow the good seed of the word of God. The only orchards which they coveted, were those in which they might plant, and water the good trees, which might bear abundantly the choicest fruits of the holy Gospel. The only house in which they desired to have any interest or title was, "an house not made with hands eternal in the heavens." Even their own lives they counted not dear unto themselves, but laid them down joyfully for the cause of their divine master. They went out into the unbroken wilderness in search of the wild and savage Indian, in order to bring him into the *corral* where were gathered the flock of Christ. Heat, thirst, and continual journeyings through interminable deserts, consumed and reduced them to the mere figures of men, and many of them, overcome at last by hunger, disease, and the severity of the climate, passed to a better country and a life without end, to join the martyrs who had gone before them. "Their dust remains scattered through those frightful solitudes where now they rest, waiting for the general resurrection of the dead."

The exalted worth of these true soldiers of the cross has justly been the theme of eulogy on the part of enlightened men in all countries, but never has it been attempted to desecrate their memories by connecting their sacrifices and sufferings with worldly acquisitions, until the establishment of the United States Land Commission for California.

OPINIONS

ERRATA.

Page 5, 23d line from top, for Ulphion, read Ulpian.
Page 5, 4th line from bottom, for *muertos*, read *muertas.*
Page 7, 5th line from top, for tribes, read tribe.
Page 12, 15th line from top, for derde, read *desde.*
Page 12, bottom line, for functionaros, read functionaries.
Page 21, 23d line from top, for *is* wanting, read is *not* wanting.
Page 23, 6th line from top, for their, read these.
Page 23, 8th line from bottom, for recorded, read reckoned.
Page 25, 10th line from top, for His Highness, read His Holiness.
Page 28, 6th line from top, for administratiorem, read *administrationem.*
Page 28, 24th line from top, for proprietatum, read *proprietatem.*
Page 33, 19th line from top, for Palon's, read *Palou's.*
Page 37, 14th line from bottom, for Micheltora, read Micheltorena.
Page 40, 17th line from top, for conditions, read condition.
Page 46, 1 line from top, for determ., read determined.
Page 46, 4th line from top, for labor, read labors.

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.....
1853.

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OPINIONS

DELIVERED BY

HARRY I. THORNTON,

AS ONE OF THE COMMISSIONERS OF THE BOARD

TO

Ascertain and Settle Private Land Claims,

IN THE STATE OF CALIFORNIA,

Under the Act of Congress of the 3d of March, 1851.

SAN FRANCISCO:
PRINTED AND PUBLISHED BY FRANCIS A. BONNARD,
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.....
1853.

TO THE PUBLIC.

Having a little interval of leisure at this time, I do not know how better to fill it, than by the publication of the opinions which I have delivered, as one of the Commissioners to ascertain and settle the Private Land Claims in California. It is due to myself, and may not be wholly without benefit to those concerned, to make known the principles by which I have been governed in the discharge of the office, from whose duties I have been recently relieved, by the appointment of the distinguished gentlemen who will hereafter perform its functions. If the views which I have taken of the duties of this Commission, under the Act of the 3d of March, 1851, creating the Board, and the conclusions to which I have arrived as to the rights of the United States, and of the claimants of land in this State, under the former governments of the country, are *not correct*, they are at least the result of an honest and earnest effort that *they should be so;* and I submit them in this accessible form to the public judgment.

When the first notice of this work was issued, the intention was, to have published it in Law form, in which it would have occupied the number of pages indicated in the prospectus. With a view to greater dispatch in its publication, the matter has been compressed into a smaller volume.

HARRY I. THORNTON.

OPINIONS OF COMMISSIONER THORNTON

ON

PRIVATE LAND CLAIMS

IN CALIFORNIA.

DISSENT OF COMMISSIONER, H. I. THORNTON, FROM THE OPINION OF THE BOARD, ON THE MOTION ENTERED BY THE COUNSEL OF MARIA LOUISA GREER AND MANUELA COPPINGER, CONTESTANT IN NO. 2 :

The motion in this case is in the effect to permit the applicant to become a party in a cause now pending before us, between the United States and the heirs of Louis Arguello, with the view of contesting the validity of the title of the claimants in that case, and to assert a right to the same land in himself. The question raised by the motion is one of considerable moment, as it may affect, if decided in favor of the mover, most materially the progress and dispatch of the business of this Board. It may not be amiss, before entering upon the merits of the question, to bestow a moment's reflection upon the subject matter of the Act of Congress which we are called upon to construe. That subject matter is the Private Land Claims in the State of California, and the purpose of the law, as declared in its first section, is to *ascertain*, and *settle* these claims.

The Government of the United States, by treaty of purchase, or, as is sometimes said, by conquest; but in which mode is wholly immaterial as far as regards the determination of the question now submitted, became the sovereign of the country, and thereby the owner, as such, of all the territory which, at the date of the acquisition, was the *eminent* domain of the *Mexican Government*, as contra-distinguished from the private property of the *Mexican citizens.* The sovereign that succeeds another, no matter in what manner, according to the well settled doctrine of the Law of Nations, acquires no right to any property, except what belonged to the displaced sovereign ; or, in other words, if there were no treaty, or, being one, it were wholly silent on the subject of the private property of the citizens of the former government, their right of private property, of whatsoever nature or character, would be equally sacred and inviolable. The Government of the United States having become, to the extent above stated, the owner of the domain of California, in accordance with her accustomed usage, and the settled policy of the nation, desired to appropriate and dispose of the lands thus acquired in such manner as to convert them to the use of her citizens, by a sale thereof, on such terms as the people, through their representatives, may devise. In thus appropriating to the use and enjoyment of her citizens the territory acquired by their common valor, or treasure, care must be taken not to trespass upon the private rights of those who had already, according to the course of proceeding of their former government, become the proprietors of any part of the *Territory.* If it had all been disposed of by the former sovereign to her citizens, everything that the United States would have acquired, was the political sovereignty of the country, and no portion of the soil itself, which she could use for national purposes, or grant to her citizens. There was, for example, on the annexation of Texas, no necessity for any laws devising means to *ascertain* and *settle the extent of private land claims;* because the government had no other, or further interest in that matter, than as she may derive benefit, in a national point of view, from the quiet and peaceable condition of her citizens, according to the maxim, "Interest Reipublicæ ut sit finis litium." But here in California, as in Louisiana and Florida, the land of the State is, to an *unascertained* and *indefinite* extent, the property in part of the Federal Government, and in part the private property of individuals. Hence, in view of the great policy above adverted to, of reducing the public domain to private and indvidual ownership, it has been deemed wise and proper to hasten that end by the creation of provisional tribunals, as well as by stimulating an appeal to the ordinary judicatures established by the constitution, for the speedy ascertainment, and settlement of the question, of the *extent* of the private ownership of the territory, acquired under the former governments of the country. But for the interest which the United States has, or believes she has, to some considerable portion of the lands of California, I suppose that she would not constitute any peculiar or special tribunals to decide upon the mere private rights of individual proprietors, but would content herself with the forums, State and Federal, which are otherwise provided with powers and jurisdiction, ample enough to decide the contested claims of private persons between themselves. An obligation rests upon every body politic, to provide tribunals for the adjustment of private rights, else the benefit of government would be but partially enjoyed, or, in other words, one of its chief ends be neglected. But there is no obligation upon government to do this, in regard to persons claiming property under one source of title more than another. So far as any obligation is imposed, by treaty stipulation, on the acquisition of foreign territory, to do any act, either legislative or judicial in its nature, concerning the private property of the inhabitants, of course such duty ought to be most punctiliously performed. In the absence of any such stipulation by treaty, there is not perceived to be any peculiar duty to provide any extraordinary means for the settlement of questions of mere *meum* et *tuum* between private owners of one class, more than any other class. To be sure, if there be any right of private property derived through the former governments, which cannot be protected and maintained by an appeal to the judicial tribunals, Federal or State, either of law or equity, then the Federal Government, we are bound to presume, would not be invoked in vain, in behalf of such a right.

We cannot, however, fail to observe that, in the Act of the 3d of March, 1851, constituting this Board, among other things, no distinction is noticed between the different classes of claimants, as to the perfect, or imperfect nature of their titles. Each and every person claiming lands in California by virtue of *any right* or *title*, derived from the Spanish or Mexican Government, is required to present the same to the said commissioners, &c.

It is clear to my mind, that the Legislative intension was, that perfect titles, as well as incohate titles: those perfected into complete right, as well as those of an equitable nature, should all be presented: and the bar of limitation, working a forfeiture to the government, in case of a failure thus to present, within the prescribed time, is expressed in terms as comprehensive, as the *requirement of presentation*. I have thought it best to premise thus much of the general nature, and purposes of this act, which I considered as bearing, in some measure, upon the particular matter presented by the motion.

The consideration of this motion, makes it necessary to come to some definite understanding, as to *the character*, and *extent*, of *the functions* to be performed by this Board. It does not, in the sense of the Constitution of the United States, compose a part of the Federal Judiciary. It wants many essential features of a tribunal of that character. Its nature is peculiar, and special; its organization provisional; and its jurisdiction limited to a single, and particularly defined subject. So far, however, as it can go, the principles governing its decisions are the same which apply to the same cases, if tried, in any other forum. As to the extent of its functions, it appears to me to have been created as an initiatory tribunal, in which to ascertain the facts, how much, and what identical land, in the State of California, is public domain? That object is one of high public duty to the citizens of the United States. The land is destined for the use of the people, and that destination cannot be accomplished in an equal and just manner, without ascertaining, in some mode, what is the public land so to be appropriated. At the same time, that the Government has undertaken, in conformity with her wonted usage, to accelerate the disposition, and equal enjoyment of the *public domain*, by creating a tribunal to *ascertain it*, which was her first great aim and duty, she has, in the same act of legislation, provided a means of settling, to some *extent*, *at least*, the private contests of individuals about the same matter. How far the means provided by the act are wise, convenient, well adapted to the end proposed, and in accordance with the constitution, all of which topics have been mooted in the argument of the question, we are not called upon to decide; but simply to say whether the course of proceeding proposed by the motion, is one competent to this Board to adopt. The act clearly, is not silent on the subject of the conflicts between different claimants, but expressly provides, in a certain degree, if not fully, for their adjudication. The act expressly refers to *contests* between individual claimants, in which the *United States* is not a party, and expressly *provides one tribunal*, and recognizes another, in which they may be conducted. The tribunals thus designated are *others* than this *Board*, and the time of *their* action is to be subsequent to the peformance of *its* prescribed functions. This contestation between claimants, in which the United States is to be no party, and which the act provides for, in the 13th section, is, *first*, where claims which have been confirmed by this Board, lap over each other, to use the language of surveyors; and this contest arises on the ground, or at the location of the land by the Surveyor General, preparatory to obtaining a patent, *after the action of this Board*, and is to be decided by the Surveyor General. And, *secondly*, where the title is contested, so that one of the contesting parties may obtain a decree or judgment for the whole land, to the exclusion of the other in toto. Thus it appears that the act contemplates and provides, most explicitly, for these cases of conflict and contest. In the absence of any provision in the act, touching the settlement of mere matters of private right, between parties *other* than the *United States*, such as has been made in this act, I would consider that the doctrine of strict construction, applicable to the jurisdiction of all *inferior*, and *special* tribunals, would limit the action of this Board, to the trial of the question of the validity of title, between the *party claimant*, and the *United States*. Neither as to subject, matter of controversy, nor as to persons,—can a tribunal of special, and limited jurisdiction, go beyond its prescribed limits. In this act not only the subject matter, and the persons constituting the parties before this Board, viz: the claimant, and the United States, are distinctly declared, but the tribunals before whom the conflicts and contests between other persons are to be conducted, are pointed out, and the mode of proceeding defined, which, to my mind, of itself, would be conclusive against the rule asked for in this behalf. The expression of the one, I would consider to be exclusive of the other.

But the proposition has been urged, with no little earnestness and ingenuity, that it is not only competent to this Board, to allow the amalgamation of claims, as proposed in the rule applied for, but that the only proper, and just course to be pursued, is to entertain the contest between different claimants, going along, pari passu, with the trial between them, and the United States. I cannot accord to the arguments by which these propositions are attempted to be sustained, sufficient force, to remove my objections to the course proposed. It is true that, by pursuing what I understand to be the intention of the Legislature, some of the consequences which are objected will ensue. It is true, for instance, that a decree may be pronounced in favor of a claim by this Board, when, in truth, there is a better title to the land claimed, than that of such successful claimant; by which means it may happen, that a shade may be thrown over the supposed better title, and the interest of the owner of it, be thus injuriously affected. This is what may, and does often occur; and no system of jurisprudence can be so far perfected, as not to be liable to such objection. It is what the law terms "damnum absque injuria." A recovery of property may be had by A from B, and yet A's title may not prevail against that of C, who may sue and recover it, from A. It may be, said that a shade was cast upon C's title, because a judicial tribunal had decreed it to A. But this is an injury that the law cannot consider. Although C could not interfere in the litigation between A and B, yet his legal rights are not affected by the judgment, and he may, by his own suit, recover his estate. So, under the operation of this act, in which it is expressly enacted, in the 15th section, that a confirmation, nay, even a patent under it, shall not prejudice the rights of third persons, but only be conclusive between the United States, and said claimants.

The objection is also urged that, by refusing the rule, the fact may occur that there may be two or more confirmations, or decrees, for the same land. This may take place, but it cannot be urged in this argument, because such a consequence is expressly recognized in the act itself, and provided for. It does not result in anything more than the estoppel of the United States, leaving the question still open for contest which of them is entitled, as against the others. This result of more than one decree against the Government, and in favor of different claimants, is recognized explicitly in the 13th section of the act. When speaking of the location, by the Surveyor General, of the confirmed claims, it is declared that the Surveyor General shall have the same power and authority as are conferred on the Register of the Land Office, and Receiver of the public moneys of Louisiana, by the 6th section of the act to create the office of Surveyor of the Public Lands for the State of Louisiana, approved 3d March, 1831. By referring to that 6th section, it will be seen that the power and authotity conferred on the *Register* and *Receiver*, which are the very same, transferred to the Surveyor General by this act, are in relation to all such *confirmed claims*, as may *conflict*, or in *any manner interfere* with each other. In such cases *they* were to decide between the parties, and in such the Suryeyor General of California can decide under this act.

Even patents of the same land are often granted to different persons. In 2d Peters' Reports, 235, in the case of Pattersons' lessees, the Supreme Court of the United States, say, "It is every day's practice to make grants for lands which have, in part, been granted to others."

The force and effect of such confirmations, or patents, are only to estop the United States, and not to affect the rights of other persons. Her grant, or confirmation, has only the effect of a *quit claim deed*, from the United States.

The argument in favor of this motion, derived from the supposed influence, and effect of that portion of this act (the 11th section), which enacts that the Commissioners, and the District, and Supreme Courts, in deciding on the valididy of any claim brought before them, under the provisions of this act, shall be governed by *the principles of equity*, would just as well apply to sustain a motion to regulate the proceedings of this Board by the laws, usages and customs of Spain or Mexico; for they are equally required to govern us, as are the *principles of equity*. It seems to me very apparent that the *principles of equity*, as the other enumerated grounds of adjudication, are only to govern the decision on the *validity* of the claims, and have no bearing whatever upon the mode of instituting, and conducting the proceedings.

If, however, I were at liberty to extend the meaning of those terms beyond their obvious import, and apply them to *the mode of proceeding*, my conclusion would be, that they would not warrant the adoption of the proposed rule. The principles of equity will not authorize a bill which is multifarious, and embraces distinct matters, affecting distinct parties, who have no common interest in the distinct matters:—2d Mason's U. S. C. C. Repts., 181. Now let us see how that principle of equity would quadrate with the proposed rule. To do this, we must follow out the matter into practice. A files a statement, claiming to own one hundred acres of land, by virtue of a Spanish grant, deraigning his title through many intermediate links in a chain, from the original grantee, who he states, conveyed the said one hundred acres of land to B; that B conveyed to C, that C conveyed to D, that D, by his last will and testament, devised the same to him: thus completing his statement of title to the said land. C comes, under the rule, and files his statement of title to the same hundred acres of land, stating the original Spanish grant as A had done, which he insists upon as against the United States.

He sets out, his deraignment of title from the grantee, as A had done. He then proceeds to disclose his grounds of contest with A, by averring that he is the *heir* at law of D, from whom A claims *as devisee;* that D's will, through which A claims, was void, for some one or more of the grounds of invalidity of a will, under the Spanish law, and so he is entitled to the land, as heir, and not A, as devisee.

C then comes before the Board, and makes his statement of title, as A and B have done, down from the original grantee to himself, but then contests the claim of them both, by averring that the pretended conveyance from him to D, the supposed testator, was void, for some one of the various grounds on which, by the Spanish or Mexican law, that conveyance may be assailed. This contestation may be extended "ad infinitum," but, in the limited panorama which I have presented, there is a busy contest: first, of all the claimants against the United States; then of two of them, the supposed heir, and devisee, against each other; then of the claimant C, with the two last, as to the sufficiency of his conveyance to D, the supposed testator. When would this Babel of conflicting private rights ever be composed? Not only the questions of law and fact, touching the original Spanish or Mexican title, about which alone the United States, one of the parties in the case, is materially concerned, must be solved, but all the nice and intricate points in the municipal law of Spain, and Mexico, concerning conveyances, and devises, must be examined into, and decided. Tantas lites, quis potest componere? The trouble and inconvenience, and confusion of this matter would be great enough to startle a man of ordinary nerve and legal attainments; if all these claimants would make their formidable entrance, at once, into our presence; but suppose it should suit their convenience to come forward, only in time to escape the statutory bar, or a final decree of this Board, on the claim first presented, then, there must be an awful pause in the proceeding. All those depositions, whose taking has cost so much time, trouble and expense, must be put aside and taken over again, if needed; for certain it is, that those *principles of equity*, by which we must be governed, will not allow them to be read against one, who was no party at their taking, and not bound to have been.

It has been urged, as a reason for adopting the rule, that, unless this contest is permitted between the claimants before this Board, the interest of the United States might be injured; because, if a confirmation, and patent afterwards, should be granted to the first claimant, there may be an older, and better Spanish, or Mexican grant, which may never be presented by the grantee or his assignees, and thus the land become the property of the United States, by means of the forfeiture created in such case by the statute.

I do not perceive, perhaps, the entire force of this view, but, as it strikes my mind, it is too remote an interest, to merit consideration in this motion. It is founded on two suppositions: *first*, that there is a better title, and, *secondly*, that it never will be asserted, in an available manner, by those owning it.

In conclusion, I will only say that I do not think the rule ought to be made, as asked for.

CRUZ CERVANTES, Claimant,
vs.
UNITED STATES, Defendant.

Before I enter upon the consideration of the questions which relate directly to the validity of the claim in this case, I will give my views of the *subject* upon which this Board was intended to act, and of the *foundations* upon which any opinion that I feel authorized to give, must rest under the Act of the 3d March, 1851. A distinct annunciation of this basis is not only due to those who are to be affected by the administration of this Act of Congress, but being settled in my own mind, will serve as the polar star to guide me through the wide tract of conflicting opinions, which have been the subject of an anxious and protracted discussion. The 8th and 11th sections of the Act, taken together, furnish the chart of our procedure. In the first named, i. e., the 8th, it is enacted, "That each and every person claiming lands in California by virtue of *any right or title* derived from the Spanish or Mexican Government, shall present the same to the said Commissioners when sitting as a Board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims: and it shall be the duty of the Commissioners, when the case is ready for hearing, to proceed promptly to examine the same, upon *such evidence*, and upon *the evidence* produced in behalf of the *United States*, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the District Attorney of the United States, in and for the District in which such decision shall be rendered." This section declares fully the *subject matter* upon which we are to decide, that is, the *validity* of any *right* or *title* derived from the source mentioned; it declares the *evidence* upon *which alone* that decision is to be rendered,—being that introduced by the claimant on the one side, and the United States on the other. Having thus stated the *subject matter* and the *evidence* upon which we are to decide it, in the 11th section it proceeds, with the same distinctness and precision, to declare *the law* by which we shall be governed. That section is in the following words: "That the Commissioners herein provided for, and the District and Supreme Courts, in deciding on the validity of any claim brought before them under the provisions of this Act, shall be governed by the Treaty of Guadalupe Hidalgo, the law of nations, the laws, usages and customs of the Government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable." With respect to the *subject matter* of our action, and the evidence upon which that action is to be had, the line of our duty, as prescribed in the 8th section of the Act, is palpable and easy to be pursued: but in the 11th section, which declares the law that is to govern us, a broad field is open to our view, and each landmark demands the most particular regard. The Treaty of Guadalupe Hidalgo is the first in the order of enumeration. This treaty contains nothing more, so far as it bears upon *this case*, than a recognition of the doctrine which is enforced in the second head, or the law of nations, viz: that in all cases of the acquisition of foreign territory by any nation, the *private property* of the former inhabitants shall be held inviolate. The next enumerated ground of decision is, the laws, usages and customs of the former Governments from which the claim is derived. This embraces all the written laws which authorize and regulate the disposition of the public domain ; as also all those laws which relate to the form, the construction, and whatever else may affect the instruments of conveyance employed for that purpose, and to the conditions which are annexed or which are authorized to be annexed to the grants in question. The customs and usages of the country as they may relate to the same subject, are also to govern us. There is no great difficulty in determining the nature and extent of the influence of these laws, customs and usages upon the subjects to which we are to apply them ; but I have felt more difficulty on the question, how far we are to notice them *judicially*, without their being brought before us, like foreign laws, duly authenticated, or established by the evidence appropriate to their respective natures. The correct adjustment of this question is of great importance to the parties in the causes submitted to this Board, and I feel bound to advert to it, as it has created some difficulty in my mind in the consideration of the points arising in them. With regard to the unwritten customs and usages to which are imparted by the Act constituting this Board, the force and effect of written law, their establishment, as it seems to me, requires the application of the rules governing the proof of other facts. Those whose rights are to be materially affected by them, ought to have the opportunity of examining the sources from which they are derived or the witnesses who communicate them, and be allowed to show, by other witnesses, that such is not the custom or usage, or even to discredit the witnesses who testify to them. The difficulty which I feel on this subject is not removed by the recent decision of the Supreme Court of the United States, reported in xi. Howard, 668, United States *vs.* Turner & Co. The court was not called upon to do so, nor do I think they did decide this question in that case. It seems that the counsel for the apellees moved for an issue, to be *tried by the jury*, whether the grant in question was perfect and complete or not, by the laws of Spain in force, in the province of Louisiana, when it was made. The Supreme Court decide that there was no error in the refusal of the court below to grant that motion, and proceed to say :—"The Spanish laws which formerly prevailed in Louisiana, and upon which the titles to land in that State depend, must be *judicially noticed and expounded by the court*, like the laws affecting titles to real property in any other State. They are questions of *law* and not questions of *fact*, and are always so regarded and treated in the courts of Louisiana. And it can never be maintained in the courts of the United States that *the laws of any State* of this Union are to be treated as the laws of a foreign nation, and ascertained and determined as a matter of *fact, by a jury,* upon the testimony of witnesses. And if the Spanish laws prevailing in Louisiana, before the cession to the United States, were to be regarded as foreign laws, which the courts could not judicially notice, the titles to lands in that State would become unstable and insecure ; and their validity or invalidity would in many instances depend upon the varying opinions of witnesses, and the fluctuating *verdicts of juries, deciding upon questions of law* which they could not, from the nature of their pursuits and studies, be supposed to comprehend." Now, if all that was intended by the court was, that the construction, the ascertainment and determination of the force and effect of a foreign law were not matters proper to be referred for the decision *of a jury,* and that the proof of such law was not for *them,* but *for the court,* then the decision would be in accordance with the settled doctrine, Consequa *vs.* Willing, Peters, C. C. Repts. 225. So also if the court intended to decide that the courts of the United States would notice judicially the laws of a State, and that the laws in question were to be regarded as the laws of Louisiana, by virtue of their recognition as such by the judicial tribunals of that State, the particular point now mooted would not be embraced in the decision : for in the absence of any means by the publication of the decisions of the tribunals of California, I do not know what those decisions are. But if the Supreme Court in the case in xi. Howard, above cited, is to be considered as deciding,—that because the laws of Spain once existed in Louisiana, and continued to control and even to constitute a part of the titles which were made under them to many citizens, then subjects of Spain, but now of Louisiana, they were *on that account* now to be regarded as the laws of Louisiana and not as foreign laws, then it seems to me that the decision is not in accordance with, but contrary to, the prior determination of the court, so explicitly made, that I do not think it would have been overruled without making the slightest allusion to it. In the case of the United States, and Wiggins reported in xiv. Peters, 345, brought up from Florida, and decided under an Act of Congress, requiring, as the Act of 3d March, 1851, does, the claims to be adjudged and determined, among other things, by the laws, usages and customs of the former Government, the opinion of the court contains the strong language which I quote : "Much evidence was introduced to prove the *practice* and *rules* in use in the offices of the Spanish Government from which titles to land issued. We think the evidence was admissable ; the existence of a foreign law *especially* when unwritten, is a fact to be *proved,* like *any other* *fact*, by appropriate evidence. The Spanish province of Florida was *foreign* to this country in 1815, when the transaction referred to purports to have taken place. The practice of the Government in disposing of the public domain may be proved by those familiar with the customs, and there is in the record very satisfactory proof by witnesses, of *the laws* and *customs* governing the provincial authorities." If the court in this case had merely declared that such evidence *was admissible*, and that the admission of such proof, even to establish a matter of law, —which would be judicially noticed without such proof,—was not ground of error, being only supererogatory, doing no injury, but perhaps affording facility to the court in coming to the accurate knowledge of it, then nothing could be deduced from the decision material to the question. But the language is strong and emphatic in the declaration of a positive rule of law upon the subject. It may be that the decision in the xi. of Howard goes to the extent of settling this question against the view taken in xiv. Peters, though I am inclined to the opinion that it was founded (so far as it goes beyond the overruling the allegation of error in the court below for refusing to submit the question to a jury,) *upon the fact* that in Louisiana the former laws of the country were continued in force after the change of Government ; whereas, in Florida, as in *California*, the English common law is adopted by the Legislature as the fundamental rule of jurisprudence. It cannot fail to be observed that the remarks made by the Chief Justice in delivering the opinion in xi. Howard, as to the consequences of a different course from that pursued by the court below, have no application, unless they relate to the determination of the force, and effect, and construction of those laws *by a jury*, instead of *by the court ;* because, whether they are noticed judicially, or introduced and proved to the court, the result would be the same as to the stability and security of title ; for in either case, *the court* and not *the jury*, would ascertain and expound them, and the same stability and security be attained in the one case as in the other.

The next legal ground to govern us in our decisions is the principles of equity. What meaning is to be attached to the terms "*principles of equity*," whenever they occur in any Act of Congress of the United States, I apprehend admits of no doubt. They are those principles which form that venerable fabric known to the American people as the system of Equity Jurisprudence. It is a monument whose chief corner stone was laid by Lord Hardwick, but whose superstructure has been gradually erected by the co-operation of men of the brightest intellects and the purest characters, who have ever adorned the ermine. Many of its proudest contributions have been furnished by illustrious citizens of our own country, "*who have left their works behind them.*" In this department of human excellence the tribute of grateful recollection should always be paid to the names of Marshall, and Kent, and Story. It will be our humble duty to make the application of those principles to the cases as they arise ;—taking care, in doing so, not to forget that Equity—illustrious as she is—is still but a handmaid to the láw, and that one of her cardinal maxims is, *Equitas, sequitur legem.*

The last ground of law enumerated in the section of the Act mentioned above to govern us in determining on the validity of claims, is the decisions of the Supreme Court of the United States, so far as applicable. In entering upon the consideration of this ground of adjudication I will remark, that the opinions of that honored tribunal ought to command the respect of all inferior jurisdictions ; and not only is that general obedience enjoined upon us, but especial reference is had to that body of learning which has, through years of patient investigation, been amassing in their reports upon the various questions of public law and private rights arising under the treaties by which we acquired foreign territory, and upon Acts of Congress passed in reference to them, and especially to those decisions which have been made upon laws passed after, and with reference to the treaties of *Paris* and *Washington*, by which we acquired Louisiana and Florida. To determine the applicability of those decisions to questions arising under the Treaty of Guadalupe Hidalgo, by which we acquired California, and the Act of the 3d of March, 1851, it is proper to compare *those* treaties and laws *with this last treaty* and Act of Congress. The stipulations of those treaties, so far as involved in this matter, I will briefly state. In the 2d article of the Treaty of Paris, the terms of cession of public domain are as follows : "The islands belonging to Louisiana, all public lots and squares, vacant lands, &c., which are not private property ;"—excluding, by the strongest implication, a cession to the United States of *any private property.* In the 3d article, after the stipulation to incorporate the inhabitants in the Union, with the enjoyment of all the rights, advantages and immunities of citizens of the United States, it concludes with the words : "And in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess. By the Treaty of Washington, in the 2d article, as in the Treaty with France, a cession is made of all islands, vacant lands, &c., which are *not private property.* And a special article is introduced, being the 8th, that all grants of land made before the 24th day of January, 1818, by his Catholic Majesty, or by his lawful authorities in the said territories, ceded by his Majesty to the United States, shall be ratified, or (as now understood,) *stand ratified* and *confirmed* to the persons in possession, &c., to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty. By the Treaty of Guadalupe Hidalgo, the right of private property of the former inhabitants is protected, at least as far as the law of nations would have protected it, without any provisions in the treaty. The stipulations of the ninth article, which is the only one applicable to the case of persons occupying the attitude of *the claimant in this case*, has been interpreted to mean a stipulation of maintenance and protection in their *property*, as well *after* the admission of the *State* into the Union, *as before*. The Acts of Congress passed with reference to the lands acquired under those treaties, and which have been the subject of judicial construction in the cases specially referred to in the Act of the 3d of March, 1851, as being one of the governing rules of our decisions, are, *First*—The Act of the 26th of May, 1824, entitled "An Act enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas, to institute proceedings to try the validity of their claims;" by which the courts were opened to decide on claims under the Treaty of Paris of 1803, of a certain class, which *were not perfect*, but which might have been perfected into a complete title under and in conformity to the laws, usages and customs of the Government under which the same originated, had not the sovereignty of the country been transferred to the United States. *Second*—An Act of the 23d of May, 1828, extending, with some modifications unnecessary here to mention, the Act of the 26th of May, 1824, over Florida. And *Third*—The Act of June the 17th, 1844, extending over Arkansas, Missouri, Louisiana, and those parts of Mississippi and Alabama south of the 31st degree of north latitude, and between the Mississippi and Perdido rivers. By the provisions of these laws, any grant, concession, warrant or order of survey legally made, granted or issued, and which might have been perfected into a complete title but for the change of sovereignty, under and in conformity to the laws, usages and customs of the Government under which they originated, could be presented to the United States District Court, &c. The Treaty of Guadalupe Hidalgo and the law of nations must be conceded to impart the same sanctity to *private property* in California as is conferred upon it by the Treaty either of Washington or of Paris. The Act of the 3d of March, 1851, authorizes the presentment before this Board *of any right or title* derived from the Spanish or Mexican Governments. It is necessary, before we are anthorized to adopt any decision of the Supreme Court of the United States, relating to the validity of titles, to see to their *applicability.* What is there in the Acts above adverted to, which gives a more enlarged scope of adjudication under them, than is given under the Act of the 3d of March, 1851? The terms any grant, concession, warrant or order of survey, are not more comprehensive, if as much so, as those adopted in this Act under which we are now acting, viz: *any right or title.* If no property of any kind were conferred by the laws, usages and customs in the case of grants, concessions, warrants or orders of survey, neither the treaties nor the law of nations would require them to be regarded; nor does Congress, by her Acts, profess that she would be authorized to maintain and protect any thing less than an *inceptive* or *imperfect right.* Those terms, then, in those different Acts, are of equivalent signification. In xi. Howard, 580, the court say, "The word *title,* in our statutes, on this subject, expressly means equitable rights, short of complete grants and perfect titles. It means equity emphatically." In the Act of 3d of March, 1851, it means that much, beyond all doubt; and not being qualified by the controlling terms which those Acts contain, it means more than mere equity, that is *full* and *perfect titles,* also. The want of applicability of the decisions of the Supreme Court of the United States to the questions arising before this Board, cannot be founded on any difference in the cases arising from the law of nations, the Treaties or the Acts of Congress under which they were made. All these concur in one point, which is, that *all property* of the former inhabitants shall be maintained and protected to the extent that it existed under the former Governments. It is true, as was to be expected in a new field of legislation, that there was in some instances inconsiderate, not to say harsh and oppressive, legislation; but its *general tenor,* whilst it sustained the rights of the nation, has preserved good faith towards the former inhabitants of the acquired country. In the general, there has been a magnanimous liberality extended, both as it regards political privileges and the property of those who were thus about to become adopted children of our great Republic. The condition of the natives of California was one peculiarly calculated to demand not only the *best faith, uberrima fides,* but the sympathy and fostering care of the new Government. They were first conquered and then transferred in violation of their feelings, of their prejudices, of their native habitudes, from a Government whose pressure they had never felt; under which, they were at least enjoying the homes of their birth. They were driven into stranger hands, of whose laws, of whose language, and of whose disposition towards them, they were wholly ignorant; trembling with anxiety at their new position, and looking forward with fearful apprehension for further chances and changes in their fortunes.

Not unmindful of the obligations of humanity, and of the law of nations, which has ever been respected as the common arbiter by all civilized communities, the course of the Congress of the United States, commencing with the legislation on the subject of the Territory embraced by the cession of the State of Georgia to the United States, in 1802, down to the acquisition of this country, has been marked by a spirit of progressive liberality and relaxation, in favor of the claimants or grantees of land, under their former Governments. This favorable consideration of all bona fide claimants manifests itself by embracing in subsequent Acts, descriptions of claims not recognized by former Acts, by extending the time within which notices of claims, and the production of evidence, were required ; by giving authority to the judicial tribunals, and Boards of Commissioners, not only to decide upon such claims, but to revise and confirm such as had been rejected. Nor is this last Act of the 3d of March, 1851, under which we are now sitting, an exception to this general rule of liberal legislation. It expressly recognizes in the broadest terms *any right, or title,* which *terms,* I have shewn, are at least as comprehensive as those used in any former Act. Nothing more could be done than this, except to say that claimants should be confirmed in their *claims* without *any right or title.* To have exercised more liberality on this head would have been what neither the Law of Nations nor the treaty required, and what, justice to the people of the United States at large, would have utterly forbidden. Neither the law of nations, nor the Treaty of Guadalupe Hidalgo, which last is indeed exceedingly meagre on the subject of the property of those who should remain in the country, and become American citizens, can act like alchemy, and convert everything, even a *permissive* occupancy, into a full, perfect and complete title in fee simple. Whatever *scintilla* of title there was, under the former Government, is to be protected and maintained. But it is necessary that this right should be made known, and not rest upon the *ipse dixit* of a claimant. Some mode must be adopted to ascertain what is to be protected and maintained ; and, to my mind, that which the Act of the 3d of March, 1851, provides, is an easy and simple and equal way of ascertaining the existence of *any right or title:* the *ascertainment* of which was of much more pressing importance to the former inhabitants, as every day's experience demonstrates, than to the Government of the United States.

Having taken this cursory view of former treaties and laws, and compared them with that of Guadalupe Hidalgo, and the Act of the 3d of March, 1851, with the view of deciding upon the applicability of the decisions of the Supreme Court of the United States, to the claims before this Board, I will here state, generally, the two great leading principles resulting from those decisions, leaving the *particular points* established in them to be applied to the several propositions or questions, as they may come under consideration in the further view of the case.

The first of those great leading principles was announced by the Court, as early as the year 1836, in the case of Smith *vs.* the United States, x. Peters, 330, 331 ; and is re-affirmed xi. Howard, 88. In the last case the Court say, in reference to this principle, "This was the rule laid down for our Government in 1836, in the case of Smith *vs.* the United States, x. Peters, 330, 331, and which has been uniformly followed since." As the language of the Court introductory of the rule, as well as in laying down the rule itself, varies slightly, I will quote it as it is laid down in both instances. In x. Peters it is thus : "In every case arising under the law, one general question was presented for the consideration of the Court : whether, in the given case, a Court of Equity could, according *to its rules* and the laws of Spain, consider the *conscience* of the *King* to be so affected by his own, or the acts of the lawful authorities of the Province, that he had become a trustee for the claimant, and held the land claimed by an equity upon it, amounting to a severance of so much from his dominion," &c. In xi. Howard, 88, it is laid down in the following words : "By the Act of 1824 we are required to exercise the power of a Court of Equity, and to adjudge in the given case, whether a Court of Equity could, according *to the rules* and laws of Spain, consider the conscience of the King so affected by the the acts of his lawful authorities in the Province that he became a trustrustee for the claimant, and held the land claimed, by an equity upon it amounting to a *severance of so much* from the public domain, before, and at the time, the country was ceded to the United States."

The *second general rule* is that which is adopted by the Court in many cases, as in ii. Wheat, 359 ; iv. Cond. Rept. 681 ; iii. Peters, 92 ; xv. Peters, 215, and which, although not in the *least departed from*, may have the supplemental addition contained in xi. Howard, 127. I will give the general rule as laid down in xv. Peters, 225, in the words of the Court. "We apply to the case the laws and ordinances of the Government under which the claim originated ; and that rule, which is of universal application in the construction of grants, which is essential to their validity, that the thing granted should be so described as to be *capable of being distinguished* from other things of the same kind, or be capable of being ascertained by *extraneous testimony.*" The supplement to which I referred above is furnished in xi. Howard, 127, in which case the concession, being wholly indefinite in itself, needed, if sustained at all, something more to constitute such a severance from the public domain, as is always required. Those additional requisites are said to be *supplied* either by *actual survey* or by *some ascertained limits*, or mode of separation *recognized* by a *competent authority.*

Having stated with as much brevity as was consistent with perspicuity, the grounds upon which the Board is required to act, both as to the *evidence* and to the *law*, in deciding on the validity of the claim, I will now proceed to consider whether, in the view of those principles, the claim of the present claimant is valid or not. It is founded upon a grant bearing date the 1st of April, 1836, signed by Nicolas Gutierrez, as political chief, or governor, at the time, of the Territory of Upper California. There is no question of the *genuineness* of the grant, whatever may be its legal effect ; nor of the *fact* that Gutierrez was the political chief, or acting Governor at the time. The evidence on file, from the public archives, proves all those facts. Whatever decrees of the Spanish Monarchy, of the Spanish Cortes, of the Empire of Mexico, under the domination of Yturbide, under the name and style of Augustin the 1st, or of the Mexican Republic, may have been in force prior to the 18th of August, 1824, *there is no doubt* that at the date of this grant the decree of the Mexican Republic of the last mentioned date, and the ordinance of the 21st of November, 1828, issued by the Federal Executive of the Republic, in pursuance of the 16th article of the said decree of the 18th of August, 1824, were in full force ; that the grant in this case was made with especial reference to that decree and ordinance ; and just as little doubt, that it rests on that decree and ordinance for *its only support.* Other decrees concerning the disposition of the public domain, and the settlement or colonization of this country, we know existed prior to the last named decree and ordinance ; and so far as they have not been expressly repealed by subsequent legislation, or by necessary implication, from their total incongruity, or conflict with those, they certainly still remained in force. However, this decree and ordinance, as to *rural grants*, like the one now under consideration, cover the whole subject so completely, as to leave little else for any prior decrees to operate upon ; their chief efficacy consisting in the light which they afford in the construction of *that decree* and *ordinance.*

As constant reference must necessarily be made to the decree and ordinance under which *this* grant was executed, to decide *its* validity, for greater convenience, and out of abundant caution, in view of their having *once been foreign laws*, however they may now be regarded, they have been introduced into the record by the Law Agent of the United States, duly authenticated from the archives in the legal custody of the

Surveyor General of California, and constitute a part of the evidence in this case. The decree of the Mexican Congress was a general law, upon the *subject of colonization*, which professed as its chief *end* and *aim* the settlement (cultivation of inhabitancy) of the vast public domain of the nation, by means of grants in full property to her *own citizens, and foreigners*, provided *they* should submit themselves to the laws of the country. The *second* section of that law provides that, "Those lands of the nation are the *object* of this law, which, being neither the property of any individual, nor belonging to any corporation or town, may be colonized." The *third* section declares, "For this purpose the (Congresses) Legislatures of the States shall form, with the greatest dispatch, laws or rules of colonization, within their respective demarcations, conforming themselves, in all respects, to the constitutive act, the general constitution, and the rules established in this law." The *fourth* section is in these words : "The lands comprehended within the twenty leagues bordering upon any foreign nation, or within ten leagues of the sea-coast, (diez littorales) shall not be colonized without the previous approbation of *the general supreme executive power*." The *sixteenth* section of the decree is in these words : "The Executive, in conformity with the principles established in this decree, shall proceed to the colonization of the *Territories of the Republic*." This decree was enacted, as stated above, on the 18th of August, 1824, after the establishment of the Acta Constitutiva de la Federacion, which was on the 31st of January, 1824, and before the establishment of the Constitution Federal de los Estados Mexicanos, the formation of which, however, was clearly in the mind of the Congress at the passage of this decree. The Executive did not proceed to the colonization of the Territories of the Republic until the 21st of November, 1828, when he promulgated his general rules, or ordinance, for that purpose. Independently of the direction contained in the 16th section of the decree of the 18th of August, 1824, by the 15th article of the *Acta Constitutiva*, he was required to "make decrees, or orders, for the better execution of the constitution and general laws ;" and also by the *second article* of the 4th title of the Federal Constitution of the Mexican United States, it was his duty to make ordinances, decrees and rules, for the more exact fulfilment of the Constitution, the Acta Constitutiva, and General Decrees. He prefaces his ordinance of the 21st of November, 1828, with the following preamble : "It being provided in the 16th article of the General Decree of Colonization, of the 18th of August, 1824, that the Executive, in conformity with the principles established in said decree, proceed to the colonization of the *Territories* of the Republic ; and it being most proper, in order to give to said *article* the most *adequate* and *exact fulfilment*, to dictate some general rules, that its execution may be expedited in the cases that may be occurring, the E. S. President has thought proper to determine on the following articles." The first article in that ordinance is in the following words : " Authority is given to the political chiefs, that in conformity with the decree of the Supreme Congress of the 18th of August, 1824, and under the conditions herein expressed, they may *grant vacant lands* of their respective territories to empressarios, families, to individual persons, whether *Mexicans* or *foreigners*, who wish it, to *cultivate* or *inhabit them*." The last article of this ordinance relates to Missions, and is as follows : " In the Territories in which there are Missions, the lands *which they occupy* cannot be colonized at present, and until it be determined if they ought to be considered as the property of the establishments (reducciones) of Neophytes, Catechumens, and Mexican settlers." To disembarras this case from any consideration of the objection on the score of this last article, I will observe here, that the record contains a disclaimer of any right on the part of the Mission ; and the proof is, that the land solicited and granted was not *occupied* by the Mission.

This statement of the decree of the 18th of August, 1824, and ordinance of the 21st of November, 1828, will suffice to give a general outline of the scheme or plan of granting the Mexican domain, under which the claimant derives his title. As other articles of them may require to be considered in the progress of this opinion, they will be introduced into it.

The first question which presents itself at the very threshold of our enquiry into the validity of the title of the claimant, is that which grows out of the fourth section of the decree of the 18th of August, 1824, and will be called, for convenience of expression, the *littoral league question.* The discussion of this question, (on the solution of which depends such vital interests) by the counsel in this case, by the Law Agent of the United States, and by other gentlemen of the bar, who have submitted cases now in our hands for decision, has been marked by that diligence of investigation, legal acumen, and forensic ability, which were demanded by the subject, and fully met in its argument.

Before entering upon the consideration of this first point, I will suggest that it is by no means clear to my mind that the land claimed in this case lies within the ten littoral leagues. There does not appear in the evidence (indeed the contrary is conceded on all hands) that there ever was any line marked out by the Mexican Government, that would indicate the region of country embraced within them. It would be very difficult to ascertain with any precision, but by means of an actual measurement, the tract of such a line along the coast of California ; and having been *never in any manner ascertained,* I suppose it will be conceded without controversy, that we cannot *judicially know it,* except in those cases where the coast is one of the calls in the grant. The evidence in the cause of the witnesses is such as we might expect, from the nature of the thing, exceedingly unsatisfactory. The Law Agent of the United States relies upon a document accompanying the *expediente,* as found in the archives, being the return of the Ayuntamiento of the City of Monterey, to whom was referred, by the political chief, the question of the fitness of the grant to the petition ; which *return* states that the land is within ten littoral leagues. The grant was made by the Governor, *notwithstanding.* But it is very apparent that his *grant* is no evidence that the return *was untrue,* for the *fact when self-evident,* presented no obstacle to a grant, as the evidence shows, particularly the document in evidence from the archives, containing the proposition of Jimeno, and the proceedings had upon it, in the Departmental Junta, in 1840. It may be that the inquisition of the Ayuntamiento of Monterey, may bind the claimant, as *res adjudicata,* though I do not think so. Yet as that impression may be erroneous, and the question has been treated as though it might arise, and has been fully argued, I will proceed to give my opinion upon it.

The solution of this question requires that we should examine narrowly both the decree of the 18th of August, 1824, and also the ordinance of the 21st of November, 1828, which in fact are necessarily connected, the latter merely educing, for practice, all that was involved in the former, which was its only legitimate office. It has been contended by the counsel for the claimant in this case, that whatever else might have been the object or motive of the fourth section of the decree of 1824, it was not intended to embrace a native Mexican citizen, of which class is the claimant now before the Board. In support of this propositon, a general review was made of the course pursued by the former Government of the country, in regard to the discrimination always made in favor of her native citizens, in granting of the public domain, and in the colonization of her provinces. It is very apparent, from this examination, that the policy of the former Governments of the country, in this regard, has been variant at different periods and conjunctures of her affairs—sometimes exhibiting the exclusive rigor of Lacedemonia, in the days of Lycurgus, or of the Celestial Empire, and at others, relaxing it so far as almost to abolish all distinctions. There does not seem to me to have been, at least since the independence of Mexico, any such fixed and settled policy in this matter, as to rely upon it with any confidence as a guide in the interpretation of this decree. It is safer to determine her policy from laws enacted at the given time, than to construe her laws by any supposed *general* policy upon the subject. An impression might indeed be taken up from the first section of the decree, that the only object of the bounty of the government was *foreigners*—that they were the chief instruments intended to be used in the colonization of the vacant lands of the Republic. This would be, however, a very erroneous deduction. In looking at the decree itself, I can perceive no distinction between *foreigners* and *Mexican citizens*, except that which is suggested by the ninth section, where, in the distribution of lands, a preference is required to be given to Mexican citizens, which involves, as I think, a distinction in their favor, over the foreigners whose introduction was contemplated.

Whatever doubt may exist as to the intention of the Legislature contained in the *Decree*, it all vanishes when we look at the provisions of the *ordinance*, which is its practical exponent. The first section of the ordinance is a clear and comprehensive and authoritive exposition *of three prominent* and *essential matters*, necessary to the execution of the Decree, whose *adequate fulfilment* the President had just declared his intention to accomplish. The *first* in his order of announcement is, that the sole and exclusive agent in the function of granting shall be the Political Chief of the Territory. The *second* is, that the subject of his grants are the *vacant lands* of his *Territory;* and the *third* is, that those grants are to be made to *empressarios*, families, and individual persons, whether Mexicans or foreigners. Whatever was intended to be granted by the Decree, I feel bound to believe, was, with the exception of the preference indicated in the 9th section of it, intended to be granted indifferently to *Mexican citizens* and to *foreigners.*

The next point which I will consider is, whether *the Territories* of *the Republic* were intended to be embraced in the terms of the 4th section of the Decree of 1824. Its application to lands within the prescribed limits situated in *the States* is evident: but that it was intended to embrace those similarly situated in the *Territories*, is not, I must confess, so free from doubt, though such is the inclination of my mind. With regard to the States, without such a proviso, all power to control the matter would have been parted with. But that consideration does not prove that the generality of the terms should be so restricted as to confine them to such lands within the States. This policy of the withdrawal of her people from contact with, and facility of access to, foreign nations, the neglect of which might involve the nation in a general war, by border feuds ; and, being so involved, might make her more vulnerable and exposed to maritime incursions along her coasts, would seem to apply as well to the Territories as the States. In speculating upon the policy and *motives* of this provision it *is possible* that there might have entered into it one consideration which was *peculiar to the Territories.* The Congress may have supposed that in devoting *her whole vacant domain,* by this permanent Decree, to *gratuitous distribution,* she might cut off any aid to her fiscal exigencies from the source of her public domain ; and may have thought it wise and prudent to submit to her executive head the determination of the economical question, whether the highest interests of the Repubiic might not be best subserved, by withholding *that portion of it* for the purpose *of sale.* But whatever may have operated on the mind of the Mexican Congress, I have come to the conclusion, not, however, with the fullest confidence, that they submitted to the will of their Executive, the future subjection of that portion of their country, whether in the *States* or *Territories,* to the process of colonization.

The next, and, as it occurs to my mind, the most important branch of this question, is, whether the Federal Executive has *exercised the power* with which he was invested by Congress, in that section of the Decree. It is certain that the mode in which he shall give his required approbation is not prescribed by the law ; and I am not prepared to say that any mode which he might choose to adopt, however it might differ from my own view of its comparative efficacy, in accomplishing the end designed, would not be competent to him to select. In view, however, of the *mode* in which he was required, both by the Acta Constitutiva and the General Constitution, when carrying out a *general law* of the Republic, I should think that the one which he pursued would be the most natural one for him to adopt on this occasion. I have already had occasion to state that, both by the Acta Constitutiva, and by the Federal Constitution, it was his duty to make ordinances, decrees, and rules, for the more exact *fulfilment* of the general laws of the Republic. It seems to me that the Federal Executive might well have executed the trust reposed in him by the Constituent Congress of 1824, by a *general ordinance.* The matter confided to him *was to determine* whether the region of the public domain, contained within the described limits, should be *subjected to colonization.* That determination, which had been doubtless confided to him by Congress from the consideration of his high official station and responsibility to the Republic, could not be, by him, devolved upon another. The power and authority conferred upon him was a *high public trust,* which he could not *delegate.* But in relation to the *process* of *carrying* it into *execution*, by establishing the details of colonization, it was his peculiar duty ; and it was just as competent to him to do that, in relation to the lands which were *devoted by his will to colonization*, as to perform the same functions in relation to those so designated by the will of Congress, as expressed in their Decree of 1824. The vice in the argument adverse to this consists, as it seems to me, in confounding the *act of the will* of the Federal Executive, by which he could *subject* that *region* to *settlement* with *the means* which he should employ to carry that *will* into execution. The objection to the mode of carrying out his purpose of settlement, after that purpose had been formed, is more properly a criticism upon the fitness of the *means* which he adopted than an argument against his *power* to communicate his *will* by a general ordinance. We may, in reviewing the transaction, suppose that the policy which dictated his investiture with that power, would have been better subserved, if he had so exercised it, *as that every individual*, before he could be permitted to settle within that tract of country, should present himself personally to the Executive, and obtain a *special permission.* But the Executive of Mexico may have thought that all which the public interest required in 1828, could be achieved by a less *onerous* and less *dilatory* process. He may have thought that the public security would be sufficiently guarded in the case of individual Mexicans or foreigners, by the ordeal through which he had required them to pass, from the first presentment of their petition to the Political Chief, to the ultimate *sanction* of the Executive ; which *last* he had provided in case of a *reasonable objection* to any *pretension.* He may have thought that in the case of an attempt to introduce, through the medium of empressario stipulations, an excessive proportion of foreigners, the check which he had provided of a personal application to himself, before the issuance of an *irrevocable grant*, would sufficiently protect the interests of the Republic from such an *inordinate influx.* That the Federal Executive, for aught that I can see in the law of 1824, might have acted in that manner — thus subjecting that region to settlement, by the promulgation of *his will*, in a general proclamation — I feel well assured. A much more important question now will demand our consideration, and that is, admitting his *competency* to do so, whether his ordinance of the 21st of November, 1828, *contains that expression of his will.* This inquiry we will now proceed to make.

At the threshold of his entrance upon the duty of carrying into execution the general Decree of August, 1824, the Executive declares, in the caption or heading of his ordinance, what it is *he is about to do.* He entitles it " General Rules, or an ordinance for the Colonization of the *Territories* of the Republic. This is transmitted to California, and is found among the archives of the Territory. Now, this is significant of one fact, that he proposed to extend the benefit of the Decree to California. And yet it is true, beyond controversy, that the *object* of the Decree could not be effected in this Territory, which was *settlement and cultivation*, to some extent at least, by *families*, except within the *ten littoral leagues*. If this was the case in 1840, as the record verifies by reference to the statement of Jimeno, how much more was it so in 1828. At that time, from the wild and savage nature of the interior, infected by hordes of hostile Indians, it would have been next to impossible to have introduced civilization, or habitancy by families, so far from the free towns, the missionary stations, the settlements already established in the Territory, and from the protecting military Presidios: all, and every one of which, we learn, were within that belt of country which is now supposed to have been withheld from colonization. It seems to me that such could not have been the intention of the Executive. The very *first* article of the ordinance, as well as the *last*, serves to satisfy my mind that he did not intend to exclude it. The *first article* of the ordinance specifies the *object* of the *proposed colonization, to be the "vacant lands" of the proposed Territory, and what they were*, the Decree, which he professes to be putting into activity, had particularly defined, as those *lands of the nation*, which, not being private property, nor *belonging* to any corporation or town, could be settled. The *last article* leads to the same conclusion as to the intention of the President. That article declares that the land *occupied* by the missions should not be colonized. This is a strong negative, pregnant of the affirmative declaration, that such of the lands *as were pertinent* or *adjacent to the missions, if not actually occupied by them, might be colonized;* and, as we have seen, all such were within the ten leagues. Not the most remote allusion is made from which an inference can be drawn, to countervail the effect of this strong language. If he intended to withhold this section of the country from settlement, which *was known to rest in his exclusive will*, he would not, I would think, have been even *equivocal in his language*, much less have used such as conveys a *contrary* intention. Nor can we suppose that a matter which constituted so material a part of the Decree which he was carrying out, and of the object of his action, would have been forgotten by him : and if not forgotten, how easy and natural to have restrained the general authority to grant, by adding to the words "*vacant lands in your Territories*," the words "except within the littoral and border leagues." He has not distinguished between the vacant lands which are within and those which are without the supposed lines which divide them. He has used no terms indicating any intention to make any such distinction, and the rule of construction in the Spanish law is, "*ubi lex non distinguit, nec nos distinguere debemus.*" I repeat, then, that *vacant lands*, in the ordinance, must be understood, without any words to distinguish them, to signify the *same thing that they do* in the decree, which it purports to carry out; and what they mean in that decree is declared in the second section to be *all those* which are not *private property*, &c. If, however, there be any doubt as to the true meaning of the ordinance, it vanishes when we look at those accompanying facts which are a legitimate ground of interpretation. The strongest evidence is found in the contemporaneous understanding and conduct of all concerned in the execution of the decree and ordinance, of the intention to authorize the settlement to proceed within the littoral leagues. The Political Chiefs and Governors, who were selected and appointed as agents to carry out his ordinance by the Executive; and the Territorial Deputations and Departmental Juntas, who were also to officiate in the execution of his instructions, *with one accord*, have put the same construction upon this ordinance. One Political Chief or Governor, might have erred in this matter, through ignorance or from some improper motive; and so of *one body* of the Deputation or the Junta; but that *all should* have done so, through a long series of years, and succession of terms, it is difficult to believe. And the evidence of this construction is heightened to the greatest degree of moral and legal certainty by the acquiescence of the *Executive*, after, we must presume, he had knowledge of this construction of his regulations: and never intimating, so far as we can learn, that there was *any error* in this uniform course of proceeding. His knowledge of all this is a fair presumption in law, from the requirement of quarterly returns to be made to him, of *all the grants* that were made, and the *facts relating to them*. It is not often that we find such a body of contemporaneous exposition of a doubtful law. To countervail this construction of the ordinance of 1828, as deduced from the contemporaneous and continued acts of the officers of the Government in the Territory, to whom its execution was especially confided by the Federal Executive; and, indeed, to establish by the same kind of evidence the opposite construction, the Law Agent of the United States has introduced from the archives a record of proceedings had before the Departmental Junta, on the 18th of April, 1840, consisting of a proposition submitted to that body: a report of a committee upon it, and their adoption of that report. The object of the proceedings seems to be to procure the confirmation by the General Government, of the grants of land within the ten leagues, and of mission property, made by the Political Chiefs, and approved by the successive Deputations and Juntas down to that time, under the law of 18th of August, 1824, and the ordinance of 1828. This whole proceeding conduces to prove that there was in the minds of that body, at that time, to say the least of it, great *doubt* and *anxiety* on this subject. It is fair to presume that such was the state of their minds at the time, as there is no ground to believe that any thing but honest apprehensions of the insecurity of the land titles of the Territory induced their action. But at the same time that it discloses this doubt and feeling of insecurity, it also supplies other facts which *outweigh*, as evidence of the construction of the decree and ordinance, the *proceedings themselves.* They furnish full proof of the facts that the Political Chiefs, from the commencement of their action under that decree, and ordinance of 1828, down to that time, had granted lands by *definitive* titles within the littoral leagues, and that Territorial Deputations and Departmental Juntas *had approved* of such during the whole of the same period. It proves further, that there were *no vacant lands*, except such as were so *situated*, which could have been colonized ; because the said record declares "it is all littoral, and the greatest part thereof is acknowledged as belonging to the *Missions*." Now, the repeated acts of the Political Chiefs, or Governors, and of the Deputations and Juntas, in the execution of their duty under this decree and ordinance, in the *scale of evidence*, greatly *preponderates* this *single act* of that body : even if their resolutions and preamble had contained the express averment that they did not consider the decree and ordinance as furnishing any authority to make the grants alluded to. But I do not understand them as expressly declaring that belief, but they are rather argumentative and deprecatory of the evils of such construction. Furthermore, if what is produced as the answer of the General Government to their resolutions, is, in fact, a response to them, (which, however, I can hardly consider as having any connection with them,) it proves one of two things, either that the Executive of Mexico did not perceive any reason for the apprehensions of the Departmental Junta, or that they were supremely indifferent to the feelings and prosperity of the people of California, and the latter we are not justified in imputing to them.

The views and considerations above suggested, relate to the construction proper to be placed upon the decree and ordinance, by virtue of which this grant was made. If I should be wrong in the conclusion to which my mind has arrived, that the decree and ordinance ought now to receive the construction which was put upon them at the time, by all concerned in the subject to which they related, and which was acquiesced in so long by the former Government: it is then worthy of consideration, whether, *first*, that approbation of the Federal Executive may not be presumed to have been given: and *secondly*, whether, even if there were no such approbation or previous consent, either in fact or in presumption of law, the principles of equity, under all the circumstances of this case, do not require that the claim should now be confirmed. As the first of these propositions is founded upon the supposition that the Executive of Mexico could by a *less public*, but *equally competent* and *effectual* mode of communication, have imparted the authority to the Political Chief, that is, by *private instructions*, which the Political Chief was not bound to expose, it may not be amiss to bestow some further reflection upon his competency to communicate his consent *in that manner*. In the argument of the Law Agent of the United States, the total invalidity of any private instructions is asserted, and the position assumed that even *a public antecedent proclamation* by the Federal Executive would not suffice; but that there must be a *direct application* for that *consent*, in every *particular* instance of *grant*. To sustain this doctrine, we were referred to the decisions of the Supreme Court of the State of Texas, in the third volume of the Reports of that State. From the fact that the State of Texas composed a part of the Republic of Mexico, and that her judicial tribunals have had their minds necessarily turned to the questions arising out of the decree of the 18th of August, 1824, much consideration is due to their judicial decision upon that subject. At the time of the enactment of that decree, Coahuila and Texas together, formed a State of that Republic. In obedience to the 3d section of that decree, that State proceeded to the enactment of a law on the 21st of March, 1832, providing for colonization within her demarcation. By the 7th article of that law she provided that no settlements should be made within the twenty border leagues, nor within the ten littoral, on the Gulf of Mexico, except they be such as were previously approved by the Federal Executive of Mexico. And "for that purpose all future petitions on the subject, whether made by Mexicans or foreigners, shall be passed to the Supreme Government, accompanied with a corresponding *report*." In the year 1837, that State, by explicit instructions to her *Commissioners of Colonization*, forbade them to give possession to any colonist proposing to establish himself within the twenty border or ten littoral leagues, unless he shall present him with a special order from the State Government, wherein the approbation thereof of *the National Government shall be manifested*. The result of this State legislation is a palpable requirement that the grantee in each case *must produce a document containing* *the previous approbation* of the Federal Executive. In that State, beyond all doubt, every grant would be void where the *consent* was not obtained as the law directed it, and could not be recognized unless proved by the *evidence* which the *law* required. There the consent must be *special* in *every case*, and no *presumption* of that consent could be indulged, to supply what the *law had required* to be *procured* and *exhibited.* The judiciary could not dispense with those positive legal requirements, and hence the decisions in the Supreme Court of Texas upon those two points, viz: the *special* application of the Federal *Executive* in case of a grant; and upon the *doctrine* of *presumption* of that *assent* by the Executive of Mexico. There was no special action required of the Federal Executive with regard to colonization in the States, as there was in regard to the Territories by the 16th section of the decree. The course to be pursued by the States was to be one of *their own adoption.* The Federal Executive could prescribe *no rules* for the *States* as to the *mode of carrying out that decree.* The State of Coahuila and Texas adopted the mode of obtaining the approbation of the Federal Executive to colonization within the leagues, by special application in every instance. If Coahuila and Texas, instead of prescribing that mode of proceeding, had, by a resolution of her Legislature, requested the Executive of Mexico to give his approbation to the settlement of that portion of the State contained within the border and littoral leagues, in the same manner that she should adopt for the colonization of the residue of her demarcation, I cannot doubt but that it would have been entirely competent to the Executive to have complied with the request, whether he did so or not; and that a general ordinance, if he had complied, would have been all sufficient to have given the authority, in the meaning of the fourth section of the Decree of 1824. I presume it will be admitted that the *National Legislature* could have at any time repealed the fourth section of the Decree of 1824. If they *had* done so, and instead of subjecting the colonization of that portion of the country to the *will of the Executive,* they had provided that it should not be colonized without the previous consent of that department of the Government, I presume that then it would be doubtless competent to Congress, by a *general resolution* to that effect, to have given such approbation. It seems to me that Congress, by transferring their power in the matter to the Executive, without any restriction upon him as to the manner of exercising it, gave him the right to exercise his best judgment as to the whole subject. Coahuila and Texas never applied for any *general authority* or approbation, but adopted the course which to her seemed best. The question never arose in that State whether such mode of giving the previous approbation of the Federal Executive was within the meaning of the Decree of 1824. Nor are the decisions of that Court applicable to the question upon which I will presently enter, of the presumption of the previous approbation of the Federal Executive. No presumption could be indulged of any *assent in Texas*, because it was expressly provided by her statute that the evidence of that approbation should accompany the petition of the colonist before he could obtain any right whatever. And one of the grounds upon which the presumption rests, if it can be indulged at all, did not exist in Texas: because the *relation* between the Federal Executive of Mexico and the authority of the State of Coahuila and Texas is by no means identical with that which exists between that Executive and the Political Chief of a *Territory*, to whom that Executive has confided the general trust as his, and the agent of the Government, to convey or grant vacant lands lying within it.

It must be conceded that the Decree of 1824 required the *previous approbation* of the Federal Executive to colonization within the border and litoral leagues. It is equally true that the officer of a Government cannot alienate the public domain of that Government without its authority. The question now to be considered is, admitting that such *authority must exist*, whether or not its existence in this instance may not be *presumed*. There cannot be any presumption indulged of the existence of an authority in a public officer to dispose of the public domain, where the public law regulates not only the *manner of conducting the procedure*, but also the authority and power of the officer. The case must be brought within the influence of the doctrine laid down by the Supreme Court of the United States, in the cases of Arredondo, Clarke, Perchmon and others, all of which recognized the same principle. Those cases rest mainly upon the power of the King of Spain to grant the public domain as may suit his royal will; and upon the presumption that those officers, through whose agency he *acts* in that matter, will, from their *dependence* upon his favor and the *fear* of punishment, not venture without authority, to encroach upon the royal prerogative. The whole doctrine is expressed in the following words, taken from the decisions above referred to: "A *grant* made by the Governor, if authorized to grant lands in his province, is *prima facie* evidence that his power was not exceeded. The connection between the Crown and the Governor justifies the presumption that he acts according to his orders; should he disobey them, his hopes are blasted, and he exposes himself to punishment. His orders are known to himself and those from whom they proceed, but may not be known to the world." And further—

"He who would controvert a grant executed by the *lawful authority* with all the solemnities required by law, takes upon himself the burthen of showing that the officer has transcended the powers conferred upon him, or that the transaction is tainted with fraud." There concurs in the relation between the Federal Executive of Mexico and the Political Chief of a Territory, and that between the King of Spain and his Governor of a Province, many points of resemblance, so far as this particular matter is concerned, though they are not alike in all respects. The point in which they differ most is, perhaps, not the one upon which the doctrine was mainly founded by the Supreme Court; and that is, the utter dependence of the Governor, for all his prospects in life, to the favor of the Government. The facts are common to them both,—that during the existence of the decree of 1824, the disposition of the land granted depended upon the *sole will* of the Federal Executive, which was as *free* to act as *that* of the King, on any of his royal domain,—that the Political Chief of a Territory had the same *general authority*, and was the only officer (who did have it) to grant lands, that existed in the Governor of a King's Province,—that there was the same unrestrained mode of communication, of the will of the Federal Executive, as to the disposition of this land in question, to the Political Chief, as existed between the King and his Governor. And it may be, that the power of appointment, or of removal from office of the Political Chief by the Federal Executive, was unrestrained by the Mexican Constitution or practice under it. This power seems to be extensive enough to have formed a strong motive to obey his orders and decrees. The 20th article of the 4th section of the Constitution confers a sufficiency of power, to assimilate the relation perhaps nearly enough, to authorize the application of the doctrine of presumption, so far as it rests on that ground. The power conferred upon the Federal Executive to carry out the decree of the 18th of August, 1824, by the 16th section thereof, and his general power, under the Constitution, to make ordinances, decrees and rules, for the better fulfilment of the general laws of the Republic, his special unlimited power to subject the land within the border and littoral leagues, to settlement by his will; with no law to regulate and prescribe the manner of communicating *that will*, or determination of it, to the agent that he might appoint and did appoint, viz: the *Political* Chief of the Territory; and his *power* over that officer who had the sole granting power of the vacant lands of the Territory, in case of a departure from his orders as given in the Constitution cited above—all strongly incline my mind to the conclusion that in the case of a grant made by him, the presumption might well be indulged that *he* *was authorized* to make it. As it is not necessary, however, in my view of the case, to decide positively upon that question, I decline to do so. This conducts me, in the course of inquiry which I proposed, to the consideration of the last matter connected with the question of the littoral leagues ; and that is, whether, in view of all the matters of fact and of the Mexican law connected with it, as presented by the record, it would be consistent with the principles of equity to refuse a confirmation of this grant, because of its locality in reference to the coast.

The nature of the transaction between the person soliciting land and the Government, is, in effect, as has been frequently said by the Supreme Court of the United States, a contract ; the consideration being, in the case now before us, the abandonment of his former home, or residence, and the cultivation and inhabiting of the land for which he petitions. And whether, according to strict definition in our law, it be a technical contract or not ; yet after the labor and toil bestowed upon it, and the long and continued residence, preventing necessarily the occupation, and, it may be, the opportunity of acquiring any other home, the doctrines governing contracts may be very appropriately applied. Viewing the claimant in this light, it seeems to me, that he may, in this case, invoke to his aid the principles of equity. He desires to avail himself of the laws of his country to procure a home. He reads that law, and sees clearly laid down the terms and conditions upon which his Government will grant it. That law contains a provision that as to a portion of her public domain, although it is not in all events, and absolutely withdrawn from settlement, yet it can only be devoted to that object by the previous consent or approbation of the Federal Executive of the Republic. He reads that the Federal Executive is required to carry out that law into practical effect. He is a native, perhaps, of California ; born in the only inhabitable part of the Territory. After the passage of the decree of 1824, he waits with patience for the necessary ordinance or regulations of the Executive. At the end of about four years that ordinance is promulgated. He learns from that, who is the officer appointed to grant the vacant lands of the Territory. He sees distinctly declared what he is required to do, to obtain a portion of that vacant land. With an honest purpose of mind to comply with all that he is required to perform on his part, he approaches the Political Chief of the Territory and submits his application. Among other things to be considered by the law is the relative position of the land which he solicits to the coast of the Pacific. The land which he solicits is in that section of the country which alone has been reedeemed from the savages, and capable of being used as the law requires. He knows that the land is grantable, if the Federal Executive shall have willed it to be so. The Political Chief, with all this before him, and with information that the land is within the ten littoral leagues, proceeds to make the grant. Is not the grant by the Political Chief made under such circumstances, in effect an affirmative response to the question, "Has the approbation of the Federal Executive been given to the granting of this land?" That question is asked by the petition, and is answered by the grant. I cannot think that this claimant is chargeable with any violation of the law. He must be considered, in this case, to have acted with good faith at least. The written laws and published ordinances of the Government, he may be held bound to know, though the presumption is so far short of the fact, *in this particular*, that both law and equity allow an apology sometimes to be urged, for not having made their acquaintance. However, in this case there was no violation of any written or published law, so far as I can perceive. The whole law seems to have been known to him so far as it was accessible to any one. The law of 1824, and the ordinance of 1828, he was bound to know, but there was a *fact*, that is the authority of the Political Chief, to grant this land which he had no earthly means of knowing, except from the source to which it would be properly communicated, if it existed. He relies upon that information, takes his grant and proceeds, as the ordinance directs him, to the possession of the land. He hears no more about the matter of the littoral leagues. The Government that granted it to him never molested him. Nor do I think that she would ever have done so. She was fully advised of this mistake of her officer, if it was one, I suppose within six months after it occurred, as there is a requirement for a special report of the matter every three months, after it transpired. The knowledge of the fact, we may suppose, was at any rate communicated by the Departmental Junta of California in 1840. I can not think that, in good conscience, the Government of Mexico would, after so many years, have driven him from his home, for the want of the previous approbation of the Federal Executive. I feel authorized, in the language of the rule laid down by the Supreme Court of the United States, in the case above cited in this opinion—to consider that the conscience of the former Government ought to be so affected by this conduct of herself and her officers, as to hold the land (if she held it at all) as a trustee for the claimant. This rule, by which the Supreme Court touched *the conscience* of the King, was established under laws which furnished rather a dimmer light, by which to hunt for it, than is given to us by the Act of the 3d of March,

1851. The old and familiar lamp of the *Principles of equity* is not held out, as it were, to *one side*, for us to see by, but it is put into our hands to guide and to govern us in the decision of those cases.

Having thus disposed of the littoral league question, and come to the conclusion that a confirmation ought not to be refused on that ground, I will pursue my inquiry into other matters affecting the validity of this claim. If all the objections that have been considered be insufficient to prevent such confirmation, yet, if according to the publicly promulgated law and ordinance, prescribing the plan and scheme of disposing of the public domain of the Republic of Mexico, no right or title of any kind, ever vested in the claimant, then there is no ground for the application, of any equitable considerations, such as the Supreme Court of the United States have applied to the cases of imperfect titles, under the former laws of Congress which have been referred to; nor any ground upon which this Board, upon any of the principles or grounds of decision enumerated in the 11th section of the Act of the 3d of March, 1851, can confirm this claim. The Law Agent of the United States contends that such is the condition of this claim when brought to that test. This makes it proper and necessary to proceed to the application of the claim, to the ordinance of November, 1828.—The argument is, that by the just construction of the ordinance there was necessary to the existence of any right, or title whatever, in the petitioner, a previous consent of the Territorial Deputation; and that as there is no evidence introduced in the case of any such previous consent, that there is no ground upon which the claim can be confirmed. The same process of reasoning may be pursued in the consideration of this question, as was adopted in regard to the construction of the decree of 1824, as to the requirement of the previous approbation of the Federal Executive to the colonization of the lands within the littoral leagues. That is, we should endeavor first to arrive at the meaning of the ordinance, by the provisions themselves which it contains, and if they are doubtful, then we may recur to the usage and practice which was adopted and pursued by all the officers of the Government, who were charged with the execution of the ordinance. In such case it is the well settled maxim of the Spanish law, "Optima legum interpres est consuetudo." And to this may be added as of great force in the construction, that the Government whose ordinance it was, was fully informed that such was the construction and practice of her officers in its execution; and that no objection was made, or correction ever attempted, of the supposed error. The proof in this cause is abundant, that the universal course of practice by all the Political Chiefs, who ever granted lands in California, was to execute complete grants, or titles to the petitioners, and to deliver them to the party before the submission to the Territorial Deputations, or Departmental Juntas, for their approval; and if there are any exceptions to this rule they are so rare, as that they only serve to prove the general rule. It is also as fully proved in this case, that the Government was well informed of this course of practice, by all her officers or Political Chiefs. My own impression is, that this practice was in conformity with the provisions of the ordinance in this respect. But there can not be any doubt, I think, that whether the ordinance contemplated the execution of the full title, by the Political Chief or not, before he was required to obtain their approbation, or rather submit it to them for their consentimiento, there was to be in existence a right or title, though an imperfect one, before the submission of the matter to that body; which last would be sufficient to authorize a confirmation according to the act of 3d March, 1851; if it were valid, according to the tests to be applied to it by that law.—In considering this question of the approval of the Territorial Deputation or Departmental Junta, it must always be borne in mind, that the whole undivided power and authority, to make grants, was vested by the ordinance in the Political Chief. There is no participation with him in that exercise of power in any body else. "The Political Chiefs of the Territories are authorized to grant, &c." All the pre-requisites to the exercise of that function by him, are enumerated in the 3d article of the ordinance. Immediately after the presentation of the petition, as required in the 2d article, "He shall proceed directly to obtain the necessary information, whether there is in the petition the requirements demanded by the law of the 18th of August, 1824, both as respects the petitioner, and the land which he solicits; and for that he may rely upon his own judgment, and act upon it alone; or, if he prefer to do so, he may consult, at the same time with the respective municipal authorities, as to whether there be any objection to the grant. The next article is: "That in view of the whole the Political Chief will *accede* or not to the *prayer* of the petitioner, conforming his conduct exactly to the laws applicable to the matter, and especially to the above named of the 18th August, 1824." Then follows the section which most particularly refers to the point under consideration. It reads thus—"The grants made to private individuals, or to families, shall not be held as definitively binding (or valid) without the previous consent of the Territorial Deputation, to which end there shall be passed to it, the respective expedientes."

As we have seen, that no share of the function of granting is devolved by the Ordinance upon the Deputation, their consent must necessarily be to what *has been done in that particular.* That he should have done something, in the contemplation of this section, towards a grant, must necessarily be conceded, even though it should not have amounted to the execution of the perfect title. That he should have acceded to the petition which was for a grant of the land sought, is expressly required, and that there was at least *a concession* to that extent, is a necessary deduction. To limit the word concession to that point in his action, would result in the same end, for there would then be an inceptive title, whose effect would only be *qualified* but not defeated by their refusal ; and that qualification was only to retain it in the condition it then was, until the final action of the Federal Executive. To say that what the Political Chief had done should not be *definitely valid* without the approbation of the deputation, is the admission of a *validity,* though it may be short of irrevocability ; and in that construction there would be an imperfect right or title, which, if never destroyed, under the former Government, might now, if in all other respects unexceptionable, be the subject of confirmation by this Board. But my impression is, that after the necessary qualities were ascertained, by the granting power, to exist in the land sought, and the petitioner, that he might under the ordinance proceed to the making, signing and delivery of the title. The 8th article proceeds :—"The concession which is asked for, being *definitely made,* there shall be executed a document, signed by the Political Chief, which shall serve as a title to the party, expressing in it that it shall be understood to be in conformity with the provisions of the laws, in virtue of which he may proceed to the possession." This definitive action of the Political Chief, in consummation of the title, refers to the initiatory steps which, by the preceding or 3d article, he had been required to take in the same matter ; and does not, as I think, by any fair construction refer to anything else. That concession, which is the only document he is ever supposed or required to make, was the same which was not to be *held definitively valid* without the previous consent of the Territorial deputation. All the force must be given to the provision requiring the previous consent of the deputation which the ordinance imparts to it. If prior to that consent there was no right or title conferred by the Political Chief, his act afterwards would be merely a ministerial duty ; the whole purpose of the ordinance would be reversed, and the granting power would in effect devolve on the Territorial deputation. But by the construction of the ordinance, which it seems has always been adopted, the effect of the consent was to place the concession or grant beyond the *supervisal* of the *Federal Executive,* and its *refusal to consent,* was not to annul the grant, but to cause its submission to the action of the Federal Executive, which might result or not in its annihilation.

The consent of the deputation did not alter the nature and character of the grant, nor could their refusal destroy it. It remained as the granting power had made it. Now every object, which, it seems to me was intended to be accomplished by the submission of the matter to the deputation, has been accomplished by the course pursued by the Political Chief in this case. He has made the definitive title expressing in its body that it is made subject to the action of the Territorial deputation as prescribed by the ordinance. The only question here is whether the failure of the Political Chief to obtain the consent of the deputation, is now to be held as destructive of the force and effect of a *perfect grant* made *subject to it.* That this grant, prior to the submission of the matter to the deputation, was a perfect and complete grant of the fee, there is no doubt. It conforms exactly with the model of a complete grant, under the Spanish law, as furnished by the Supreme Court of the United States in the case of Menard's heirs *vs.* Massey, reported in viii. Howard, 314. The insertion of conditions are common to them both. It often occurs that conditions subsequent are imposed, by the terms of the contract, between the parties ; but they are entirely consistent, with a full investiture, of the grantee, of the entire estate in fee. In one sense of the word, those conveyances are not *definitively valid*, that is they carry upon their face and bear about them the means by which they may be destroyed. That an estate in fee simple may be granted on conditions : see Greenleaf's Cruize, i. vol., 59. And further, a condition in deed may be annexed to every species of estate and interest in real property ; to an estate in fee, entail, for life, or years, in any lands or tenements ib. Title 13 Estates on Cond. chap. 13, page 2. The right of the claimant must be tested by this grant, as it is. I do not think it was made by the Political Chief prematurely, in order of time. Whether made prematurely or not, is a question of the construction of the ordinance ; and I think that the construction which has been put upon it is right : and furthermore, that if it be not right, the consequences must be borne by the grantor, the Government, and not by the grantee. The grant is not void, but must stand as it is, although in contemplation of the ordinance, the full and complete title was not intended to be made until after the action of the Territorial deputation. More especially should it be so held, after the long usage of that mode of granting, under the ordinance, with the knowledge of the Federal Government, as we are bound to presume from the evidence on the record in this case. The fact of the authority, and the sole authority, of making grants being vested in the Political Chiefs, once established, no grant executed by him can be held void for the irregularity in the manner of executing that trust, though it may result in making the consent of the Territorial deputation a quasi condition subsequent, instead of a condition precedent to the grant. Here was an authority in the grantor to grant, and to grant the very lands ; or, in other words, the lands were grantable, and he fully authorized to grant them ; but he has misapprehended, honestly, (if at all,) the course to be pursued in carrying out his conceded power, in the point whether he could not proceed to make the grant, after ascertaining the matters entitling the petitioner to it, and then submit it to the deputation : or, submit it first to the deputation and then execute the grant. The Political Chief has not usurped any authority conferred on the deputation by his course. He expressly subjects his action to their approbation. It is a case, at most, of irregularity in carrying out an *ordinance* prescribing his duty ; and a grant thus made ought not to be avoided, for a departure from its directory injunctions, even in a case where the consequences resulting from the departure would be much more serious and important than the *total* neglect, under the decree of 1824, to have submitted his action at all to the review of the Territorial deputation. The Supreme Court of the United States, in v. Wheat., 239, lay down a rule which I think applicable to this case. They say that as to irregularities committed by officers of the Government prior to the grant, they do not doubt but that the Government and not the individual must bear the consequences. And in xi. Wheat., 380, they say : " It would be extremely unreasonable to void a grant for irregularities in the conduct of those who are appointed by the Government to supervise the progressive course of a title from its commencement to its consummation in a patent." My opinion is, that this is a perfect title, subject only to the effect declared in the ordinance, as consequent upon the failure of the Political Chief to obtain the consent of the Territorial deputation, and to the conditions which are lawfully annexed to the grant. The grant being definitively made and delivered to the claimant as the decree contemplated it should be, he had nothing to do further than to perform those conditions lawfully attached to his grant, and which were to be performed by him. If the grant was not *annulled* by some action to be had upon it, according to the ordinance by others than himself, it remained as it was when delivered to him, a perfect and complete title. No such action did take place during the existence of the former Government. The consequence of the failure of the Governor to obtain the approbation or consent of the deputation we have seen, did not *annul* the grant, but was only to be followed by a reference of the matter to the Federal Executive. No such reference was ever made, nor indeed was there ever any final action upon it, by the deputation. There was no time limited for their action, and we have no doubt that they would finally have approved of it, as the only objection made to the adoption of a report by their committee, of entire approval, was an evident error in the *form* of that *report.* I can see no reason why the Territorial deputation should not have approved of the claimant's grant. I believe it is *substantially* approved, and as its neglect was no fault of the claimant, I do not think we ought, in equity and good conscience, to refuse him a confirmation of his title.

Having considered thus far the grounds of objection or difficulties which presented themselves to a confirmation of this title, and not having seen any fatal defects, we will proceed to examine, if any objections affecting its validity can be predicated of the non-performance of any of the conditions attached to it.

I will remark here, that as to several of these conditions I do not find any authority for their imposition in the decree of 1824, nor in the ordinance of 1828. But as the Political Chief is required in the ordinance to conform to the laws regulating the matter, as well as to the decree of the 18th of August, 1824, and the ordinance of 1828, I am not prepared to say that they are imposed without authority. The presumption is, that he did conform to the laws. The conditions not to obstruct the highways, crossings, and right of way, and to build a house and live in it, within a year, and to put in the limits of his land, besides the land marks, some fruit trees or forest trees of some utility, seem to have been taken from the regulations of Don Felipe de Neve, dated in June, 1779, and approved by his Catholic Majesty in a royal order of the 24th of October, 1781. In the 9th section of those regulations, we find it provided that the new colonist shall be free, and exempt from paying tithes or any other tax on the fruits and produce of the lands, and cattle given to them, provided that within a year from the day on which the house lots and parcels of lands be designated to them, they build a house in the best way they can and live therein ; open the necessary trenches for watering their land, placing at their boundaries, *instead* of land marks, some fruit trees or wild ones, of some utility, at the rate of ten to each suerte of land. App. No. 2, of Capt. Halleck's report Sen. Doc. No. 17, page 136. If this was the law, by authority of which these conditions were inserted in this grant, however suitable to urban grants, they seem to me to be out of place in the large rural grant to this claimant ; and instead of the comparatively mild penalty of paying tithes and taxes if he failed, the most disproportionate penalty of losing his whole land, is affixed in this grant; which, however, we may safely conclude would never have been enforced by his Government. Without questioning any further the power of the Political Chief to insert the conditions which he has put in the grant, I will proceed to the more important considerations of the questions which arise out of this feature of the case. The conditions annexed to the grant are numbered to the extent of five, though the last so numbered is not in fact a condition, but a *clause of forfeiture*, declaring, "should he (the grantee) violate these conditions, he shall lose his right to the land, and it may be denounced by another." I have no doubt that the conditions in this grant, under any interpretation which the ordinance of 1828, or the decree of 1824 can bear, are all subsequent conditions, for it cannot be supposed that the execution and delivery of the definitive title spoken of in the 8th article of the ordinance, was to be longer delayed than the consent of the deputation; and besides, the conditions are of matters in their nature subsequent to that time. It will be observed that some of the conditions are negative in their character, and some active or positive, and one of them at least, a mere recital or descriptive allegation of what was already *done*, which is not strictly a condition, as that must necessarily relate to the future. Of those which are affirmative and active, some are to be performed by the *grantee himself*; and others by an officer of the Government, at his instance.

With regard to any failure or imperfection in the performance of any of them, which the grantee is not required to perform, he ought not, whatever else he may suffer from that failure or imperfection, to be *subjected*, on account *thereof*, to the forfeiture prescribed in the penal clause. It could only be by a reversal of the lenient rule applicable to the construction of penal clauses, that he could be visited with the defaults of a public officer, whose action the Government had required him to solicit. The penal clause is, "If *he* shall violate these conditions, he shall lose his right," &c. Surely, he will not be held to the penalty for the violation of conditions which he was not required to perform, and the execution of which he could not control. So far as there appears to be any violation of the conditions which the grantee was to perform, I have no doubt that the failure is of a nature and character which ought not to be visited with the penalty of the loss of *his title*. The only neglect or violation of a matter material to the grant, relates to the *time* of building the house and living in it. The *actual occupation*, the judicial possession and measurement, the building of the house, and his residence in it, all took place many years before the acquisition of the country by the United States, and to inflict the penalty now, for the difference of *time* between their requirement and actual performance, would seem to me to be entirely too disproportionate and vindictive to be sanctioned by the laws of Mexico, or by the principles of equity. The imperfect manner of executing, or departure from the laws and ordinances regulating the discharge of the duty of measuring this land, which by the condition of the grant he was required to procure to be performed, is according to my view of the penal clause, no ground for inflicting its force upon the grantee, and will not be considered by me, except in connection with another objection, which is that to the validity of the claim, for want of a sufficient segregation of the land, from the remainder of the vacant lands of Mexico. This view of the question as to the effect of the conditions in this *grant* upon its validity, taken in connection with the proof in the record, might suffice perhaps upon this branch of the case ; but there are other views which I feel called upon to take of this matter, of the subsequent conditions in the grant. This grant in its construction, as to its character, and as to the effect of the breach of the conditions annexed to it, is to be tested by the law of Mexico. We have already seen that it was, in its form and structure, a complete conveyance of the fee simple title. We are now to consider what is the effect under the Mexican law, upon the rights of the party, of a breach of the conditions which are annexed to it. The entire fee being vested in the grantee, the first question which arises is, whether upon a failure or breach of an annexed condition, that *vested title* was thereupon *ipso facto* divested out of the grantee, and revested in the Government, without anything done on the part of the Government to manifest her will to take advantage of the forfeiture. This is a very essential consideration ; for if the land, in this grant, did not *revest* in the former Government, but required some action or procedure of some kind to produce that result, which proceeding was never had, under the former Government, the United States did not acquire the *land*, under the Treaty of Guadalupe Hidalgo, but at most a mere *naked right* to enforce a forfeiture which belonged to the former Government. The distinction must never be lost sight of in considering this question between conditions which were to be performed, before the perfect right, by a grant of the fee, was to be vested in the party, being what we term, in our law, conditions precedent—which, not being performed, would leave the fee in the former Government, and thus, under the treaty, would devolve upon the United States to be dealt with as she might direct : *and those conditions*, which, according to our nomenclature, are called conditions *subsequent*, which attach to a complete grant of the fee, and have such effect, if violated, as the law of Mexico prescribes. I will advert, for a moment, to the view of this subject as it is regarded in those Governments with whose principles we are more familiar than we are with those of Mexico, and by which the Government of the United States, both in its legislative and judicial departments, has always manifested a strong inclination to be governed, when adjusting questions of private right between herself and her own citizens. The rule in this country upon the subject is laid down with so much brevity, and yet with such comprehensiveness, in a note to the Text of Cruise on Real Property, as edited by Mr. Greenleaf, that I will quote it at large: "A condition is something inserted for the benefit of the grantor, giving him the power on default of performance, to destroy the estate, *if he will*, and revest it in himself or his heirs. As the law does not presume forfeitures, it requires some *express act* of the grantor as evidence of the intention to reclaim the estate, viz: an entry"—i. Greenleaf Cruise, page 46, of Tit. 8. The doctrine of the English Common Law on this subject, except when varied by special legislation, is adopted generally in this country. That doctrine, even in grants by the Crown of England, is thus laid down by Cruise, *ib.* 40: "In all cases where the Crown is entitled to land upon the breach of a condition, an office, countervails an entry." Citing Plowd. 243. The People *vs.* Brown, iv. Caines, 416, 426. In the State of Tennessee, which had a large portion of public lands for distribution, the doctrine with regard to grants by the State is, that even a grant which is *void* for fraud, must be adjudged so by some process of law before the State can reclaim it:—iv. Cond., U. S. Repts., 657. And that a grant by breach of conditions subsequent is *not void*, but only voidable. U. S. Dig., vol. i., 472; i. Preston's Ten. Repts., 370. I will now advert to the doctrines of the Civil Law upon that subject, which correspond in a remarkable degree with those of our Equity. I am of opinion that the doctrines which are applicable in this particular to private grants or conveyances, ought to be equally so to public grants; and that when brought before a judicial tribunal, where the nature of the grant is the same, and more especially where its features are identical, the same rules of decision should apply. There are rules which are peculiar in their application to grants by a Sovereign, which are not involved in the consideration of the force and effect of these conditions. Such, for example, as that in grants by a Sovereign, nothing should be taken by *implication*; and that in their construction they shall be taken most strongly for the sovereign: whereas, in private grants the rule is that they shall be taken most strongly against the grantor, and in favor of the grantee. But where the question is not one as to the meaning and intent, but as to the effect of unambiguous stipulations, such as conditions whose signification is apparent, the same rules should govern, no matter who are the parties. The Supreme Court of the United States have held, in an opinion delivered by Judge Marshall, that the King of Spain was bound by the fundamental laws of his kingdom. It is needless to remark that the Republic of Mexico is governed by the same municipal laws which prevailed before her independence, except so far as they are not consistent with the present form of Government and have not been changed by her own decrees. In the Partidas I find the doctrine asserted, without qualification, that the King is bound by the laws of the Kingdom, although he made them, just as a subject is bound by them : i. Part, Tit, i., Law 14. So also in Novisa., Recop., vol. i., Tit. 2, Lib. 3, it is declared that the laws must be kept, as well by the King as the people. Those doctrines of the Civil Law to which I shall make reference, are as follows : " Clauses of nullity and penal clauses are not always executed to the rigor ; and covenants are not dissolved nor penalties incurred in the very moment which the condition bears ; even although it should be agreed on that the contract should be void, by the bare deed, and without any ministerial act of justice. But these sorts of claims have their effect regulated by the discretion of the Judge, according to the nature of the covenants and the circumstances : i. Stra. Domat, page 185, Art. 222." If the condition depend either wholly or in part on the act of one of the contractors, and he has not satisfied it within the time, it is understood that in the cases where it would be equitable to grant delay, it ought to be granted according to the circumstances ; as where the delay has occasioned no damage, or if there is any, where it may be repaired : *ib.* page 184, Art, 218. In all covenants in which one of the covenanters is obliged to do or give a thing, or to accomplish in any other manner that which is agreed on—and especially in those in which the non-performance is to be attended with a dissolution of the contract, or with some *other penalty*, it is equitable and for the public interest that the covenants be not immediately dissolved, nor the penalties incurred for every sort of non-performance indifferently : *ib.* page 177, Art. 196. Although a covenant proves to be null, yet he who complains of it cannot restore himself to his own right unless the other party consents to it. But he must have recourse to the authority of justice, whether it be to get the nullity declared by a sentence and himself reinstated in his right, or to get the sentence of the court put in execution, in case it should meet with opposition : *ib.* page 191, Sec. 240. When a covenant is not dissolved by common consent, the party who complains cannot *molest the other*, but he ought to have recourse to justice to get the covenant declared void and the sentence of the Judge put in execution : *ib.* 196, Art. 14. These extracts are very explicit, and place the whole matter of the effect of conditions and their breach, and of penal clauses and forfeitures, upon grounds which recommend themselves to the conscience and sense of justice of every one ; and, moreover, are the foundations of our equity system on the same heads. It is laid down explicitly in Novisa. Recop., Book iii., Tit. 5, Law 1., that what the King has once granted to any one he cannot take away *without fault*, (Sine culpa). The important question is, *how* that fault is to be *ascertained*, and the sovereign will to enforce it be manifested. I have no doubt that in different branches of the administration of public affairs, somewhat different modes were adopted to enforce penalties and forfeitures. There were public denunciadores, known officers, and there were secret denouncers, who like plaintiffs in our *qui tam* actions, were the instruments of vindicating the violated laws and of enforcing the penalties attached to their breach. The last part of the penal clause in this deed alludes most distinctly to such process, in case of breach of any of the conditions by the claimant. It says, in case "*he violate* the conditions, he shall lose his right to the land, and *it may be denounced* by another." Now, if *may* means *must*, which would be the case in a *decree* of the same sort, there would be no difficulty in the case. But it is possible that this is *a mere privilege to others*, and is a cumulative proceeding ; not *exclusive* of any on the part of the Government, or decisive of the question whether the title does not revert *ipso facto*, upon the happening of a breach. An interesting case has lately been decided by the Supreme Court of Texas, Hancock *vs.* McKinney, Nov. Term, 1851. That decision was upon a complete Mexican title or grant like this, with conditions annexed, but the terms in the clause of forfeiture do not expressly refer to the process of denouncement by another ; yet that mode of ascertaining the fact of breach of the conditions is referred to in the decision as an established course of procedure. The case, however, is not conclusive of the qnestion whether it was or was not the only means by which the title of the grantee could be impeached, or whether any inquisition of any sort were *necessary* to reinvest the title in *the Government*. The language of the court upon that subject is : "It is certain that down to the period of the commencement of the revolution it would have been competent for any person entitled to land to have denounced any land that he might wish to appropriate to himself ; and if, in the process of perfecting his title, it should appear that the land he wished to appropriate had been *already granted or conceded*, *the inquiry would be made* if it had been forfeited for the non-performance of conditions, or from any other cause. And whether the denouncer should have his title or not, depended upon the result of the inquiry whether such *forfeiture* had *occurred* or *not*." I have remarked that this is not conclusive of the point, but from the the general doctrines of the Mexican Law to which I have adverted, from the mention made of this mode of procedure in the penal clause of this grant, and from the fact as disclosed in the opinion of the court, in the case from Texas, that no re-*grant* would be made upon the mere allegation of forfeiture, but that it must be established by an *inquisition*, I am brought to the conclusion that there was not in fact a reinvestiture of the fee simple title in the Mexican Government of the land now claimed at the time the United States acquired the country, and that this Government only acquired by the treaty, if anything, a mere right of the former sovereign to enforce a forfeiture.

There have been no cases brought before the Supreme Court of the United States under the former Treaties and Acts of Congress, which furnished occasion or necessity for any *express opinion* upon the question I am now considering. In the case of the United States *vs.* Sibbald, in x. Peters, 321, the court use this language:—"It is unnecessary to decide whether the Acts which authorized the Courts of Missouri and Florida to decide on claims to land therein, Congress intended to assert a right by forfeiture, for conditions broken, to lands which had been once *legally granted*. And it may well be doubted whether it would have been re-annexed to the Royal domain, had the province remained under the dominion of the King of Spain; nor is there any provision of any law of Congress which *specially requires the court* to enquire into the performance of conditions on which grants were made." The cases in which it has been held by the Supreme Court of the United States that this Government could, or at least would, take advantage of forfeitures which had occurred under the former Governments, were such as were considered by the court to have been of that category in which *no title in fee* had vested in the claimant, and that by the stringent force of the ordinances under which they issued, they were utterly *void ab initio;* and to be considered as *never having been given at all:* that the conditions were *precedent* and their performance expressly required, before the *concesions* were to *have any effect.* Of that class of cases are the United States *vs.* Kingsley, xii. Peters, 476; United States *vs.* Wiggins, xiv. Peters, 334, &c. In the absence of any express authority of the Supreme court, I do not feel at liberty, under the terms of the Act of 3d March, 1851, to decide that we have *no authority* to declare a forfeiture of complete titles, by the non-performance of conditions subsequent. In this case the result of that inquiry has been satisfactory to my mind that the claim ought not to be rejected for the want of any compliance with those conditions under the Spanish Law, and more especially under the application to all the facts disclosed by the record of the principles of equity.

The only remaining question arising in the consideration of the validity of the claim in this case is, whether the land granted can be considered as ever having been, or is now capable of being, severed from the public domain, in virtue of what has been done in regard to it, by the authority of the Mexican Government. If anything more is intended by, or embraced in, the requirement of a severance of the land granted, from the mass of the public domain, than the obvious requirement, which inheres in every grant, or deed, from the very nature of things, viz: that there must be something granted which can be distinguished from other things of the same sort, it must be derived from the positive laws and ordinances of the Government where the grant is executed. The general doctrine of universal application is plainly stated by Judge Marshall in v. Wheat., 359 ; iv. Cond. 682, in the following words : "It is essential to the validity of a grant that the thing granted should be so described as to be capable of being distinguished from other things of the same kind. But it is not necessary that the grant itself should contain such a description, as, without the aid of extrinsic testimony to ascertain *precisely* what is conveyed." In applying this rule we should observe what is the intention of the grantor as to the *thing granted*. Where the intention is to grant a *specific thing*, as a house, or town lot, the house, or lot, must be so described in the deed as to identify it, or by reference to something by which it can be done. But when the grant only intends to be of a certain *number* or *quantity*, of an understood, and defined *nature of things*, then that *number or quantity*, is the matter to which the rule will especially apply ; and that *number or quantity* must be so certain as to distinguish it from another number or quantity. But all the certainty above that is of the *genus* or *species* of *the thing*, of which that certain number or quantity is predicated ; and the further identification or specification of the thing, is to be determined in a mode to be agreed upon, or it may be establshed by means provided by law. It may be by the selection *ad libitum* of the grantee or grantor ; or, as is usual in grants of land by a sovereign, by the *public officer* called the Surveyor. And where the thing is to be selected and specified, by a *public officer* chosen by the Government for the grantee, to perform that office—*his* omission or fault does not vacate the grant.—v. Monroe's Repts., 159. This distinction is palpable, and cannot be better illustrated than by a case adjudicated in i. Howard, 24. There was a concession upon a petition of the party, stating that he was *ignorant* of the *public lands* that were vacant, and desirous to avoid interference and dissensions with any person, he further prayed his Excellency to grant them, at places where the Surveyor General might survey them, as vacant land. Here was a segregation of nothing, but the number 8,000, from the infinite extent of numbers ; any identification of a specific tract, or parcel of land, being *expressly excluded.*—The grant was made accordingly of the 8,000 acres of land, and the Survoyor General ordered to survey for the grantee that amount of vacant lands, without injury to other persons. And this claim was confirmed by the Supreme Court of the United States. Judge Catron, in delivering the opinion of the Court, states, as one of the grounds of objection taken on the part of the United States, to the confirmation, that, "There is no description whatever in the said pretended grant, of the lands alleged to be granted, and no valid survey could be made so as to sever any lands from the public domain." He proceeded to answer the objection and says, "Although there is no description of any place where the land granted shall be located in the Governor's decree, still it was binding so far as it went. The Surveyor General was ordered to survey the land solicited, in places vacant, and without injury to third persons. The acts of the *subordinate officer came in aid* of the decree," &c. This proves what, indeed, needed no authority to establish, that a grant may be good, though not of any *specific thing*, which is ascertained in the mind at the time of granting. But *the thing of which the quantity* or *number* is predicated, is the *object* of the grantee to acquire, and of the grantor to give. All else, that is in the grant, is moonshine, but for *that.* Now, this primary object of getting the *thing* into possession for use and enjoyment is to be attained, in cases of public grants as I remarked above, usually through the instrumentality of officers of the Government. This appropriation of the specific thing, or separation of it, from the mass in which it lies confounded, is, in every Government, a matter of public policy which relates to herself. The Government desires to know for her own interest and convenience *what* is left to her after that granted quantity is taken out, and *where* it is, so that she may know what she has to give to others, and that others may know *what* to solicit. It is the duty, or rather it is wise policy in every Government having lands to dispose of, to adopt such a mode of procedure of identification, of what she grants, as will best subserve *her own* and the public convenience and interest. But it is a matter which concerns *herself* and her citizens alone. She may regulate it according to her own views of policy, in which she is generally determined by the means and conveniences which she may be able to command ; and is often influenced by the peculiar condition of the country or province, and the pursuits—whether agricultural or pastoral—of the inhabitants of it. Whatever plan or course she may adopt, is all-sufficient to bind her and her citizens, and should also bind those who afterwards succeed to her rights and obligations. The Supreme Court of the United States have expressly recognized this view of the subject. In deciding upon cases where land is granted, or attempted to be granted *specifically*, and not a mere *number of acres*, or *quantity* of land, to be identified thereafter—either by the party at his election, or by a public officer—they have laid down the rule upon this subject expressly with reference to the laws and ordinances of the country making the grant. They say, where the grants, even by a liberal construction, contain no points by which the lands can be identified, the grants must, for vagueness and uncertainty, be held void. The Court have not been influenced in this conclusion by any of the common law rules which make grants void for uncertainty : such, for example, if the King grant land in a peat waste, without ascertaining *what* part, or the *special name* of the land, or how bounded—the grant is void for uncertainty ; and yet, if an individual so grant it would be good. They have only applied the *laws* and *ordinances* of the Government, under which those claims are derived ; and required that the thing granted be so described as to be capable of being distinguished from other things of the same kind, or be capable of being ascertained by extraneous testimony—xv. Peters, 215. So in xi. Howard, 127, the Court say : "These conclusions are in strict accordance with numerous decisions of this Court, which insist on the necessity of the severance of the property claimed from the public domain, *either* by *actual survey*, or by some *ascertained limits* or mode of *separation recognized by a competent authority*."

In view of these principles, we will examine for a moment the plan or system of granting, adopted by the Mexican Republic by the ordinance of the 21st of November, 1828, carrying out the general decree of the 18th of August, 1824, under which the grant in this case was made. This mode of disposing of the public domain by the Government of Mexico, was unlike that which had been pursued by the Spanish Government in the Provinces of Louisiana and Florida, and, indeed, unlike that pursued in most countries with whose practice, in that particular, we are most familiarly acquainted. In all those countries, the general course has been, upon the petition being presented by the party, or application in some mode made by any one desiring to obtain land, for the purpose of furnishing the necessary certainty of description, and of separating the land from that which is not granted ; to direct a *survey* to be made by sworn officers or Surveyors, using the implements and apparatus necessary to do the work upon the ground, and afterwards to plot it upon paper. This description of the land, being thus made by a surveyor, is transferred into the grant. It consists of courses and distances, run by the surveyor, and of stakes or marked trees, or other natural objects, which ascertain the very land which was actually surveyed. But in California there was no such means provided by the Government for that purpose ; and yet, the public policy and interest of the Republic required the advancement of settlement and cultivation, in this region of her vast dominion. The Government proceeded to do this, foregoing the convenience which her more regular and usual course might have attained, in the matter of segregating the land granted, from the residue of her public domain. In this unprovided condition of the country, she adopted the plan of granting, requiring the applicant to present to the Political Chief a petition — as appears in the 4th article of the ordinance of 1828 — stating with particularity all that related to the *person of the applicant*, " marking, likewise, with the distinctness that *may* be (possible), and describing in a map or (design), the land which he solicits." That map, or plan, which was a rude sketch, made with no scale of distances, with no reference to, or, at least, with no accuracy, as to *course*, was generally drawn, as it would seem, with the finger or some blunt instrument, and the lines colored with the juice of berries, or charcoal or some other coloring substance. It contained always notable natural objects, with which the country abounds, and generally, if not invariably, gave a *name to the place or tract solicited*, which, if not then notorious, soon became so, and generally retains it still ; stating the *supposed quantity* in leagues, within the natural monuments of rivers, hills, the sea, the Sierra, or some remarkable ravine or promontory of that coast range of mountains. That description *went* into the *grant instead* of a *survey*, and designated the *locus in quo*, the granted leagues were to be contained. Sometimes the grant was by those metes and bounds, and sometimes of a number of leagues within them. After the grant was made, the party, in the language of the ordinance, was to *proceed* to the *possession*. This grant contains conditions also, which relate, as we have seen, to a possession, and to a measurement of the land according to the ordinance, which measurement was of the nature and kind exhibited in the record of this case. Such was, and is, the mode of segregation in this case, as provided for, authorized, acknowledged and recognized by the Government of Mexico, in California. As to any survey, in the legal sense of that word, as understood and practiced in the Provinces of Louisiana and Florida, and generally elsewhere, under the superintendence of a Surveyor General, such a thing was not contemplated nor *exacted*. To have required it would have been like the Egyptian exaction of the captive Jews, to *make brick without straw*. There never was that we can hear of, an officer holding the place of a Surveyor, in California under its former governments. The neighboring Justice of the Peace, or Alcalde, who was required to officiate in that capacity, was not qualified to do more than to put the party upon the land, and make an *attempt* to measure it, which, with no compass but the sun, and with a lasso for a chain, was, of course, very far short of the accuracy of the same process, conducted according to Galvan, or to Gunter. It was all however that the government had provided means for, and was all that she required or expected. It was conducted with the observance of all due forms and ceremony, and in one of its rites, is almost identical with the *livery of seizin* of our Saxon ancestors. The grantee was required to pluck turf, or break twigs from the trees or shrubbery on the ground, or pick up rocks, and in token of his full ownership, to throw them to the *four winds*. The proceedings on the ground, were all reduced to writing, and deposited by the magistrate in the archives, where they are now found, with as much care and fidelity as a navigator would render up the chart of his voyage of discovery, to the Board of Admiralty, or to the Secretary of the Navy. Nor was all this a mere idle mockery. The result of this mode of judicial possession, and measurement, resorted to from necessity, as it would seem, has been to *identify the spot*, and lead us to it with almost unerring certainty. In this case the lines were pursued on three sides of the tract, the record, stating, with particularity, the progress of the measurement. It does not appear that they did more, but closed the operation by *vista ojos*, or a survey with the eyes. A deposition of a *witness* referred to in the case of Bosidore in xi. Howard, who was a regular practical surveyor, states that in all his experience, he had never met with a Spanish survey, which inclosed every side of the tract. Even the Surveyor General of Louisiana seemed to think that the purpose of the Government was accomplished by that, and, doubtless, it was a sufficient identification. I do not think if there are any such monuments in existence, as the grant calls for, that any surveyor could miss his way to the place. The government of Mexico, I feel some assurance, would never have turned the claimant out of doors, from off the *land* where her officers had put him, on the pretext, that the *land* could *not be ascertained.* She could not in good faith have done so, and I think *this* government ought not to deal more rigorously with him than *that.*

Her policy was satisfied by what was done in regard to the separation of the land granted from the residue of her *vacant lands*, and I entertain no doubt that in making the survey of this country according to the perfect system which the government of the United States has adopted, that there will never be any insurmountable difficulty in locating the claim of Cruz Cervantes. Guided by the map or design referred to in the grant, and forming a part of the muniment of title ; by the possession, which has continued from the day at least on which he was *formally* installed in it, to the present time, within the monuments described in the grant, a surveyor *can now*, without difficulty, find not only *where the land lies*, but by the aid of the recorded measurement of his less accomplished predecessor, he *may find the beginning*, and, at any rate, he will be furnished with abundant means *to make one.* In conclusion, I think from a full view of the whole case that the claim of Cervantes is valid.

HARRY I. THORNTON, *Commissioner.*

August 3d, 1852.

Cruz Cervantes, Claimant,
vs.
United States, Defendant.

Final Opinion upon Rendering the Decree of Confirmation.

This Board having already, by an opinion heretofore pronounced, and filed on the 3d day of August, 1852, decided upon all the questions necessary to a final decree of confirmation in this case, except *as to the quantity ;* and having now fully considered *this point*, we proceed to declare the further reasons, on which our determination is founded.

The Decree of the Mexican Government of the 18th of August, 1824, and the Executive Ordinance of the 21st of November, 1828, regulate the quantity of every grant made in virtue thereof—the maximum being eleven square leagues, and the minimum two hundred varas square. The quantity then, being an inherent ingredient of the grant, and expressly prescribed, must be presumed to have constituted the cardinal, or controlling call of the same—the purpose of the map or deseno, being the segregation of the premises from the residue of the public domain, to fix its identity, and furnish a guide to its future location and survey. The conjectural nature of this map or deseno, as to quantity, and the terms of the grant, which expressly reserve for the use of the nation, whatever should result, upon actual measurement, over and above, the named quantity within its bounds, clearly show that the intention of the grantor was not an irrevocable grant, by metes and bounds, to the extent thereof ; but that the granted quantity within those metes and bounds, was to be afterwards identified, by a survey, ascertaining the the sobrante, if any, and separating it from the private estate of the grantee. The map or deseno, being the act of the petitioner, designating that which he sought, we think it just and proper to restrain the grant to the extent of the limits, or bounds of the said map, though they should not contain the granted quantity. This construction is in accordance with the intention, so strongly manifested by the Mexican Government, not to grant the same land to different individuals. As to the sobrante within the bounds of the map, if there should be any, a grant thereof had no effect, until after the ascertainment by the Government, of the precise location of the prior grant, upon whose identification indeed, its existence depended.

HARRY I. THORNTON.

JOSE DE JESUS NOE, Claimamt,
vs.
THE UNITED STATES, Defendant.

This claim is founded upon a grant made and delivered to the claimant by Pio Pico, on the 23d of December, 1845. It appears by the duly authenticated transcript of the archives, from the office of the Surveyor General of California, that Pio Pico was the Governor of the Department of the Californias, at the date of the grant, duly authorized to grant the vacant lands of Upper California. The genuineness of this grant is also fully established, by the proof in the case. The grant was made, as it recites, in conformity with the decree of the Mexican Congress, of the 18th of August, 1824, and the ordinance of the Federal Executive of the Republic or Mexico, of the 21st of November, 1828; both of which duly authenticated from the archives, are in evidence in the case. It appears also, from the same character of proof, that after the signing, and delivering of the said grant, the expediente of the proceedings, had by the Governor, was submitted to the Departmental Assembly of California, who, by their resolution of the date of the 3d of June, 1846, fully approved of the grant, made, and delivered to the claimant.

The objections made to the confirmation of this claim are—

First, That the land claimed, lies within ten leagues of the sea coast. This objection is founded upon the 4th section of the decree of the 18th of August, 1824, above referred to, by virtue of which the grant was made. That section of the decree provides, "That the lands comprehended within twenty leagues, bordering upon any Foreign Nation, or within ten leagues of the sea coast, shall not be colonized, without the previous consent of the Supreme General Executive Power." This ground of objection is common *to this*, with most of the grants of land in California. The subject, has been by this Board fully considered; and for the reasons set forth in an opinion delivered in the case of Cruz Cervantes, and of file in that case we have decided that this objection is *not valid*. To save a needless recapitulation of our reasons for the decision of that point, we now refer to that opinion, as forming a part of this, so far ts *this question* as involved, and others arising in the case.

The second objection to the confirmation of the claim, is that the land was not subject to grant, on account of its relation to the ex-Mission of Dolores. The 17th article of the Ordinance above mentioned, of the 21st of November, 1828, relates expressly to this subject, and provides, that, "In those Territories in which there are Missions, the lands which they *occupy* shall not be colonized at present, and not until it be resolved, &c." The prohibition, it will be seen, applies expressly to such lands as are in the *occupation* of the Missions. The proof is full, that this land was not so occupied, and of course, was such *vacant land* of the Republic, as could be colonized. The decrees of the Republic, and the Regulations of the several Governors, and Departmental Assemblies, from the decree of the Mexican Government of the 17th August, 1833, known as the Decree for the secularization of the Missions, (which itself was suspended on the 17th of November, 1835) and whatever else was done afterwards, on this subject, down to the last act prior to this grant, by Governor Micheltorena, on the 29th of March, 1843, never repealed the provision of the ordinance of 1828 above cited : but in the last proclamation referred to, and in its 5th article, after declaring, that what *was done* in the way of such grants, was *irrevocable*, merely *promises* not to make any new grants without the information, of the authorities, of the Rev. Padres notorious *want of occupancy*, or of *cultivation*, or *necessity*. The absence,.or want of occupancy, or cultivation, by the Mission, was fully established in this case.

The third objection to the confirmation of this claim, is want of segregation of the land granted from the public domain of Mexico. The question which we are called upon to decide *in every case*, is whether the grant is so *vague* and *uncertain* in itself ; or so incapable of being made certain, by the aid of those extrinsic facts and circumstances, which may be legitimately invoked to its aid, as to *be void for* want *of an identification* of the land granted. The view which I have taken of this case, in the light of the decisions of the Supreme Court of the United States, satisfies my mind, that the grant, and the matters referred to in it, all of which are in the expediente, and of record in the case, and which are to *be presumed* to be *in existence*, do separate the land from the public domain ; and can enable the Surveyor General to cause it to be surveyed and platted without any difficulty or doubt, *identically* as it was granted to the party, and no more needs any measurement, *according to the Ordinance*, than if it were an *island in the sea*. The Government of Mexico has not, as I think, made an abortive effort in this case, to grant a *specific portion*, of her public land. Nor do I think that the decisions of our Supreme Court, or the principles of equity, by which we are to be governed, would authorize us to declare the claim invalid for that defect. The possession *under* the grant, and *coextensive with it*, is proved to have been had, and taken by the party as early as the date of the grant. It must be borne in mind, that according to the scheme, or plan of granting the public domain, as adopted by the Mexican Republic in California, as will fully appear by her Decree of the 18th of August, 1824, and the ordinance, made in pursuance of that decree, on the 21st of November, 1828, there was no *survey required* to be made, before the complete and perfect title was to be executed, and delivered to the petitioner. The expediente in this case illustrates the law and practice invariably pursued, almost, in executing the Decree and Ordinance.—The deseno, or map required to accompany the petition, supplied the place of a survey, and went into the grant, as the survey did, in Florida, and in Louisiana, and in most of the States or countries with whose mode of disposing of their public lands we are familiar. The identification of the land was by that map and grant; and in most *instances*, at least *in this*, as I think, they fully accomplished that end. The recent decisions of the Supreme Court of the United States, re-affirm the doctrines of the earlier cases on this subject; and although they seem more strenuous, do not depart from the principles that, if the instruments relied on contain such descriptive calls, or bounds, as that the land can be *severed* thereby from the public domain, or refer to what may render the location *practicable*, in accordance with the maxim, "id certum est quid reddi potest certum," they will not reject the claim. The extraneous facts of *possession* and of notorious and long recognized ownership, may well be invoked as aids against the rejection of a claim for *uncertainty*, which is often resorted to by ingenious knavery, as a pretext to annul the obligations of common honesty. In support of the principles which ought to be applied to test the sufficiency of this severance, I refer to the following cases: 5th Wheat. 359; 4th Cond. 682; 1st Howard 24, Acastas' case; 16th Peters 159, Mirandas' case; 5th Howard 10, Lanton's case; 15th Peters 283, O'Harra's case; do. 215, Byuck's case, 3d Peters, 92; 11th Howard 665, Lecompt's case do. page 127.

The *fourth objection* urged against the confirmation of this claim, arises out of the conditions annexed to the grant, which are numerically four, though in fact, there are but two which can be strictly so called; the other matters contained in the clauses, being either mere recital or directory instructions to the officer, on whom the grantee is required to call for the delivery of possession. With regard to the obstruction of highways and crossings, there is no complaint on that head. It is true that it does not appear from the record, or parol proof, that the claimant ever did solicit any officer to put him in possession; and that there does not appear to have been, any measurement of the land granted. The grant in this case was a complete grant, according to the Mexican law: 8th Howard, 314. The view which we took in regard to the effect of the failure of those acts of delivery of possession, and measurement we would refer to, as contained in the opinion which we have already made a part of this decision. We have regarded *them*, as not furnishing a ground, upon the principles of Equity, for a forfeiture, to be *now asserted* by this Government: being conditions subsequent, in *their nature*, and *in fact*; and also of a character, rather directory *to another*, than intended to be destructive in case of non-compliance, of the vested right of the grantee. In addition to those reasons, why we cannot feel at liberty, to refuse a confirmation for those alleged deficiences, I will suggest that the only purposes, which those requirements were intended to accomplish, are satisfactorily effected, without them. The object of the grant, as is apparent from the Decree, and Ordinance under which it was made, was the *settlement*, or *occupation* and *cultivation* of the land. Now we have seen that the claimant performed that consideration of the grant, just as completely, as if there had been an *Official intervention.* Nor was that done, in violation of any law. He was no trespasser in the act of possession. By the 8th article of the Ordinance he was directed, or at least authorized, upon the receipt of his grant, " to proceed to the possession," according to the Mexican law. Occupation, or taking possession of anything, may be, by the delivery of the instruments of writing, which convey it, and also by the use and enjoyment of it, with the knowledge, and without the opposition of the grantor. Escreche title possession, 341 ; Partida 3d, Little 30, Law 8. There needed in this case no Official interference, further than the *grant*, to locate the land. It was *specifically defined*, as the expediente will show. Equity regards not the circumstances, but the substance of the act ; and will relieve against the omission of formalities, where *the end* is achieved. Livery of Sizen, a legal requirement in all conveyances of a freehold at common law, will be relieved against in Chancery : 2nd, Chy. Rep., 216. On this principle defects of circumstances in conveyances, are frequently supplied in Equity : Francis Equity, maxims 64. The members of this Board concur unanimously in the conclusion of the validity of the claim.

(Signed) HARRY I. THORNTON.

JOHN KEYS, Assignee of Pedro Cordero, *vs.* THE UNITED STATES. } No. 222.

This claim is presented by the assignee of the original grantee. The genuineness of the transfer to the present claimant is fully established; and the chief objections, or questions raised in the case, relate to the validity of the original right or title. There was read as evidence, without objection, a statement by the Surveyor General of California, the custodian of the archives of the former governments of the country, which shews that such a grant as the claimant presents, was made; that the papers appear to be fair and genuine, and that he knows of nothing in the said archives calculated to show suspicion thereon. The original grant, which purports to have been made by virtue of the Decree of the Mexican Government, of the 18th of August, 1824, and of the Ordinance of the 21st of November, 1828, is introduced, and sustained by full proof of its genuineness, execution, and delivery to the grantee, by Governor Micheltorena, the Political Chief of the Province, on the 18th day of May, 1844. It appears in proof that a house was built upon the land granted, and that it was occupied by the grantee in the year 1843, or 1844: who had upon it cattle and horses; and that this occupation has continued down to this time, without interruption, by the grantee or present claimant. There does not appear to have been any presentation of the grant by the Governor for its approval, by the Departmental Assembly; nor was there any delivery of possession and measurement of the land granted, as required in the conditions annexed, by any public functionary, during the existence of the former Government. Those last mentioned acts were performed in December, 1849, after the change of Government; and if not done in exact accordance with the conditions requiring them, are facts which tend to the identification of the land granted, and to render entirely feasible its present location, or survey, by the Surveyor General, whose duty it is to perform that act. All the objections above referred to, have been considered by this Board, and overruled for the reasons given in the opinion filed in the case of Cruz Cervantes, No. 56, of the docket of cases.

The condition inserted in this grant, that the grantor may not sell it, alienate, or mortgage it, &c., was not violated, and no forfeiture incurred on that score whilst the former Government existed, so that the fee existed in the grantee at the time of the acquisition of the country by the United States ; and we do not think that in good conscience the transfer, which was afterwards made, ought to work a forfeiture to this Government. It was held by the Supreme Court of the United States in the case of Ardondo, that the failure to comply with the subsequent condition, of the introduction of foreign settlers, was not one, which this Government ought to regard, as detrimental to the title. By parity of reasoning, the sale made by the grantee to the claimant in this case, ought not to operate a destruction of the claim. At all events we have decided, that this condition was nugatory, because it was repugnant to the established policy of the Mexican Government, prohibitory of every species of entails ; and to her laws forbidding any restrictions upon the alienation of estates : Escreche 610, edition of 1851. Collection of Decrees of the Mexican nation, vol. 2, 154.

The land in this case is most distinctly segregated from the public domain by the grant ; and there can be no difficulty in surveying off to the claimant, that which has been uninterruptedly possessed, and enjoyed by him, and his assignor, ever since its date.

There occur in this case, terms of which it is necessary to determine the force and effect, in order so to settle, and ascertain the claim, by our decree of final confirmation, as that, its location, and survey, may be definitely made. It is declared in the fourth condition of the grant that, "The land of which donation is made is one and a half square leagues, '*a little more or less*,' as shewn by the respective map or deseno." The idea of quantity was clearly in the mind of the grantor, when using these words, "a little more or less," but it is equally clear that they do not convey an idea of any *precise quantity*. The question to which they give rise is one of intention, and as the words to be construed are doubtful, and indefinite in themselves, and have no fixed meaning appropriated to them by law, they must be subjected to that reasonable rule, which directs us to seek that intention in the extraneous facts, and circumstances, which may be legitimately invoked, to find out, and fix their meaning. There are but two sensible or possible constrcutions to be placed on these words, where they occur in Mexican grants, made under the Decree of the 18th of August, 1824, and the Ordinance of the 21st of November, 1828 ; and as we have no warrant to settle arbitrarily their meaning, we must endeavor to carry out the intention of the grantor, as far as we can attain it. One of those constructions referred to, is that the grant was intended to be made of the whole tract described in the map or deseno ; and that the words "a little more or less" were used to enforce that intention. The other supposeable construction, is that it was not intended to grant the *whole tract* so marked out, but only the *quantity* specified, diminished, or increased by *that*, embraced in the terms "more or less." The first construction cannot be adopted, as the map or deseno, though required by the Ordinance to be made with all the exactness practicable, could not from the nature of the case, do more than furnish a general description of the place or tract of country, where the land asked for, and granted, was situated. It was made without any survey, and could not of course be accurate. It was sketched by persons not professing to be sufficiently familiar with the locality, even to approximate to certainty, as to its contents. The land was confessedly not so known to the parties as to be granted by the map *as a whole*, merely adding the words "a little more or less," to carry out that intent irrespective of the quantity it might contain. Where the public lands have been previously laid off into divisions, and subdivisions, of a given form and magnitude ; or in a settled country where the parties are acquainted with the different tracts, or parcels of land by long possession, and acknowledged ownership, that intention is recognized, and the words "more or less" may have acquired such a fixed signification. But in this Province at that time, it is manifest that such a construction would not effectuate the true intention of the parties. A tract of land could not be granted as an entirety, unless its contents were known to be less than, or rather no more than, *eleven leagues ;* for the law prevented a grant of larger extent *than that.* If the words *more or less*, or *a little more or less*, should occur in a grant, without any other terms to qualify their sense, it might with more *plausibility* be suppposed, that the intention of the grantor was, in subordination to the legal restriction of eleven leagues, to grant to the extent of the limits of the deseno ; that is, to grant the whole tract delineated in the map, with a tacit proviso, that it contain no more than the legal compliment. But in this case, there are connected with them, other words, which indicate a different intention. Those supplemental words being significant, cannot be rejected, according to any just rule of construction, unless the palpable sense of the writing would be marred, or an absurdity introduced by their retention. The qualifying words alluded to, which follow immediately upon a reference to the map or deseno, are "The magistrate who may give the possession, will cause it to be measured according to the ordinance, *leaving the surplus which may result*, to the nation for its convenient uses." *This surplus which may result*, must mean the residue within the bounds of the map or deseno ;

for it is certain, that the grant cannot extend beyond them, whether more than eleven leagues, or less, be embraced within them. The applicant has fixed by his own selection, the limits within which his land is to be contained ; and the interest of the Nation, as well as that of other petitioners, would be most injudiciously affected, if he were permitted to transcend them. It is more equitable that he should be disappointed of his supposed quantity, by his own act, than that others should be injured by his error. Then we can only give a proper effect to those qualifying terms in the grant, by supposing it to have been estimated that there might be more within the bounds of the deseno, than the quantity actually intended to be granted. It might possibly be urged, that such a construction can be put upon the words, "leaving the surplus which results," &c., as to give them their full effect, and also to give the words, "a little more or less," the import which has been suggested. That interpretation is, to construe the words, *a little more or less* as extending the grant to the bounds of the map, if there be no more than eleven leagues, and the words, "*surplus which may result*," as relating to the residue of the public domain, outside of those bounds. By that construction of the grant, the words of reservation would not only be idle, and supererogatory, since without them such would be the case, but the strange paradox would be thereby adopted, that a grant of one league and a half, a little more or less, means, or may be extended to include eleven leagues, by means of the erroneous, or fraudulent representation of the applicant, in the map with which he accompanies his petition.

The quantity of every grant is limited by the Decree and Ordinance above recited, to the maximum and minimum therein prescribed, and the discretion of the Political Chief is to be exercised within those limits. If there had been no change of Government, and Mexico had provided (as she had never done in California) sufficient means, through a Public Surveyor, to ascertain the exact limits of her private grants, it would have then been necessary to have reduced every claim to *absolute certainty.* It is now the object and design of the Government of the United States to perform that duty ; and this Board is engaged in furnishing its quota towards that purpose under the Act of the 3d of March, 1851. As a preliminary to this location, or demarcation of those private grants, we are required to ascertain their validity. The validity however, of a claim or grant, involves necessarily a *thing granted ;* and where *quantity* is given, as the characteristic, descriptive feature of *that thing*, we must if we can do so, ascertain that *quantity.* We must in the case of such a grant, either *ascertain it*, or declare the grant void for uncertainty. Nor will it be competent to this Board to declare the claim valid for one and a half leagues, "a little more or less;" for that would leave wholly indefinite what we have seen it was our duty to ascertain, if we confirm it at all, where the grant is by quantity; and even where the grant is most explicitly by metes and bounds only, we should still guard against a violation of the law regulating the quantity, by a provisional confirmation; as for example, thus: "To the extent of the bounds, if there be no more than eleven leagues within them; and for such quantity only, where the bounds contain less."

The words *poco mas ó menas*, are not only as we have said terms of quantity, but they are also comparative terms, referring to some number already expressed. They also evidently mean a fraction of some integer, or unit. The unit of which they constitute a fraction in this case, is not the aggregate of the antecedent leagues, but of a unit composing a part of that aggregate number. The unit of which, *a little more or less* is a fraction, is clearly one league; but at all events, as a sign of quantity, it is wholly uncertain, and we are not authorized to adopt arbitrarily any proportionate part of any integral number, as its exponenent; nor can we by force of these terms, either add to, or diminish, in any degree, the specified quantity. The only alternative which we can adopt, is either to declare the whole grant a nullity for want of certainty; or to reject those terms on account of their uncertainty, and declare the grant valid to the extent which is clearly expressed. The quantity of one league and a half in this case is certain, and it is more consonant with equity, to confirm the claim to that extent, than to declare it void in toto, on account of these expletory terms, which are so utterly indeterminate. It seems that the reasonable maxim, utile per inutile non vitiatur, is justly applicable to sustain a grant, which to the extent of one league and a half at least, was clearly intended.

We are unanimously of the opinion, that according to the principles laid down for our government in the 11th section of the Act of the 3d of March, 1851, the claim in this case is valid and ought to be confirmed to the present claimant, to the extent of one square league and a half. Commissioner Hall concurs in the result above announced.

HARRY I. THORNTON.

JOHN B. R. COOPER, Claimant, *vs.* THE UNITED STATES. } "El Sur," No. 124. Decision of the Board, By Harry I. Thornton.

The claimant presents this claim as assignee, by virtue of a deed of exchange, duly solemnized, and authenticated, from the original grantee, Juan B. Alvarado, bearing date on the 9th of December, 1840. The original grant proved by the testimony of David Spence, is in evidence, as also a copy of record among the public archives, which being duly certified by the Surveyor General of California, the custodian thereof, together with the whole expediente relating to the same, is filed as part of the evidence in the case. The Grant was executed by virtue of the Decree of the Mexican Congress of the 18th of August, 1824, and of the 21st of November, 1828, carrying the said decree into effect, by Jose Fegueroa, the Political Chief of the Territory of Upper California, on the 30th of September, 1834. There is no question, or controversy, as to the authority of Fegueroa, nor of the genuineness of the grant. It appears from the evidence, that Alvarado, the grantee, occupied the land in 1831, under a provisional title, prior to the grant in fee, and that it has been occupied and resided continuously, ever since its first settlement, by the said Alvarado, and the present claimant, for about twenty years. The grant is a full conveyance of the fee, in accordance with the decree and ordinance above cited ; and by the grant, and the accompanying map, or deseno, which is referred to therein, the land is identified, and so segregated from the residue of the public domain, as to render its location and survey entirely feasible. The objections urged by the Law Agent of the United States against the confirmation of this claim, have all been considered by this Board and overruled, in the case of Cruz Cervantes and the United States, (the opinion in which case, to save a tedious repetition, is now referred to as a part of this decision), except one, which has not hitherto been decided by this Board. This objection is, that the first condition in the grant, viz., "that the grantee shall abide by the regulations which may be made for the distribution of vacant lands, and in the meantime, neither the grantee nor his heirs, can divide, nor alien the land," has been violated by the transfer to the present claimant, and that, of course, no right, either legal or equitable, could be acquired by him in virtue of said transfer. If this condition was lawfully imposed upon the grant to Alvarado, the result would certainly follow which is alledged by the objection. With regard to this condition, I am under the impression that it was either capriciously inserted ; or in a spirit of paternal guardianship, to operate *in terrorem* against improvident alienation ; or in accordance with the form which was used in the case of provisional concessions or licenses to occupy, issued prior to the promulgation of the ordinance of the 21st of November, 1828, in which it would be very properly inserted. But at all events, our conclusion is, that in this grant the condition is nugatory. It is clear, that if the full ownership of the *land* was granted, as the Decree of August, 1824, and the Ordinance of November, 1828, evidently contemplated, *it* no longer remained *vacant land*, which could be affected under the Mexican constitution, by any future regulations for the disposition thereof. By that Decree and Ordinance, a grant in full property, with all the necessary incidents of ownership in fee, was clearly intended and provided for. Upon the ascertainment by the Political Chief that all the prescribed requisites were met by the applicant, both as regarded himself, and the land which he solicited, it became his duty to carry out by his grant, the purpose of the Government, which was the inhabitancy or cultivation of the vacant land of the Republic ; an object which might have been thought more attainable by means of unrestricted grants of the soil in full property, than by such as would withdraw it from commerce, and would tie the grantee, and all his posterity, to one spot, like an oyster to the rock.

The conduct of the Political Chief, in performing the function of granting, devolved upon him by the ordinance of 1828, was regulated by the laws in force upon that subject ; and he could not impair or defeat the policy and object of the Government, by the imposition of terms and conditions which were at war with that object and policy. It is certain that no such condition as the one we are considering is contained in the Decree and Ordinance, in virtue of which, he made this grant ; and if, as we have concluded, a conveyance in full property was intended by them, a restriction such as this condition imposes, emasculates the grant of one of its distinctive characteristics, and is in direct contravention of the provisions of the law. The Ordinance of November, 1828, does, it is true, require the Political Chief to conform, not only to the said Decree and Ordinance, but, generally, to the laws regulating the disposition of the public domain. By reverting to the laws existing at the time, it appears that they were in conflict, with this prohibition to alienate.

The decree of the Cortes of Spain of the 4th of January, 1813, for the reduction of *the vacant*, and other *common lands* to private ownership, and which it would seem was binding in the Republic of Mexico, being published as such among her laws, provides in the 11th section, that they shall be distributed "*en plena properdad*," in full property, page 56, 5th vol. of Orders and Decrees of the Cortes of Spain considered of force in the Republic. So, by a provision in the 14th Section of the Decree of the 27th of September, 1820, "upon the suppression of every species of entails," ib., p. 135, it is declared that, "no one can in future, neither for the purpose of advantage, nor under any other pretext, establish a *mayorazgo*, *fidei—commissum*, *advowson*, nor any other entail whatever, in relation to any kind of property, or rights, nor prevent its alienation, either directly or indirectly." It is said in Escreche, p. 610, Art. Enajenacion, edition of 1851, "No one can found entail on any class of property, or rights, nor prohibit, directly or indirectly their alienation." We conclude that the policy of the country, and its express legislation, was violated by that condition in the grant. Collections of Decrees of the Mexican Nation. On Entail, Vol. 2d, 154, 7th August, 1823.

In consideration of the whole case, for the reason above given, we are unanimous in the opinion, that, in view of the principles prescribed for our government in the Act of the 3d March, 1851, the claim in this case presented, is valid, and ought to be confirmed to the present claimant.

ANTONIO AND FAUSTINO GERMAN, *vs.* THE UNITED STATES. } No. 62

The claim in this case presented to this Board, as appears from the Archives of the former Government, duly authenticated, originated with a petition addressed to Figueroa, who was the Political Chief at the time, on the 25th of April, 1833. The petition was for a tract or parcel of land, by the name of Juristac, near the Brea, describing it by no very specific limits, and praying for no determinate quantity. Upon information taken by the Governor, as appears by his decree of the 21st of November, 1833, it appeared that the place was at the time of the presentation of the petition, and then, in the occupation of the Mission of San Juan Baptista ; that it was in part at least, held by the claimants upon loan, at the will of the Rev. Padre of said Mission ; and that although the petitioners had as such tenants at will, built houses on it, lived there, and cultivated the same, yet that it was so possessed and occupied by the Mission, as not to be grantable by him. This obstacle he directed to be made known to the said applicants, so that they might address a petition for some other place which was vacant. Afterwards, on the 3d of June, 1835, another petition was addreseed to Figueroa by the claimants, for a place called the Rancho de la Brea, which it seems is identical with that before petitioned for, as Juristac near la Brea. This last petition is accompanied with a deseno, or map, and describes the boundaries of the land sought with more particularity than before, but solicits no specified quantity of ground. After full information being obtained by the reports of those to whom he referred for the same, the Governor by his decree of the 27th of August, 1835, ordered the expediente to be passed to the Most Excellent Deputation, who on the 15th of September, 1835, adopt the proposition, "That the land solicited by the petitioners the Germans, may be conceded to them." Then on the 22d of October, 1835, a concession is made by Jose Castro, he having become the Political Chief in the mean time, declaring the Germans owners in property of the tract of land known by the name of Juristac. Of the same date is the complete patent or conveyance of the fee by said Castro, which is proved by the deposition of a witness on file, to have been duly executed by him. In this grant there is a recital of the boundaries, which are "from East to West those of the Citizens Castros', and the Arroyo of the Pascadero," and in the condition numbered 4 in the same, it is declared, "The tract of land of which mention is made is of one sitio, de ganada mayor, (one square league) as the map (or deseno) explains which is annexed to the expediente ;" and further, "The Magistrate who shall give possession shall cause it to be measured according to Ordinance, the overplus (sobrante) which shall result, remaining to the nation, for its convenient uses." Judicial possession was afterwards given to the parties on the 29th of October, 1835, and a measurement made, as was the custom, professing to be in accordance with the grant. A detailed account of this official act of possession and measurement, is introduced and proved before us.

All the objections urged against the validity of this claim except one.

have been heretofore considered and overruled by the Board, in the case of Cruz Cervantes, the opinion in which case, to save a tedious repitition, is referred to as part of this. The objection to which I refer as not hitherto decided upon, is that the land granted in this case was excluded from grant by the 17th article of the Ordinance of the 21st of November, 1828, which declares, "That in those Territories where there are Missions, the lands occupied by them shall not be colonized at present," &c. The point raised in the argument was, that by the just construction of the said article, such of the public domain as was then, at the date of its promulgation, in the occupancy of the Missions, was reserved from alienation by the Political Chief. Even if that proposition were assented to by this Board, there is no proof in the case, that at the date of the Ordinance, such was the condition of the land now in controversy. That it was so occupied, is deduced by the Law Agent, as a presumption from the fact proved, that it was in that predicament in the year 1833. We do not think such a presumption can legally arise. It is true that things which are continuous, will within reasonable limits, according to their nature, be presumed to continue to exist, being once established, until the contrary is proved. But there is no presumption arising from their existence at any given time, that they did so exist at any anterior period, unless it grow out of their nature: and we do not consider that the fact of occupancy in the year 1833, is of such a nature as to authorize the presumption that it existed in 1828.

In accordance with the principles of decision prescribed for our government, in the 11th section of the Act of the 3d of March, 1851, we have come to the conclusion unanimously, that the claim presented is valid.

Having decided for the reasons above declared, in favor of the validity of the claim, in accordance with the grant finally issued to the claimants, it may be due to the case, and at all events more satisfactory to the parties in the cause, to assign the reasons why we declare the claim valid according to the grant, without regarding the metes and bounds, further than as descriptive of the *locus in quo* the land granted lies. The claimants' counsel have contended that, notwithstanding the grant declares that only one square league is granted, yet as the minute entry or concession by the Government declares the ownership to the claimants of the land as solicited; and as the previous proceedings without naming any definite *quantity*, describe the land sought, as a tract by prescribed bounds, that the claimants ought not to be restricted to the quantity of one league named in the grant, but are now entitled to have a decree of the validity of their claim, to the extent of the metes and bounds of their map and petition, as recognized in the minute of concession.

In deciding upon the validity of a claim, in every case of a grant, or concession made in virtue of the decree of the Mexican Congress of the 18th of August, 1824, and of the ordinance of the 21st of November, 1828, as this was, we must necessarily have regard to its quantity. It is our province, and duty, to construe the grant, and in doing this, as the quantity which may be granted to any one person, is limited, the maximum being eleven leagues, and the minimum two hundred varas, we would be acting in disregard of the express provision of that decree, and ordinance, if we declare a claim valid, without ascertaining, and settling that it is within the lawful limits as to quantity. In this case, it is urged by the counsel for the claimants, that we should disregard altogether the quantity, which is specified in the final grant, and consider the case, as if no quantity were mentioned in it. To this view of the matter, we are not prepared to accede. In a case where there is no mention made of any quantity, but the grant is clearly by metes, and bounds, it would still be our duty to consider the quantity, and only declare the claim valid, on the ground that the intention of the grantor, was to grant the *quantity allowed by law* to be granted, if within the *boundaries mentioned*, and *no more*, no matter how much more there might be within *them*. There is a discretion vested in the Political Chief, as to the amount or quantity, which he may grant in any given instance; which discretion ranges between the maximum and minimum, of the Decree and Ordinance; and which is regulated by considerations affecting the nature, or character of the land, and of the person applying for it. Where the grant is thus made by metes, and bounds, we should, *ut res magis valeat quam pereat*, construe it in such manner, as that the grant may prevail, and yet the law, not be violated. Hence the validity, necessarily involves, as an inherent and essential ingredient, the quantity, of a claim made under the Mexican Decree of 1824, and Ordinance of 1828. Not that we must in every case declare how many precise leagues the claim contains, but, that it shall contain, no more than the law allows. But the claim now under consideration, is not of the last mentioned character. The presumption, by which we would sustain such a claim to the extent of the law, is not to be indulged, when in his grant the Governor specifiies the exact quantity, though it were wholly omitted in the petition, and even in his concession, preliminary to his final grant. It is competent to him to fix the quantity within the prescribed limits, and his power is not exhausted, until his grant passes to the applicant. The quantity, when named by the applicant in his petition, as supposed to be contained in the accompanying map, or deseno, was never ascertained, as in a regular plat of survey, and is known, and generally expressed to be, merely *conjectural.* The concession of the land *as asked,* is of course, *equally so :* but it may be fixed by the grant. The Governor is not estopped by such concession. In the case in hand, the intention is manifested, because the concession, is of even date with the grant ; the latter being an extension into full title, of the former, which was a mere minute entry, of the complete conveyance.

HARRY I. THORNTON.

CAMILLO YINTIA, a native Indian,
vs. No. 71.
THE UNITED STATES.

The claim presented to the Board in this case, is founded upon a grant, or conveyance in full title made to the claimant on the 22d of October, 1843, by Micheltorena, who was at the time Governor of the Department of the Californias, and duly authorized by virtue of the Decree of the 18th of August, 1824, and Ordinance of the 21st of November, 1828, to grant vacant lands in the Province. The original grant is in evidence before us, and its genuineness fully established by the testimony on file. The grant recites that, "The requirements, and investigations in the matter, have been complied with, agreeably to the laws and regulations." There was also read as evidence, without objection thereto, a statement of the Surveyor General of California, the legal custodian of the Public Archives of the former Governments of the country, from which it appears that there is among said archives evidence of the grant, that the papers relating to it are apparently fair and genuine, and that he knows nothing among said archives calculated to throw suspicion thereon. It appears by the proof on file that the grantee resided in a house, upon the land granted to him, during the whole time since the year 1841, down to the taking of the proof in the case ; that the farm was stocked by him, and used for pasturage, and cultivated also, within enclosures, to the extent of about two hundred acres in grains and vines, during the whole period above mentioned. A document is in proof containing the full proceedings of Judicial possession and measurement of the land, according to the usage of the country, which bears date on the 7th of December, 1843. This proceeding, though it may not conform rigidly with the Ordinances regulating surveys, yet, as there was no Public Surveyor appointed by the Government, it was all that could be done, or was required by that Government. It constitutes, in our opinion, if the grant itself does not effect that purpose, which I think it does, to the extent of the map, a sufficient segregation of the land granted from the Public domain, and will effectually enable the Surveyor General to locate the same.

The objections urged against the validity of the claim, consist, of the failure to produce any evidence of the submission by the Governor, of his grant, to the Departmental Assembly, for their approval ; and of the insufficiency of the performance of the conditions subsequent annexed to the grant, relative to the measurement of the land. These objections have all been fully considered by this Board, and overruled for the reasons given in the opinion, delivered and on file, in the case of Cruz Cervantes, No 56, of the docket of the Board.

The grant in this case is for two square leagues, *a little more or less.* We declare the claim to be valid to the extent of two square leagues, without any increase or diminution thereof by the terms, "a little more or less." The reasons for this construction of the grant are fully set forth in a prior opinion of this Board, on file in the case ot John Keys, Assignee, &c., to the Ranch of Sal si Puedes, No. 222.

For the reasons above given we are of opinion that the claim in this case is valid, under the rules of decision by which we are required to be governed in the 11th section of the Act of the 3d of March, 1851, organizing this Board. In the result above announced Commissioner HALL concurs.

HARRY I. THORNTON.

NOTE. The grant in this case recites the fact, that the grantee was an "Indigena," or native Indian. See the case of A. A. Ritchie, "Suisun," No. 3, where that objection is considered.

FRANCISCO DYE, *vs.* THE UNITED STATES. } No. 122.

Decided on principles settled in prior cases.

ARCHIBALD A. RITCHIE,
vs.
THE UNITED STATES.
} No. 12.

Decided on principles settled in prior cases.

A. A. RITCHIE AND P. S. FORBES,
vs.
THE UNITED STATES.
} No. 40.

Decided on principles settled in prior cases.

JOSEFA ANTONIO GOMEZ, &c.,
HEIRS OF RAFAEL GOMEZ, DECEASED,
vs.
THE UNITED STATES.
} No. 195.

The claim in the case presented is founded upon a grant made on the 18th of December, 1834, under and by virtue of the Decree of the Mexican Government of the 18th of August, 1824, and of the Executive Ordinance of the 21st of November, 1828, by Jose Figueroa, Governor of California, to Rafael Gomez, the ancestor of the claimants, for six square leagues of land, a little more or less. On the 29th of August, 1835, the grant was approved by the Territorial Deputation of California ; and on the 5th of February, 1836, a measurement according to the custom of the country was made of the premises, and possession thereof delivered to the grantee. Continuous and undisturbed possession and occupation of, and residence on the same, has been had and enjoyed for upwards of nineteen years, by the grantee, and his heirs, the present claimants. The genuineness of the grant, and the authority of the grantor, and all the other facts above stated, are fully established by regularly authenticated documentary evidence from the Public Archives of the former Governments of the country, and by the other testimony on file in the case. The evidence is not by any means conclusive as it relates to the locality of the land with regard to the sea coast.

There is in this grant, a reservation or condition, of the approval of the Federal Executive, which not being *specially* obtained in this case, is insisted upon as destructive of all right or title, in the claimants. The grant declares that it is made in conformity with the laws and regulations ; and we have always decided that in grants like this, the special approval of the Federal Executive is not necessary, according to the said laws and regulations. The effect of this reservation or condition can be nothing more than that the approval of the Federal Executive must be had, only *if*, or in the contingency that the other alternative provided by the Ordinance, viz : the approval of the Territorial Deputation, should *be refused*, to the Governor's grant.

All the grounds of objection urged against the validity of this claim have been fully considered, and overruled, in the case of Cruz Cervantes, the opinion in which is now on file, in the office of the Secretary of this Board.

The effect of the terms, a little more or less, which occur in this grant, we have already decided not to be destructive of it, for uncertainty, nor to increase nor diminish the specified quantity. This was so held by us in the opinion delivered and on file, in the case of John Keys, assignee, No. 222.

In view of all which, we decide the claim in this case to be valid, and that it be confirmed. In the results above announced Commissioner Hall concurs.

HARRY I. THORNTON.

CHARLES MEYER, ET AL.
vs.
THE UNITED STATES.
No. 199.

Decided on principles settled in prior cases.

FRANCISCO PEREZ PACHECO, *vs.* THE UNITED STATES. No. 65.

Decided on principles settled in prior cases.

ARCHIBALD A. RITCHIE, Assignee, &c., *vs.* THE UNITED STATES. No. 3.

The claim in this case presented is founded on a grant made on the 28th of January, 1842, by virtue of the decree of the Mexican Congress of the 18th of August, 1842, and of the Executive Ordinance of the 21st of November, 1828, by Juan B. Alvarado, Governor of California, to Francisco Solano; which grant, on the 3d of October, 1845, was approved by the Departmental Assembly of California. In accordance with the usual requirement, within the year of the grant, an accurate measurement of the land was made, and judicial possession thereof delivered to the grantee. Prior to the petition for the grant in full property, as early as 1837, the grantee was put in possession of the *identical* land, under a provisional title by General Vallejo, who was military commander of the Northern frontier and Director of Colonization. Whilst thus in possession, Solano built upon the premises a large dwelling house, a number of large storehouses, and smaller ones for his people and retainers. He enclosed and cultivated considerable portions of the land, and occupied other portions with his herds of cattle and horses. The present claimant derives his interest in the land through mesne conveyances from the grantee, in whom, and those claiming under him, the peaceable occupation and uninterrupted enjoyment of the premises have been had from the year 1837 down to the acquisition of the country by the Government of the United States. The genuineness of the grant, the authority of the grantor, as well as all the facts above cited, are fully established by duly authenticated transcripts from the public archives of the former governments, and by other evidence on file in the case. The proceedings in this instance, from their incipient state to the final consummation of the title by the grant of the full property, and the performance of all the conditions annexed, are so regular and complete, that the only objections against the confirmation of the claim which have been suggested are to the *capacity* of the *grantee* to receive a grant of land, or to dispose of it by alienation, as was done in this case.

It must be conceded, that a grant made in California in violation of the public law of Mexico, in virtue of which it purports to be made, *is void;* and that the land thus attempted to be granted will remain a portion of the public domain. The supposed illegality of this grant consists in a fact which, if not necessarily inferable from the grant itself, is abundantly verified by the record ; that is, that the grantee was an *Indian*, born on the spot which he solicited. In the grant he is declared to be "*Indigena*," which means a native, or original inhabitant, and also to be Chief of the Tribes of the frontiers of Sonoma.

It must be observed that private property, if it be not founded on natural law, is at least so well established by the common consent of all mankind, that it is coeval with the history of our race, and has now all the force of the law of nature. We may consider it, then, as of the dignity of a law of nature, that all persons of the human species who are not idiots, madmen, or infants, are capable of accepting property ; and that full property in any subject is the right to use it to any purpose, and to dispose of it as we please. That there is no incompetency in the grantee in this case, by the general law of nations, there is no doubt. He is one of the human species ; he is neither an idiot, a madman, nor of such infantile age as not to have attained to the exercise of a rational volition. On the contrary, the record shews that he was endowed in more than an ordinary degree, with the attributes of an elevated, moral and intellectual character. He was a commissioned officer, of the grade of captain, in the Mexican service. The Governor of California, who, by the 2d and 3d articles of the ordinance of the 21st of November, 1828, was the person designated to pass upon the qualifications of the applicants for land, states that he was "a Chief of the Tribes of the frontiers of Sonoma," and "worthy of reward for the quietness which he caused to be maintained by that unchristianized people." It is true, that the general law in this matter is subject to such municipal modifications as may be made by the legislative authority of different nations ; and that such modifications have been often made must also be admitted. The question is, whether any such decree or municipal regulation existed in Mexico, at the date of this grant, as forbade the grantee in this instance to be the recipient of a donation of land; or would forbid its alienation by him any more than by any other grantee. The learned counsel in this case have extended their researches, with most commendable industry and discrimination, into the various sources of Spanish and Mexican law on this interesting subject. Want of time only prevents me from making that thorough examination to which the arguments submitted so persuasively invited. I have, however, taken a view of the question, which has led my mind to a satisfactory conclusion; and I will submit it with as much conciseness and brevity as the pressure of time will allow.

The plan of Iguala, which is the first stable land-mark amid the continual mutations that agitated the country from 1810 at least to the 27th of September, 1821, is based upon what has always been known in the history of those times as "The Three Guarantees"—which were, the independence of the country, the exclusive maintenance of the Catholic religion, and the abolition of all distinction between the inhabitants founded on race or descent. The last of these guarantees, which is the only one *now* to be regarded, is contained in the 12th article of the said plan, and is in the following words: "That all the inhabitants of New Spain, without any distinction between Europeans, Africans or Indians, are citizens of this monarchy, with eligibility alike to every employment, according to their merit and virtue." By the treaty of Cordova between the Spanish generalissimo and the revolutionists, which was adjusted on the 24th of August, 1821, the plan of Iguala was re-affirmed in all its parts. In the declaration of Independence solemnly promulgated on the 28th of September, 1821, the plan of Iguala and the treaty of Cordova are announced as the bases of the government about to be established. By an express decree of the constituent Congress on the 17th of September, 1822, in the reign of Iturbide under the title of Agustin the First, the fulfilment of the 12th article of the plan of Iguala, above quoted, was enforced by a strong and pointed enactment. And lastly, on the 8th of April, 1823, on the overthrow of the empire and the establishment of republican institutions, the constituent Congress re-affirm "The Three Guarantees" of the plan of Iguala. The Indian, Francisco Solano, is expressly within the letter of the last enumerated guarantee, so early announced and so perseveringly recognized and re-affirmed through all the vicissitudes of her revolution, down to the final establishment of the republic of Mexico. There is no constitutional provision nor decree of the Mexican republic, which I have been able to find, that destroys the equality of civil and political rights which is conferred upon all the inhabitants of

New Spain by the plan of Iguala, in which they are all declared to be "citizens of this monarchy." All who were citizens of the monarchy, in the sense of the term *citizens* as used in the plan of Iguala, I presume, became successively citizens of the empire and of the republic. I think it may then be legally predicated of Solano, that he was a citizen of the republic ; and, in view of all the laws which we have just adverted to, stood on the same footing with any other citizen with regard to the acquisition and alienation of property. But, notwithstanding the necessary concession that he was a freeman, a native inhabitant of the territory, a citizen of the republic, and capable generally of acquiring and alienating property, yet it is objected that he is incapable of becoming a grantee under the decree of 1824 and ordinance of 1828, because he is not of the description of persons mentioned as the recipients of land therein. By the 1st section of that ordinance, the political chiefs of the territories are authorized to grant vacant lands to empresarios, to families, to single individuals, Mexicans or foreigners. It is said that Solano is in neither of these categories. He is clearly not an empresario, nor a family, nor a foreigner. If embraced in the decree, then, he must come under the class *Mexicans.* I think it can be demonstrated that Solano is a Mexican. *All Indians,* by the plan of Iguala, are declared to be *citizens of the monarchy,*—all *citizens of the monarchy* became *citizens of the republic ;* so that *Solano* became a citizen ; and surely there can be nothing more than a mere verbal difference between the terms *Mexicans,* in the sense of the ordinance, and *citizens of Mexico.* I will only add, in conclusion, that as to the legality of the grant to the Indian Chief and Mexican Captain, Francisco Solano, although the question involves the propriety of the conduct of the Governor who made it, yet the *presumption* is in favor of the correctness of his construction of the ordinance which he was appointed to administer, and will stand until rebutted by the production of clear evidence of its error. And as to the right and capacity of Solano to alienate the land granted to him, the usage, as proved in the case, was for Indians holding full property to dispose of it in the same manner as other citizens of the country.

In view of all which, and in accordance with the principles laid down for our government in the act of the 3d March, 1851, the claim is declared to be valid, and ought to be confirmed.

HARRY I. THORNTON.

WILLIAM GORDON, } No. 203.
vs.
THE UNITED STATES.

Decided on principles settled in prior cases.

JUAN MIGUEL ANZAR, } No. 20.
vs.
THE UNITED STATES.

Decided on principles settled in prior cases.

CARMEN SIBRIAN BERNAL, &c., } No. 30.
vs.
THE UNITED STATES.

Opinion overruling Motions for Initiatory Surveys.

In this case, wherein an opinion has long since been filed, declaring the claim to be valid, and that it ought to be confirmed, a verbal motion is now made to the Board, for a final confirmation, *without any preliminary survey.* In anticipation of a motion in some case, *for such survey,* I had prepared an opinion, which I will take this occasion to file, as it is responsive to the proposition submitted by the counsel for the claimant.

The object of a motion to obtain an order of this Board, for a survey to be made by the Surveyor General of California, is, of course, I presume, to use the same as evidence, in a case pending before us. I will not now say in advance, whether I would reject a survey with the plat and field notes, as evidence, when offered as such. But I will say this, that the necessity of any such evidence, as it strikes my mind, will very rarely if ever occur, and would be much to be deplored, especially since the reduction of force in the clerical department, and the increase of labor imposed by the recent action of Congress, will make the thrice repeated drafting and transcribing of this evidence, a very serious obstacle in the dispatch of business. Such a motion does not, however, involve the question whether a plat of survey is to be admitted in evidence, if caused to be made by the claimant, of his own mere notion, and offered by him. But the question is, whether this Board will make an order for the execution of such survey, even at the request of the claimant, and at his own cost. I am unwilling to make such an order ; but leave it to the party, as I would in regard to any other testimony, to decide whether he will, or not, proceed to the expense of such survey, and tender it in evidence,

In withholding my assent to such a motion, however, inasmuch as, heretofore, they have been granted, without any dissent filed by me, I feel bound to give the views which I have always entertained and expressed, on the subject of such orders of survey, but which, as the Board was then organized, I did not feel it incumbent on me fruitlessly to interpose.

I cannot consider the motion for an order of survey, without determining the question, whether it be legally proper for this Board *to require* one to be made : because it is very apparent to my mind, that as long as the idea is countenanced, that a decision of this Board *awaits*, or is in any manner dependent upon such survey, the claimant is put under a constraint, to become the mover, and to incur this heavy expense, rather than be delayed in the final decision of his case. I consider it then fit and proper, to express a definite opinion, as to the duty of this Board, with regard to the survey, or location of private land claims, under the Act of the 3d of March, 1851.

How far that duty may fall short of what we may suppose ought to have been imposed upon us, is not a matter for our consideration. We should, if we can, ascertain what we have to do, as prescribed by the law of our creation, and proceed promptly to do it. The doctrine of our system of Jurisprudence, and the spirit of our Republican Constitution, in regard to the Judiciary of whatever grade or dignity, and to quasi judicial tribunals, such as this Board, is this, "*est boni Judicis ampliare justiciam, sed non amplificare jurisdictionem.*"

The eighth section of the Act organizing this Board, which purports to define our duty, after speaking with regard to the evidence upon which we shall act, and the *parties* in the case, declares that we shall decide upon the *validity of the claim.* Now we must determine what is involved in the terms *validity of the claim.* The following matters are indisputably embraced in them, viz : is the claim genuine : does it proceed from the proper authority : is it in conformity with the decrees and ordinances, usages and customs of the Government from which it is derived : and ought it now to be held valid, when tested by those legal standards laid down for our government in the 11th section of the Act of the 3d of March, 1851. It is my opinion that this Board is not authorized to take any step towards the location or survey of a claim, but to decide on its validity, and so to frame our decree of final confirmation, as that in the survey which is to be made *upon* it ; there may not be included in it, neither more, nor less, than the maximum or minimum quantity, prescribed by the law of the Government from which the claim is derived, where there is such limitation of quantity.

The Act of Congress of the 3d of March, 1851, was certainly designed as its title imports, to ascertain and settle the private land claims in the State of California. And the first section of that Act declares, "That for the purpose of ascertaining and settling private land claims in the State of California, a Commission shall be, and is hereby constituted." To ascertain, means to be sure, to reduce to precision, by removing obscurity, or ambiguity. But however broadly the term may be extended, the quota towards that object to be furnished by this Board, reaches no farther, than is prescribed in defining our duties. To ascertain, in the fullest extent of the meaning of the word, unqualified by anything else, would embrace the duty not only of deciding on the validity of claims, but the mode of their location, the boundaries, the courses and distances of every line of the plot of survey, and of their actual demarcation upon the ground. Our duty *most certainly* stops short of all that. My opinion is that it extends no further than to decide on the validity of the claim, but that in doing this, we must necessarily have reference to its quantity. Every grant must contain a grantor, a grantee, and a thing granted. The thing granted in this case, the land, is required by the Decree of the Mexican Congress of the 18th of Aug., 1824, and the Ordinance of the 21st of Nov., 1828, to consist of no more than eleven square leagues, and no less than two hundred varas square. Hence, to decide on its validity, necessarily involves, as one of its inherent legal properties, the quantity : to see that it neither exceeds, nor falls short of, the quantity prescribed. It may be genuine, and valid in all other respects, but be objectionable, *pro tanto*, for this excess, or defect. The construction of a grant, embracing all its properties, is to my mind very different from the projection of a locative survey. The duty of the Board is to construe the grant, and to decide upon every matter touching the validity of the claim, and to reject, or confirm it. After that is done by the Board, or by the revising tribunals in case of appeal, and the decision is in favor of its confirmation, *then* the duty *of* the Surveyor General of California, *upon that confirmation* is declared ; which consists in doing what the Act prescribes for him to do, towards the ascertainment of the private land claims in California. The duty of the Surveyor General is declared very explicitly, in the 13th section of the Act. After speaking of the effect of a final rejection of claims, it proceeds, thus, " And for all claims finally confirmed, by the said Commissioners, or by the said District, or Supreme Court, a patent shall issue to the claimant, upon his presenting to the General Land Office an authentic certificate of such confirmation, and a plat, or survey of the said land duly certified and approved by the Surveyor General of California ; *whose duty* it shall be *to cause* all private claims which shall be finally confirmed, to be accurately surveyed, and to furnish plats of the same ; and in the *location of said claims*, the said Surveyor General shall have the same power and authority as are conferred on the Register of the Land Office, and Receiver of the Public Monies of Louisiana, by the sixth section of the Act 'To create the office of Surveyor of the Public lands for the State of Louisiana, approved 3d of March, 1831.'" That sixth section then is to be considered, as if expressly inserted in, and making a part of the Act of 1851, and is in the following words, "That in relation to all such confirmed claims as may conflict, or in any manner interfere with each other, the Register of the Land Office, and Receiver of public monies for the proper land district, are hereby authorized to decide between the parties ; and shall in their decision be governed by such conditional lines, or boundaries, as have been, or may be agreed upon between the parties interested, either verbally, or in writing ; and in case no lines, or boundaries, be agreed upon between the parties interested, then the said Register and Receiver, are hereby authorized to decide between the parties, in such manner as may be consistent with the principles of justice ; and it shall be the duty of the Surveyor General in the said State, to have those claims surveyed and platted in accordance with the decisions of the Register and Receiver : Provided, that the said *decisions*, and surveys, and patents which may be issued in conformity thereto, shall not in any wise, be considered as precluding a legal investigation, and decision, by the proper Judicial tribunals between the parties to any such interfering claims, but shall only operate as a relinquishment, on the part of the United States, of all title to the land in question." Now, by the provisions of the 13th section of the Act of the 3d of March, 1851, it is the duty of the Surveyor General, *to cause* all *private* land claims, which shall finally be confirmed, to be accurately surveyed and platted out, whether there be any *conflicts* or not. The introduction of the sixth section of the Act of 1831, provides for what may occur in the discharge of the general duty. Where there are any conflicts, he shall decide them as provided for in the *sixth* section of the Act, above transcribed. This duty he is not required to perform under our instructions. He, and not this Board, is substituted for the Register and Receiver, as to this matter. If this Board should undertake to direct the location or survey of those claims, which necessarily includes their boundaries, and the courses and distances of the lines, we certainly usurp his functions, and to that extent displace him from his office : unless we also hold that his duty in this matter, only relates to cases where there are conflicts, or interferences ; and that where there are none in the confirmed claims, it is our duty to adjust the boundaries, and all else embraced in the terms location and survey. If we restrict our duties to those cases alone, in which there are no conflicts, or interferences, there will be not only a divided duty, between that officer and this Board, he performing it independently of us where there any contests in the matter, and subject to our instructions where there are none ; but there arises then, the difficulty of determining before-hand, under whose jurisdiction the given case may fall ; for the Act of 1851, not anticipating that difficulty, has made no provision for its solution ; and after all our instructions on that head, of location, boundaries, &c., he may be compelled to peform his functions as prescribed by the Act, *or*, to adopt our determination on the subject ; of which alternatives, I presume that he will not hesitate to take the former.

The action of the Surveyor General, is not subject to our control, in any manner. We do not cause the survey to be made. Every thing required by the Act for us to do, might be performed, without there being such an officer as Surveyor General in California. Not only is there no reference in the Act to any duty to be performed by this Board, of causing any survey, or location of claims, but the duty of the Surveyor General in that regard is definitely prescribed to him : as an independent officer, whose labors commence, after ours are terminated and closed ; and are founded in fact, upon that determination. I am the more fully confirmed in this view of our respective duties, by considering the legislation of Congress, upon this subject, and the decisions of the Supreme Court upon it. By the 2d section of the Act of the 26th of May, 1824, touching territory formerly acquired, this duty was expressly imposed upon the Court, using the same language in conferring the power, which in this Act is used in reference to the Surveyor General; and it was by virtue of that section, that the Courts of the United States have felt themselves bound to give directions upon that subject, or to interfere with it in any manner. In 5th How., the Supreme Court, speaking of this Act, say, "Under the rules prescribed for the government of the Courts in the 2d section of that Act, it is their duty, *first* to determine all questions relative to the title of the claimant; and *second* to ascertain the extent and locality of the claim, and *cause it to be surveyed*, and marked by definite boundaries." In a case in 15th Peters, on page 82, United States *vs.* Forbes, Judge Catron, in delivering the opinion of the Court, says, "*First* the paper title to such private property, it is our duty to investigate, and ascertain, and by our opinion to establish: and *secondly*, it is our duty to ascertain, and *cause to be surveyed and marked* by definite boundaries the land granted."

In the Act of the 3d of March, 1851, when Congress, in view of all their former legislation on cognate subjects, and the decisions of the courts, came to act in reference to the same matter in California, they omit the provision contained in the 2d section of the Act of the 26th of May, 1824, conferring the power, and *duty* to direct, or cause to be made a survey of the land claimed, upon the tribunals designated, and confer *it* explicitly upon the Surveyor General of California. The Surveyor General, and not the Board, or Courts, as directed in the 2d section of the Act of 1824, is required to cause all private land claims, which shall be finally confirmed, to be accurately surveyed, and to furnish plats of the same. This act of the Surveyor General, he may not be required to perform, until after the expiration of the term for which the Board is limited to exist. The whole and sole use of any preliminary survey, before our confirmation of the claim, (and that is stated in the instructions of the Land Office to this Board) is that it will facilitate the *future settlement of controversy*, about the location of the land claimed, and *furnish evidence of the existence and nature of conflicting claims.* All this may do very well, but it relates to matters with which this Board has nothing to do. It is not necessary to the discharge of our duty, under the law which we are bound to obey; nor does it in any manner contribute towards the discharge of that duty. To encumber, and clog, and delay the performance of the simple duty pointed out by Congress for this Board, with the preliminary questions of surveys, and conflicting, and interfering boundaries, all which belong to other tribunals; and this too at the expense of the claimant, who has no earthly benefit from it in this contest, I cannot consent to do. The onerous imposition upon the claimant, under the Act of the 3d of March, 1851, of the cost of a survey before he can present, or have a hearing, upon a claim which may never be confirmed to him, is not right in itself, nor required by law. The requirement seems to be connected with, and founded upon a matter ulterior to the action of this Board, that is, the settlement of the respective rights of parties between themselves, or the United States, as to a matter, in the adjustment of which this Board has no agency.

HARRY I. THORNTON.

GUILLERMO DOMINGO FOXOM,
vs.
THE UNITED STATES. } No. 219.

Decided on principles settled in prior cases.

GEORGE C YOUNT,
vs.
THE UNITED STATES. } No. 243.

Decided on principles settled in prior cases.

DAVID SPENCE,
vs.
THE UNITED STATES. } No. 54.

Decided on principles settled in prior cases.

SAMUEL J. HENSLEY,
vs.
THE UNITED STATES.
No. 230.

The claim presented in this case is founded upon an Expediente, consisting of a petition accompanied with a map or deseno of the land asked for, addressed by the claimant to Micheltorena, Governor of California, dated on the 25th of July, 1844 : a decree, entered thereon of the same date, directing the Secretary of Dispatch, Manuel Jemeno, to take the necessary steps for information : an order of the next day by the said Secretary, addressed to Senor Augustus Sutter, for such information ; the report of that officer, on the 29th of September, 1844, that the land sought was vacant ; an entry by the said Secretary of the 11th of November, 1844, suggesting to the Governor, to suspend all petitions of a similar kind, until he should visit that section of country, concluding with the words, "but your Excellency will do in the premises whatever to you may seem best :" an order without date in the following words, "Let the same be done according to the information." Signed, Micheltorena ; and finally, a copy of a document, which was executed by Micheltorena, on the 22d of December, 1844. The land claimed, although, for the reasons assigned by the officer applied to for that purpose, it was not measured, nor delivered judicially to the claimant, was occupied, built upon, and cultivated by him in the year 1845, and afterwards more largely stocked, ditched, and cultivated. All the documents composing this Expediente, are fully proved to be genuine ; and the original document called the Title, signed by Micheltorena on the 22d of December, 1844, was also proved by the testimony of Capt. Sutter, to whom it was delivered ; who also proved that the copy attached to the Expediente, was delivered to the claimant about the 20th of April, 1845.

The important question for our decision in this case is, what is the force and effect of that document above referred to, concluding the Expediente, towards the investiture of the claimant with *any right or title,* to the land claimed, which, according to the principles prescribed for our government, can be recognized and confirmed. That document commences with a recital by the Governor, that not being able, in consequence of his close occupation with the affairs of the Government to extend *one* by *one* the respective titles to all the citizens who have petitioned for lands, with a favorable information from Senor Don Augustus Sutter, Captain and Judge, in charge of the jurisdiction of New Helvitia and Sacramento, I, in the name of the Mexican nation, by these letters confer upon them and their families, the lands described in their applications and maps, to all and each of them, who has solicited and obtained favorable information from said Senor Sutter up to this day, so that no one can dispute their titles. Senor Sutter will give them a copy of this, in furtherance of a formal title, with which they will present themselves to this Government to extend the same title, in the proper form, and upon corresponding sealed paper. And for the establishment of which fact for all time, I give this document, which will be known and acknowledged by all the civil and military authorities of the Mexican nation in this, and the other departments. Duly authenticated with the seal of the government, and the military seal in Monterey, this, 22d of December, 1844. Signed, Micheltorena."

I entertain no doubt, that this document, which was signed by Micheltorena, and delivered to Capt. Sutter, has the same validity and effect, as if delivered to each individual, whom it was intended to benefit and embrace ; in other words, that it is of the same force and effect as if, instead of being merely descriptive of the grantees, it had been made to each and every one of them, *nominatim*. The object of all rules of interpretation is to discover the intention of the party ; and any words which are sufficient to denote the persons meant, and to distinguish them from all others, operate as a good description. Greenleaf's Evidence, 364, paragraph 287. Greenleaf's Cruse on Real Property, 206, title, 38. Devise, ch. 10, sect. 26 and 27. Nor is there any difference in this particular between public and private grants. The doctrine is, that, even in grants by the Sovereign, in which nothing passes by implication, a grant in general terms referring to a certainty, is the same as if the certainty had been expressed in the grant itself ; though such certainty be not of record, but lie in averment, by matter in pais, or in fact. 2d Greenleaf's Cruse, title 24. King's Grants, Sect. 15 and 18. In this document, executed by Micheltorena, he states, that owing to the pressure of his official duties, he cannot execute a title in form, *one* by *one*, to all those who have petitioned for land and have a favorable information ; but that there may be no failure of colonization, which was the cherished policy of the nation ; nor any injustice to the citizen, he executes a solemn deed, containing the strongest words of grant or concession ; describing the thing granted with sufficient certainty, by express reference to the petition and map or deseno, in which, in this instance at least, its quantity and boundaries are given : describing the grantees, as those petitioners who have obtained favorable reports from Senor Sutter, a high functionary of the government in the district where the land was situated, in response to his own order for information addressed to that officer.

The considerations upon which Micheltorena executed and delivered that document, are precisely those which are prescribed by the Mexican Decree of the 18th of August, 1824, and by the Ordinance of the 21st of November, 1828. According to the scheme or plan established by that Decree and Ordinance, for the disposition, settlement, and colonization of the public domain, upon the application by any one in writing to the Political Chief of the Territory, it became his duty to obtain the necessary information, both as it regarded the land and the applicant, and where the requirements of the law were met, to sign a document, in accordance with the 4th and 8th articles of the said Ordinance, which was to serve as a title. There was no particular form prescribed in which that document should be framed, which the Governor is there requested to sign, and in virtue of which the party "may proceed to the possession."

The object and effect of the document issued in this instance, were not merely a manifestation on the part of the Governor, that he was satisfied that the persons therein described, were entitled to grants; but to transfer to them, a right and title to the land. That intention is clearly conveyed by this language, "In the name of the Mexican Nation, I confer by these letters the land," &c., "so that no one can dispute their title." And at the same time, that for the reason alleged, a more formal instrument is not executed *in extenso,* to each person thus acknowledged to be entitled to the land described in the petition and map, yet a most solemn assurance is given that such formal title, will be extended, at any future time, upon the application of the party. Nor was there any time limited within which this more formal title was to be applied for. But it was evidently an act for the benefit of the grantee, and one in which the interest of the Government was not materially involved. She had substantially, according to the mode adopted by her, parted with her title to the land; and this more formal extension, was for the satisfaction, or better security of the grantee. The subsequent conditions which the Governor could lawfully impose, and which were usually inserted in the formal grants, had they been *explicitly introduced*, and their strict performance neglected, that neglect according to the principles heretofore adopted by this Board, would not without any action had under the former Government, have constituted, *per se*, a forfeiture of the title. And *where omitted in the grant*, they existed by virtue of the law.

Even if the document relied upon by the claimant, be not a full, complete, and perfect title, there can be no doubt, it seems to me, that it has the force and effect of a bond for the future execution of such a complete and perfect title ; and upon the principles of equity, ought to have been, and doubtless would have been specifically performed if the former Government had continued, and the execution of a more formal title had been desired by the party concerned.

The fact that this Expediente was not returned by the claimant, and deposited with the public archives, is not deemed destructive of his right. It is true that the proceedings of all the Departments in any way concerned with the disposition of the public domain, were required to be preserved ; and constitute the public archives. The finding an Expediente among those archives does furnish evidence that it is not a fictitious or forged proceeding, but it is not *conclusive evidence* of that fact. And that one is not to be *now* found there, is not conclusive against its verity ; because there is the most incontestibie evidence, that documents once there, are not now to be found. We all know, as a matter of general history, that the public archives of California, have been, in those often repeated seasons of domestic broils, and civil revolution, to which she has been fated, not only neglected in their original constitution, or formation, but were afterwards exposed to destruction and spoliation. It is not to be sure, in evidence in this case, but testimony has been taken by us, establishing the fact that those very archives, were on one occasion at least of civil feud, used as so much waste paper, by the soldiers, for the purpose of making cartridges,—that the doors of the house in which they were deposited, were open for a long time, without any custodian, and that they were accessible to any one, for any purpose, either of alteration, subtraction or addition. I do not therefore think that the fact of the non-existence of an Expediente, among the public archives, is conclusive against the right of a claimant, though it certainly throws upon him an increased burthen of proof. In the case now before us, from the evidence on file, it appears that the interval of time, between the completion of the Expediente, and the hoisting of the American flag, on the 7th of July, 1846, was, to a great extent, a period of revolutionary warfare, in which the Governor, Micheltorena, was himself expelled from the country : and that a neglect during that period of all concerned in the making, and preserving the memoranda of proceedings appropriate to the different Departments of the Government, is reasonably accounted for. *Silent leges inter arma.*

All the objections to which this claim is obnoxious, not disposed of by this opinion, have been fully considered, and overruled in the case of

Cruz Cervantes, and of others heretofore decided. Upon the principles of decision prescribed for our government, in the 11th section of the Act af the 3d of March, 1851, we are of the opinion, that the claim is valid, and we proceed to enter the Decree of final confirmation. Commissioner Hall concurs in the result.

HARRY I. THORNTON.

GUILLERMO CASTRO,
vs.
THE UNITED STATES.
No. 285.

Decided on principles settled in prior cases.

DANIEL WRIGHT, et al.
vs.
THE UNITED STATES.
No. 69.

Decided on principles settled in prior cases.

CONCESSION MUNRAS,
vs.
THE UNITED STATES.
No. 145.

Decided on principles settled in prior cases.

STEPHEN SMITH, *vs.* THE UNITED STATES. } No. 23.

The claim presented in this case is founded upon a grant made by Manuel Micheltorena to the claimant on the 14th of September, 1844. The grant is for eight square leagues of land, or 8 *sitios de ganada mayor ;* under and in virtue of the Decree of the 18th of August, 1824, and the Ordinance of the 21st of November, 1828, of the Mexican Government. The approval of the Departmental Assembly was procured by the Governor on the 22d of April, 1846. There was no judicial measurement, and delivery of possession subsequent to the grant : but the map, or deseno, accompanying the petition in this case, is made with great care, and the land has been constantly possessed by the claimant, at least from the date of the grant, if not before, who erected expensive buildings upon it, not only for residence, but for purposes of manufacture and ingenious machinery : which seems to have constituted, in part at least, the motive or consideration of the grant. The genuineness of the grant, and the authority of the Governor who made it are not controverted. The evidence introduced from the Archives is satisfactory upon those points. With regard to the objection, founded on the 12th section of the Decree of the 18th of August, 1824, of the Mexican Government, raised upon an agreed statement of facts, which is contended to effect the validity of the grant, because it shews an excessive ownership above the quantity of eleven leagues allowed to any one individual, we have only to say, that whatever may have been the intention of that section, we think that the word *propriedad*, contemplates an interest of a different character from that which was in the grantee at the date of his grant. The evidence is, of a possession under a contract to purchase six leagues of land from one Berry. Now possession of itself, in the Spanish law, does not constitute a proprietor. And the contract to purchase, even if it were assumed, (which the statement does not warrant,) that Berry was himself the owner of the property in the land which he had so contracted to convey, does not constitute the claimant a proprietor.

There is a peculiar feature in this case, which though it does not affect the decision, yet deserves some consideration, as it has been considered to affect the question of the ten littoral leagues. I allude to the application to the Federal Government, for its approval of this grant, and the *prohibition*, contained in the favorable response of that Government, of future grants in like cases. There is no explicit object disclosed in the Expediente for this application, nor any certainty of the point to which the prohibition was directed. It is true that a Decree of Santa Anna in 1842, prohibited grants to all *Foreigners*, without the approbation of the Federal Government ; repealing to that extent the Decree of the 18th of August, 1824. But the grantee, Smith, with the view of obtaining the preference given by the 9th section of the said Decree of August, 1824, over the other persons who were then seeking the same place, under the suggestion made by the Prefect Estrada in his report to the Governor, had become a citizen *prior to the grant ;* so that the approval was not needed on account of the *alienage* of the grantee. It could not relate to the locality of the land within the ten littoral leagues, because Micheltorena, both before and after, made grants *within them*, without any such application ; and Alvarado, upon whose testimony alone this matter rests, as Governor, made many grants within the littoral leagues, as did all the Governors of California, without, in a single instance, any reference to the Federal Government, so far as the Archives shew, having ever been made. If there were not, in the grant, an express exclusion of the Port of Ross, and its environs, the supposition would be very reasonable, that this document spoken of by Alvarado, referred to that Port : and it *is possible*, that such may have been the end and aim of that dispatch. But there is one fact in this case, which it is apparent, would well *warrant*, if it did *not cause*, the application for the approval of the Federal Government, as well as the inhibition, of any more grants of the like kind, at the date of this instrument. Bodega was a Russian settlement, made under a contract between the former Government and the Russian Company, or its Government ; and upon that account, grants should not have been made of land thus situated, until an adjustment by the Government of the unsettled claim of that Company. This view is strongly corroborated, by the testimony of a very intelligent witness in this case, John J. Vioget, who testifies, that his application for this identical place, was made before that of Smith : that his pretention was not rejected, *but postponed*, as he was informed by the public authorities, until they could hear from Mexico, since the claim of the Russian Company to the land had not been terminated.

According to the principles laid down for our decision in the 11th section of the Act of the 3d of March, 1851, the claim is valid, and ought to be confirmed. Commissioner Hall concurs in the result.

HARRY I. THORNTON.

ANTONIO MARIA LUGO, vs. THE UNITED STATES. } No. 308.

The claim presented in this case would seem to rest, as well upon ancient grants and assurances, made prior to the establishment of the Independence of Mexico, as upon a grant by Alvarado, the Governor of California, made in the year 1837. From the most careful examination, however, which I can make, of the various muniments of title introduced, I am brought to the conclusion that the only basis upon which a confirmation of the claim can be sustained, is the proceeding had under and in virtue of the Decree of the 18th of August, 1824, and of the Ordinance of the 21st of November, 1828, of the Mexican Government; which resulted in a grant, made to the claimant, on the 27th of September, 1838.

The claimant on the 26th of April, 1837, presented to the Governor his petition, in which he sets forth three documents, pertaining to the land for which he solicited a title. The first of those documents is a declaration by Guillermo Corta, made at the request of the claimant, on the 18th of March, 1837; who states that as commissioner of the city of Los Angeles, in the year 1810, he received orders from Don Jose Arguello, then Governor of the Province, to give possession of a place for raising large cattle, to the claimant; and that he did so, in the place called San Antonio. He proceeds to state the boundaries of the place, of which he so put the claimant in possession. All which he says was with the understanding that he should not injure any individual of the city. The *second* document thus referred to in the petition to the Governor, of the same date, and made by the same person as the first, declares thus: "I, Guillermo Corta, say that in the year 1827, being Alcalde of this City, by the order of the Senor Commanding General, Don Jose Maria de Echandria, the place of Don Antonio Maria Lugo was enlarged, and it was from the sycamores, which he has for a boundary, to the point of the Mesa." The *third* document relied upon in the said petition, consists of a solicitation by the claimant, dated September the 6th, 1833, addressed to the Ayuntiemento of the Pueblo of Los Angeles, for a portion of the common lands of that Pueblo; stating that the place on which he is settled, was not sufficient for the increase of his large stock of cattle, &c.; and the Decree of that body in response to his solicitation, by which, for the reasons alleged, they resolved to *lend* to him the land asked, declaring it at the same time to be "the common lands of the City," &c. These documents do not amount to satisfactory evidence of a grant of the full property, nor even of an inceptive title, afterwards to be extended into a perfect conveyance, of any portion of the lands described in them. They rather imply a tenancy at will, or a permissive occupancy, than a grant of the full and perfect property. That portion averred to have been the common land of the Pueblo, is expressly declared to have been only *loaned* to the claimant. There is in addition to those documents, now introduced, a petition of the claimant preferred on the 21st of March, 1823, in remonstrance against an aggressive resolution of the Ayuntiemento of Los Angeles, to eject him from his possession ; and an order of Governor Arguello, to whom it was presented ; which also fail to satisfy my mind of the existence of any grant prior to that time, of the full property to the claimant. This last petition to Arguello alleges only a grant of the possession of a small place in the neighborhood of the Pueblo of his residence ; and the order of the Governor sustains that *possession*, as legitimate, concluding with an injunction upon the authorities of the Pueblo, not to take a similar course in other like cases, *without his knowledge.* The claimant, on the 26th of April, 1837, filed a petition to the Governor, in which he states, "that having a sufficiency of cattle and horses to stock the places which I have had *provisionally* granted to me, as appears by the three documents contained in the annexed Expediente, I come to request your Excellency to have the goodness to grant me the corresponding possession, and documents which may serve *for a title.*"

It seems to my mind, in the absence of the decrees themselves, and of any special evidence of their contents, that is of the Decree of Dario Arguello, in virtue of which, Corta states he put the claimant in possession ; and of Echandria in augmentation of that possession ; and from the statement of the claimant, as to the nature of his right in his petition to Alvarado, that there was only a legitimate possession, under a grant, or decree of the right *to occupy* the premises, anterior to the grant of Alvarado, in the year 1837. In the Spanish law, the doctrine is, "*poseedor se opone a proprietorio.*" One can be possessor without being proprietor, and *vice versa.* Escreche, titles *poseedor* and *posesion.* The genuineness of the grant, and the authority to make it, are not controverted. The long possession of the land granted in this case, by well defined lines and boundaries, its occupation and residence upon it, in buildings erected by the claimant, all, for years anterior to the grant, are fully established by regularly authenticated transcripts from the archives of the former governments of the country, by documentary and other evidence on file in the case.

The conclusion that the claim in this case rests upon the grant of Alvarado, and of course that it must be in accordance with the Decree and Ordinance of the Mexican Government, above cited, makes it necessary to advert to the fact of its *quantity ;* since neither the grant, nor perhaps any thing else in the Expediente, ascertains expressly the number of square leagues which were intended to be granted ; and especially, since by that Decree and Ordinance, the maximum of eleven square leagues, and the minimum of two hundred varas square, *are fixed,* in every grant of the public domain, to be made after that enactment, and cannot be *legally departed from.* This Decree and Ordinance do not require that the granting officer should *specify* the *quantity,* but only that *no more nor less* than they authorize, shall be granted to one individual. The grant in this case is clearly one by metes and bounds, designating no *specific quantity ;* and there is no alternative left for this Board but to declare it *void,* for *that omission,* which would be a most harsh construction, *or* to confirm it in such manner, *ut res magis valeat, quam pereat,* that the grant may not fail, nor yet the law be violated. We must presume that the Governor neither intended to do a vain and idle thing, nor to violate the law by granting more than that law would allow. To carry out those fair presumptions, we ought to confirm the claim, if it be otherwise unexceptionable, and at the same time guard that confirmation, by such restrictive provisos and qualifications as to prevent any infraction of the law of quantity.

In this case, in one of the clauses of conditions subsequent, attached to the grant, a requirement is made of the officer who shall measure the land, that he report to the Governor the number of square leagues that the grant contains. This officer did make an elaborate measurement, which it would seem has ever since been recognized in the country ; and the presumption is, that he reported it to the Governor. At all events, whether he did so or not, his failure, without any act done under the former government, to manifest any dissatisfaction with the grant as made, would not, I humbly conceive, work a forfeiture of the right of the grantee. The objection that the land lies within the ten littoral leagues, and all other objections not disposed of in this opinion, have already been considered and overruled by this Board, in the case of Cruz Cervantes, and others heretofore decided.

According to the principles of decision prescribed for us in the 11th section of the Act of the 3d of March, 1851, we think the claim is valid, and now proceed to enter a decree of final confirmation. Commissioner HALL concurs in the result.

HARRY I. THORNTON.

JUAN B. R. COOPER,
vs.
THE UNITED STATES.
No. 138.

This claim is founded on a grant made in June, 1822, by Pedro Vigente Sola, to Jose Joaquin de la Torre. Whatever right or title was vested in the said grantee has been by apt and proper mesne conveyances, transferred to the present claimant. The question of the existence of any right or title in the original grantee has been raised, and its non-existence strenuously insisted upon, because, as is contended, the Governor who made the grant had no authority to make it. If this grant had been made during the existence of the Spanish Government over this country, I would not feel the slightest difficulty on the question. I would not ask the claimant to produce any direct authority emanating from the King, from the Viceroy, the Commandante of the Internal Provinces, or from anybody else, to make this grant, more especially as it was made in reward of long military services. In accordance with the well settled doctrine of the law, so often affirmed and reaffirmed by the Supreme Court of the United States, I would presume the existence of authority. The doctrine of presumption in such cases, has been repeated so often in such different forms of language, that it has become as familiar as a household maxim of that Court. The following summary announcement of this doctrine, and the few references cited, I consider amply sufficient on this question.

The Courts presume that every Government has power to dispose of its land, and in the absence of any evidence to the contrary, that it exists in the officer or tribunal who exercised it by making grants ; and the acts of public officers in disposing of public land, by color, or claim of public authority, are to be received as evidence of title until their authority to make the grant is disproved by those who oppose the title set up under it. 6th Peters, 691, 728 ; 8th Peters, 459 ; 9th Peters, 759. The only open question, according to my view, touching the authority to make this grant, arises out of the fact that it was made after the independence of Mexico, and before any enactment by the new Government of any special decree, prescribing any defined mode of disposing of the public domain. This grant was made by Governor Sola, by the authority and in the name of his Imperial Majesty, Iturbide, then Emperor of Mexico, under the name of Augustin the First. If the presumption above mentioned is not to be indulged, of the authority of Sola to make a grant, acting as Governor, the highest officer in the province, under color and claim of authority, and in the name of his Imperial Majesty, who was then invested with the absolute authority of a Dictator over the country ; yet there was, as I humbly conceive, an express recognition of the authority of all the existing public officers, to perform all their wonted functions, until new decrees should be made changing those functions, or requiring their performance by other functionaries. Through all the convulsive stages of that revolution which terminated in the independence of Mexico, and afterwards, it seems that great care was taken to preserve and continue the administration of the Government, in all its departments ; and in point of fact, grants of the public land were made, at least in this province, by the Governors, under the old forms, until the enactment of the decree of the 18th of August, 1824, and the ordinance of the 21st of November, 1828, of the Mexican Government. Sola, who made the grant, was, according to the history of the times, Governor of this province under the former Government of Spain, and having complied with the requirement of the Plan of Iguala, as to the declaration of allegiance to the new Government, continued after Independence was declared to act as before, except that his style was changed, from the name of his Catholic Majesty, to that of Imperial Majesty.

I deduce the authority of Sola, from authoritative Public Acts of the country, whose officer he claimed to be. By the 15th article of the Plan of Iguala, it is provided, "The junta will take care that every Department of the State remain without any alteration whatsoever, and all the political, ecclesiastical, civil and military officers continue in the same state they are this day. Those only who shall not declare for the Plan shall be removed, substituting in their places those who may best distinguish themselves by their virtue and merit." This Plan was promulgated by Iturbide, on the 24th of February, 1821. By the treaty at the City of Cordova, on the 24th of August, 1821, between Senores Don Juan O Donoju and Don Augustin de Iturbide, it was provided in the 12th section, that "the provisional Junta being established, shall govern in the mean-time conformably to the laws in force in every particular, which does not oppose the Plan of Iguala, and whilst the Cortes shall form the constitution of the State." In conformity with this expression of the national will, in the plan of Iguala, and treaty of Cordova, on the 5th of October, 1821, the following decree was enacted: "The Provisional, and Sovereign, and Administrative Junta of the Mexican Empire, considering that from the moment that independence of Spain was solemnly declared, all the authority necessary for the exercise of the administration of justice and other public functions, must emanate from the Empire, have thought proper to confirm and legalize all the authorities in the legitimate exercise of their respective functions, for the present, in conformity with the Plan of Iguala, and the treaty of the City of Cordova." I am of the opinion that it was one of the legitimate functions of the Governor of California, in which he was confirmed by the said decree, prior to the establishment of Mexican independence, to make such grants as this, and that his continuing to make them after the independence, was well warranted by law. The genuineness of the grant is not controverted. Although from the statement of the Surveyor General, the keeper of the archives, which statement is admitted as evidence in the case, there does not appear to be anything therein, relating to it, but a memorandum of such a grant, in a book containing a catalogue of titles, &c.; yet the original grant is produced and fully proved. The grant is of the place *by name*, which was known prior to the issuance thereof. Its possession was had and enjoyed by the grantee under a provisional grant of occupancy before the 23d of June, 1822, when, upon his petition the full ownership was conferred upon him. It was occupied also, by one Milligan, the transfer to whom of one moiety of it, by the grantee, and of the same, by Milligan to the present claimant, was made before an Alcalde of the district, and approved by the Territorial Deputation. The present claimant has been in possession ever since his purchase, down to the present time. The land claimed in this case, is to my mind satisfactorily segregated from the public domain by the proof of its identity, and of the possession thereof up to the limits or bounds described in the map, and also in the deed from Torre, the grantee, to the claimant, which though not evidence of title against the Government is competent evidence as to the extent of possession had and enjoyed under the title.

In accordance with the principles of decision laid down for our government in the 11th section of the Act of the 3d of March, 1851, we think that the claim is valid, and proceed to enter the decree of final confirmation. Commissioner Hall concurs in the result.

HARRY I. THORNTON.

JOSE DEL CARMEN LUGO,
vs.
THE UNITED STATES. } No. 316.

Decided on principles settled in prior cases.

SALVADOR VALLEJO,
vs.
THE UNITED STATES. } No. 194.

Decided on principles settled in prior cases.

VICTOR LINARES,
vs.
THE UNITED STATES. } No. 39.

Decided on principles settled in prior cases.

ANASTASIO CARRILLO,
vs.
THE UNITED STATES. } No. 328.

This claim is founded upon a grant made by Governor Pio Pico, on the 18th of October, 1845, to the claimant, for a suerte or lot of ground, of four hundred varas square, *a little more or less.* The grant recites that the necessary examinations had been previously made ; and in the name of the Mexican Government, declares the ownership in the grantee, of the said ground, in conformity with the Decree of the 18th of August, 1824, and of the Ordinance of the 21st of November, 1828, of the Mexican Nation. There does not appear to have been any approval of the grant obtained by the Governor, from the Departmental Assembly, nor any official measurement, and judicial possession had during the existence of the former *Government ; which* however did not continue for a year after the making of the grant. But the actual occupation and use of the place are proved to have been enjoyed by the grantee, from the date of the grant to the present time. The land is within the ten littoral leagues. All the objections to the confirmation of this claim have been considered and overruled by this Board, in the case of Cruz Cervantes, and of others heretofore decided. The Archives of the former Government, according to the statement of their custodian, admitted as evidence in this case, shew that such a grant was made ; and although there has not been found an Expediente of the title, among them, yet the original grant is introduced, and its genuineness fully established.

The only question of any consideration in this case, is that of the identification or segregation of the land from the remainder of the public domain. The identification must be ascertained, by the grant itself, or be capable of being ascertained by extraneous testimony : 15th Peters, 215, &c. The grant describes the land as a suerte, or lot, in the marshes, contiguous to the Mission of Santa Barbara, which was formerly occupied by the deceased Indian, Juan Pablo, of the aforesaid Mission : and is for the quantity of four hundred varas square, a little more or less. The facts, if they exist, and be shewn by proof will lead to the place, so as to enable the Surveyor General to locate it without any difficulty. It was so designated and plotted off, as appears by the map in evidence ; and although that was done subsequent to the change of

Government, yet as a means of identifying the land granted, and as evidence in connection with the possession, of its segregation from the public domain, it may well be considered.

In the confirmation of this claim it is necessary to determine whether the intention of the grantor was, to convey a *specific lot or parcel of land*, or merely to convey a *given quantity*, at the place indicated. If a *quantity* merely, and not a specific, and known piece of land, as a unit, was the subject of the grant, then the words *a little more or less*, according to our previous decisions, are mere redundant expressions or terms, having no effect whatever, neither avoiding the grant for uncertainty, nor increasing or diminishing the quantity, expressly named. In large rural grants, in a sparsely inhabited and wild country, where the quantity grantable is limited by law ; where the map or deseno, referred to in the grant is made by conjecture without any survey, and more especially where there is an express reservation of the *sobrante*, or *overplus* within the map, which may result from the survey of the granted quantity, the construction above stated seems altogether reasonable. But where the grant is of a piece of ground, in language embracing the whole of it, which is not wild land, but in the midst of a settlement, and which may be reasonably supposed to be known as containing a grantable quantity, then the words more or less, or a little more or less, are not insignificent, but apt and appropriate terms, implying, as they always do, except when overcome by circumstances which may be lawfully regarded, or by countervailing terms, a grant of a specific tract or parcel of land. In the case now presented, I think the grant is of this specific character. It is of a small parcel contiguous to the Mission of Santa Barbara, without the almost universal reservation of a sobrante ; the place had been occupied in severalty before its grant ; and above all, the grant is of a "*suerte de tierra*," which means a lot of ground already separated from others, by its own boundaries, being synonymous with the *agellus singularis, ab aliis distinctus*, of the Romans. The question is one of no great interest, if of any at all, to the parties in this case ; for, if the grant be considered as one for the quantity of four hundred varas square, it must be of that quantity within the bounds of the *place* designated, if *it* contain so much ; and, since those bounds appear not to contain the quantity of four hundred varas square, the result would be the same, no matter how the grant may be construed in this particular. In accordance with the principles laid down for our government in the decision of the claims presented, in the 11th section of the Act of the 3d of March, 1851, this claim is valid, and ought to be confirmed. Commissioner HALL concurs in the result.

HARRY I. THORNTON.

ANTONIO CAZARES,
vs.
THE UNITED STATES.
No. 19.

Decided on principles settled in prior cases.

CATALINA MUNRAS,
vs.
THE UNITED STATES.
No. 155.

Decided on principles settled in prior cases.

JUACHIM CARRILLO,
vs.
THE UNITED STATES.
No. 15.

Decided on principles settled in prior cases.

CAYETANO JUARES,
vs.
THE UNITED STATES.
No. 126.

Decided on principles settled in prior cases.

JOSE MARIA AGUILAR,
vs.
THE UNITED STATES.
No. 360.

Decided on principles settled in prior cases.

OPINION

OVERRULING MOTION TO INTERVENE IN THE LAS PULGAS CLAIM, NO. 2, UNDER A RULE ADOPTED BY THE BOARD AS THEN CONSTITUTED. THERE WAS ALREADY ONE INTERVENTION IN THE CASE.

If the rule adopted by this Board, as it was formerly organized, allowing the intervention of third persons, were merely a rule of practice, I would probably raise no objection to the motion now submitted. But in my view of the matter it is far otherwise. It is at war with the general scheme and plan of the act creating the Board, besides being a palpable violation of many of its express requisitions. For instance, that act among other things makes it our duty, after hearing the evidence of the claimant on the one side, and of the United States on the other, to decide promptly on the claim. Now to delay, for the purpose of allowing testimony to be taken by an outsider, which under the act I cannot consider in the determination of the case, is inconsistent with the duty of prompt action by the Board. The proposition is now made, at the trial, to admit a fourth party to come into this case.

Let this Commission do what it may, towards the end of determining between adverse claimants before it, whether under different grants or under the same grant, and it will result in nothing but a loss of time, that is alone an insurmountable objection to the rule. That loss of time involves so much injury to the claimant, and to the whole country, by delaying the ascertainment of the public land, that it is of the deepest interest to all parties concerned, that the rule should be arrested. That any decree or decision of this Board, or any of the Courts authorized to revise its proceedings ; or even a patent procured in virtue of the same, can have any effect decisive of the conflicting rights or titles of claimants, is a supposition directly in oppugnance to the express intention manifested and declared in the 15th section of the Act of the 3d of March, 1851. The rule is based upon the intention on the part of this Board, to settle questions of right between contesting claimants, by confirming one of their claims and rejecting that of the other ; and this, even when it is ascertained beyond doubt, that according to the test which the United States has prescribed to govern the controversy before the Board, between a claimant and herself, she has no title. But it is said to be the duty of the Commissioners to determine between persons claiming adversely the same land, which of them has the strongest claim on the United States for confirmation; and the rule declared that "when the same tract of land, or a portion of it, is claimed adversely, under Spanish or Mexican titles, by two petitioners, either or both of them may file a motion in the case of the other, for leave to appear and contest the right of the petitioner to a confirmation of his claim." If anything substantial is to be the result of this contestation, it is the confirmation of one, and the rejection of the claim of the other, where the Government has no title to the land. Now the law under which this Board acts, declares in the section above cited, that a confirmation—nay, not even a patent, procured by virtue of said confirmation, shall affect the interests of third persons; and who those third persons are, can be no others than those who are not parties in the case, as those parties are defined in the act, viz: the claimant on the one side, and the United States on the other. Suppose a claim be presented, and the Board should come to the conclusion that there is such equity in it as to warrant its confirmation, and certifiy it acordingly. Afterwards, however, in the course of the existence of the Board, the case of another claimant comes up, whose claim covers in part, if not in whole, the land which has been confirmed to the first-named claimant; and the Board should become satisfied that this last has the strongest claim on the United States for confirmation. It would seem to be a necessary course for the Board to take, under the principle of the rule, to refuse a confirmation, even to the best claim, on the ground that they had already made a decree of confirmation of the same land to another. To be consistent, and carry out the principle on which alone the rule can rest, the Board ought not to decree a confirmation in any case, until after the time expires for the presentation of claims, lest they might confirm to one whose boundaries or title might in some way conflict with another. It is admitted, however, that where there is no formal application made to appear and contest, there may be two confirmations of the same land to different persons. The rule involves the proposition that a confirmation and patent to the first, destroys the right of the other. The law, however, says this shall not be the case.

The terms used in the first section of the Act, "that, for the purpose of ascertaining and settling private land claims in the State of California, a Commission shall be, and the same is hereby, constituted," etc., are convertible terms with these, "that for the purpose of ascertaining and settling the *public domain* in the State of California, a Commission shall be, and is hereby, constituted," etc. The settlement or ascertainment of the *one*, is necessarily the ascertainment and settlement of the *other*. The object of the Act, as far as the Board is concerned, is to settle and ascertain *what* is private property, and not *whose* it is; for if it be not public domain, it matters not to the Government to which one of her citizens it may belong. The whole time consumed under this rule, and doubtless it would continue to be the case, so far as the interventions are founded on different original grants, has been in a mere dispute about boundaries, as to which, if there be anything more clearly than anything else, provided by the Act of the 3d of March, 1851, it is, that with that subject this Board has nothing to do. An examination of the 13th section of that Act, and the 6th section of the 3d of March, 1831, "To create the office of Surveyor of the Public Lands for the State of Louisiana," which is re-enacted by the Act of 1851, makes that proposition too clear to need any discussion. With respect to Private Land Claims in Louisiana and Florida, it has been made the duty of the District Court, by the 2d section of the Act of the 26th of May, 1824, to decide on their boundaries, etc. But Congress thought proper, when they came to legislate on the subject of the private land claims in California, to adopt the 6th section of the Act of the 3d of March, 1831, above cited, and to require their location and survey to be made, though not conclusively, by the Surveyor General, and not by this Board; and perhaps all the contests between different grants will be mere questions of conflicting boundaries. Upon this subject of the adjustment of conflicting boundaries, I refer to the opinion filed by me on the motion in Bernal's case, No. 30, for a decree of confirmation, without an initiatory survey.

The error in this matter consists in the idea that the United States intended through the instrumentality of this Board, and of the courts put in requisition by the Act of the 3d of March, 1851, *to grant lands* or *confer titles* to land, when she declares that she has no such intention, but only to *ascertain* what lands had already *been granted*. If the intention of Congress were to grant land, then there would be good reason to tax them with the folly of intending a thing which they have taken the most special pains to declare shall not be accomplished. There is so plain and marked a difference between merely authorizing a confirmation and patent, when such confirmation and patent are expressly declared to be of no force against any third person, but merely to bar any right which might be supposed to exist in the grantor, and doing the *same thing*, for the purpose and intent of creating and conferring a title by one who claims the absolute ownership of the premises, that it seems difficult to confound the two things. If land which belongs to the United States, or which she, in her sovereign political capacity, has asserted to be public domain, on the ground that the title to it devolved upon her from the former sovereign, is granted by her without qualification or reserve, the result would generally be that her officers, judges, and citizens, too, would acquiesce in her asserted claim. If after a grant of such land to one of her citizens, she were improvidently to grant the same land to another, her first grant would be maintained in a contest between the two grantees. But I presume it is competent to the United States to declare by law what shall be the effect of her own future grants ; or that a Government, like an individual, may make a quit claim deed. If the competency of the Government to do this is admitted, which I presume can hardly be denied, the question is simply this : has she done so in this case ? If she were to set about doing it with the fullest purpose, I do not think she could have been more successful in the use of language to effect that specific intention, than she has used in the 15th section of the Act of the 3d of March, 1851.

It is bootless to inquire what will be the condition of the claimants if this Board does not settle all the questions between them, about their lines and boundaries, and also all the questions upon which their claims to landed estate may rest, growing out of the numberless contracts which they have for years been making with each other, or growing out of the laws of marriage, of descent, of wills and testaments, which may bear upon their interests. It does seem to me, that after a tract of land is decided to be no part of the public domain of the United States, contests about it, between the citizens, in which the Government has no concern, might be confided to the courts and juries of the country, Federal and State. If Congress in the Act of the 3d of March, 1851, has made none, or a very limited and inadequate provision for this settlement of mere private rights, that is no reason why this Board should undertake to supply what can be done much more to the satisfaction of those concerned, in the regularly constituted judicial tribunals of the country. But it must be borne in mind that the Government has through the instrumentality of this act removed all difficulty out of the way of claimants, in asserting their rights, by clothing them all with patents, and thus enabling them to stand in any court, their title being imperfect and purely equitable, *non obstante.* No one who had obtained the benefit intended for him by the law, can be met with an older patent, which *ex necessitate rei* is anterior in date, and be told by the holder of such patent that it is conclusive against him, and shuts the door of justice against any assertion of his right. The idea seems to have been entertained by Congress, that there were not a great number of complete and perfect titles in California ; at all events, they provided that where there was *any right or title*, the Government should declare, by her patent, that she had no interest, and thus enable the parties to assert their rights, obviating the objection founded on the political announcement which had been previously made by Congress, and sustained by the Supreme Judiciary of the country, that as to all inchoate or imperfect titles held by the former inhabitants of newly acquired territory, they could not be recognized by the judicial tribunals. Through the instrumentality of the Act of the 3d of March, 1851, two highly important objects are sought to be obtained—First, the extent of the public domain in California is proposed to be ascertained and settled ; and, second, the owners of private claims, whether the original grantees, or claimants under them, are invested with the panoply of a Government patent, which will enable them to prosecute and defend these claims, in those tribunals of the country which, under the Constitution of the United States, are provided for the protection of the rights of the citizen. This Board is not such a tribunal as the Constitution guaranties for the adjustment of contests between the original grantee and those who claim under him as his vendees, between different vendees for portions of the same grant, or between persons who claim the same land by virtue of different grants from the former Governments of the country.

The Act of the 3d of March, 1851, directs this Board to decide *upon the validity of the claim.* The idea that this requirement involves necessarily the determination of its validity, not only against the United States, but against everybody else, is surely not in conformity with the provisions of the Act. If the question be asked, against whom is the claim to be declared valid, the Act responds to that inquiry by declaring, "That the final decrees rendered by the said Commissioners, or by the District or the Supreme Court of the United States, or any patent to be issued under this Act, shall be conclusive against the United States, and the said claimants only, and shall not affect the interests of third persons." So that a claim may be decreed to be valid against the United States, and a *third person*—that is, one not a party as claimant in the case in which the decree is rendered, may have a just and valid right to a part, or to the whole of the land. As, where one representing himself as the sole heir or representative of a deceased grantee presents the claim, and it is confirmed and patented to him ; or where the title is confirmed to one who has sold his right, not only in such case would the confirmation or patent enure to the benefit of the co-heirs or the vendee, which might be availed by them without ever coming before this Board, in the judicial tribunals of the country, but they might present their claims to this Board, if they thought fit to do so, and obtain the confirmation of the same land. But the question to whom the property belonged, and in what proportions, as between themselves, would still have to be settled in a litigation, in which they alone, and not the United States, in any form, would constitute the parties. This is an instance merely, put to illustrate the general proposition. So we may suppose a case of two or more claimants under different grants to the same land in its whole extent, though such a case will rarely, if ever, occur. If, however, such should exist, and indeed in any conceivable case of contest, I would only feel authorized to inquire whether each separate and distinct claim, as presented by its holder, was valid as against the United States. I would carry out the object of the Act of the 3d of March, 1851, as I understand it, by confirming each and every claim, where there was a *prima facie* showing of right as against others, and in a clear conviction, that according to the rules and principles prescribed for our decision, the land was no part of the public domain. In all such cases, without undertaking to decide as between the various claimants, I would put them all in a condition *to stand in the Courts*, and try between themselves the questions of fraud, or accident, or priority, &c., in cases of *different grants;* and of heirship, devise, partition, distribution, succession, or of purchase, under the same grant. In this way all the questions of mere private right, will be settled before the judicial tribunals of the country, to the benefit of which all citizens are equally entitled. In this way alone can the Government of the United States acquit herself of the high obligations devolved upon her by the law of nations, and expressly assumed by the treaty of Guadalupe Hidalgo, to admit the former inhabitants of the country to the enjoyment of all the rights of citizens of the United States, and to maintain and protect them in the enjoyment of their property. There is a class of cases, which may often occur, though always against very strenuous efforts to the contrary, on the part of the former Governments; that is, where the grants of lands, in the same vicinity, in projecting their surveys, lap over, or interfere in their boundaries. The whole extent of land thus situated being covered by valid grants, is no longer a part of the public domain, and each claim must be decreed to be valid against the United States; but as to that portion embraced in the interference, the question arises—to which of the grantees does it belong? The Act of 3d of March, 1851, recognizes just such a case, and provides for its adjustment so far as it was necessary for the purpose of surveying the public land. When such conflict occurs, the Surveyor General of California, in locating the claims, will observe and respect such dividing lines, as may be agreed on between the parties. If, however, they will not, or cannot agree, he must not on that account abandon or delay the public work, but proceed to run the lines as to him may seem just between the parties. If they are not satisfied with his decision (though it is probable they generally will be,) they are expressly referred by the Act to the proper judicial tribunals. I am constrained, from my view of the Act of 3d of March, 1851, to overrule this, as I shall all motions having the same object.

HARRY I. THORNTON.

JOSEFA SOTO, Claimant,
vs.
THE UNITED STATES. } No. 157.

The claim presented in this case is founded upon a grant made by Micheltorena, Governor of California, in virtue of the Decree of 18th of August, 1824, and of the Ordinance of the 21st of November, 1828, of the Mexican Government. By a regularly authenticated transcript from the archives of the former governments of the country, by documentary evidence, and other testimony in the case, it satisfactorily appears that the grant was duly made, by competent authority, on the 21st of December, 1844, and that it was approved by the Departmental Assembly, on the 22d of April, 1846. There was not any delivery of possession to the grantee, nor measurement of the land by a magistrate, as required by one of the conditions of the grant: nor was there any house built on it, and occupied, within one year from the date of the grant. It would seem from the evidence, that from the year 1847, inclusive, down to this time, it has been occupied and largely cultivated under the grant.

The objection is urged against the confirmation, that the title was forfeited for the failure to comply with the requirement to build a house and inhabit it, within one year after the date of the grant. In accordance with the principles which we have recognized in decisions heretofore made by this Board, in Cruz Cervantes, and in other cases, the failure of strict compliance with this condition does not, *per se*, avoid the grant, without any act being done to enforce the forfeiture, by denouncement, at the instance of any other applicant ; or by any manifestation of an intention, on the part of the government to reclaim the land. This condition is neither in the Decree of 1824, nor in the Ordinance of 1828 ; and it is at least doubtful whether the Governor could properly impose it. In the case of two grants to the same individual, as might be, and was often the case, it would be *impracticable ;* though the grantee might *occupy or cultivate,* which the law only required him to do. But at all events, by an express provision in the third condition, annexed to the grant, the possession in this instance seems to have been postponed until after its approval by the Departmental Assembly, should have been obtained by the Governor, which was not done until the 22d of April, 1846. The delay after that time, and until the Mexican rule of the country had ceased, was clearly not a ground for denouncement, or for any other process of *divestiture,* of the vested title. And by analogy to the principles settled by the Supreme Court of the United States, in the case of Arredondo, 6th Peters, 691, and in the case in 14th Peters, 350, the delay subsequent to that period is an immaterial matter. The want of judicial possession and measurement, we have already decided not to be fatal to the claim. The grant is for five leagues in length, and two in breadth, making an area of ten square leagues. In accordance with the principles laid down for our government in the 11th section of the Act of the 3d of March, 1851, the claim is held to be valid, and we proceed to make the following Decree of confirmation. Commissioner HALL concurs in the result.

HARRY I. THORNTON.

WILLIAM GORDON, ET AL.
vs.
THE UNITED STATES. } No. 202.

Decided on principles settled in prior cases.

JASPER O'FARRELL,
vs.
THE UNITED STATES.
No. 86.

Decided on principles settled in prior cases.

JOHN WILSON,
vs.
THE UNITED STATES.
No. 220.

Decided on principles settled in prior cases.

JACOB P. LEESE,
vs.
THE UNITED STATES.
No. 165.

Decided on principles settled in prior cases.

JOSE CARRILLO, AT AL.,
vs.
THE UNITED STATES.
No. 49.

Decided on principles settled in prior cases.

In the cases above stated, opinions were delivered by Commissioner THORNTON. At the time of notice of the removal of the late Board, there were opinions and final decrees entered in seventy-two Claims, embracing cases of grant, both under the Spanish and Mexican Governments.

APPENDIX.

ENTRIES OF TWO FINAL DECREES OF CONFIRMATION, AS MADE IN THE RESPECTIVE CASES; ONE BEING OF A GRANT FOR A SPECIFIED QUANTITY OF LAND,—AND THE OTHER, OF A GRANT BY METES AND BOUNDS.

JOSEFA SOTO, CLAIMANT,
vs.
THE UNITED STATES. } No. 157.

This Board upon full consideration of the various grounds affecting the validity of the said claim, having come to the conclusion that the same is valid; Therefore now proceeds to make, and does hereby make the following decree, or report of final confirmation, viz: It is decreed that the said claim be confirmed to the claimant to the extent and quantity of ten (10) square leagues, *and for no more:* being the same land described in the *Grant* and Expediente, referred to *therein*, and of which the possession is had, under the *same:* PROVIDED, that the said quantity of land granted, and now here confirmed, be contained within the boundaries called for in the said Grant, and Map to which the Grant refers: and if there be less, than the said above named quantity, within the said bounds, then we confirm to the claimant that less quantity; it being apparent that the said quantity exceeds the minimum of two hundred varas square, as prescribed by the Ordinance of the 21st of November, 1828, of the Mexican Government. Witness our hands this 11th day of April, 1853.

ANTONIO MARIA LUGO, Claimant,
vs.
THE UNITED STATES.
No. 308.

This Board upon full consideration of the various grounds affecting the validity of the said claim, having come to the conclusion that the same is valid ; Therefore now proceeds to make, and does hereby make the following decree or report of final confirmation, viz: It is decreed that the said claim be confirmed to the claimant, to the extent of the metes and bounds described in the Grant, and in the Map and Expediente, to which the Grant refers ; Provided, nevertheless, that there be no more than eleven square leagues of land within the said bounds : and that if there be more than eleven square leagues in the said bounds, then we confirm to him only eleven square leagues within the said bounds, *and no more:* and provided further, that if there be less than eleven square leagues, within the said bounds, then we confirm to him that less quantity ; being of the same land, in whole, or in part, as the case may be, described in the Grant of the claimant, in the Map and Expediente referred to in the said Grant, and of which the said claimant has been long possessed. Given under our hands this 21st day of February, 1853.

ERRATA.

Page.	Line.	
9	10	for *Salano* read *Solano.*
21	15	from bottom, for *denies* read *decrees.*
22	1	for 291, 292, read 32, 33.
22	9	strike *n* from *Gutiernez.*
22	13	for *rancheras* read *rancheros.*
23	7	for *Salano* read *Solano.*
26	16	for *anoyo* read *arroyo.*
26	29	insert *first* before *elected.*
26	39	strike out *Review in this case.*
27	15	for *commoners* read *commons.*
27	45	place *ruling* after *this* in preceding line.
28	1	for *was* read *being.*
28	2	for *the town* read *that place.*
29	25	place 50 before *vara.*
32	7	from bottom, read *title* for *titles.*
33	14	for *repealing* read *repeating.*
33	29	for *Dourment* read *document.*
43	21	for *quoting* read *quieting.*
44	25	for *ib.* read 1844.
63	13	from bottom, for *county* read *country.*
68	9	for *government* read *governments.*
68	10	for *source* read *sources.*
76	1	strike out *Part VIII.*
76	18	before *regulated* insert *here.*
77	22	after *already* strike out *contended, and.*
77	32	for *And* read *Though.*
80	29	for *excludes* read *includes.*
82	16	strike out *of* after *except.*
86	5	for *property* read *third parties.*
87	19	from bottom, read *nor even* for *not even.*
95	28	insert *or confirmation* after *grant.*
95	30	insert *or confirmation* after *grant.*
101	7	after *lands* insert *last mentioned.*
104	31	after *Constitution* insert (*Vid. Shelford on Mortmain*, 23–4, *et seq.*)
112	3	from bottom, read *facts* for *fact.*
114	17	from bottom, read *Berrien* for *Barien.*
115	17	from bottom, strike out *benefit* following same word.
122	15	before *These laws* place a colon instead of a period.
126	14	from bottom, for *c.* after *Dig.* read *Execution.*
135	15	from bottom, for *of* read *under.*
152	12	for *exercise* read *excuse.*
158	15	after *suppose* insert (*I repeat.*)
161	20	for *ch.* 28 read 29.
161	22	strike out *Law* before 214.

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"L. Com. Ex.," or "U. S. Ex."—Land Commission Exhibits published by the United States.

"Ar.," or "Arch. Ex."—Archive Exhibits published by the United States.

"Miss. Ex.," or "U. S. Ex. Miss."—Mission Exhibits, a pamphlet published by the United States, containing the laws, regulations, etc., concerning Mission Lands.

Manifesto—Governor Figueroa's Manifesto to the Mexican Nation, 1835. The translation by Edmund Randolph, Esq., 1855.

Evidence City Case—Case of San Francisco vs. the United States, for four leagues of land; the pamphlet publication of the Evidence therein, published in 1854.

[Owing to circumstances needless to explain, some few annoying but unimportant typographical errors have occurred in publishing this argument, which must be left for the reader to correct.]

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REPORT

OF

ARGUMENT

MADE BY

WILLIAM J. SHAW,

BEFORE THE SUPREME COURT OF THE STATE OF CALIFORNIA,

STEPHEN J. FIELD, Chief Justice,
JOS. G. BALDWIN, } Associate Justices,
W. W. COPE, }

IN THE CASE OF

HART (Jesse D. Carr) *vs.* BURNETT *et al.*,

(Involving the validity of Peter Smith Titles, and the question of Titles in the old missions and villages of California,)

DELIVERED AT SACRAMENTO,

ON THE

8th, 9th, 10th and 12th of December, 1859.

REPORTED BY CHARLES A. SUMNER.

PUBLISHED BY APPELLANTS:
SAN FRANCISCO.

1859.

J. ANTHONY & CO., PRINTERS, SACRAMENTO.

ARGUMENT.

GENERAL STATEMENT OF THE CASE.

On the 18th of September, 1851, Jesse D. Carr obtained a judgment against the city of San Francisco, for $4,270. In virtue of such a judgment against one of the local governments of this State, he procured an execution from the Clerk of the Court, in which it was rendered, and under that execution procured a Sheriff's sale, to be had on the 26th of November, 1851, whereat was sold about 400 acres of land, situated in the old corporate limits of the city of San Francisco, on a bid of $50, (*vide* Sheriff's returns.) On the 26th of June, 1852, a Sheriff's deed was made for the lands to Isaac N. Thorne—though one Hill appeared, from the return, to have been the purchaser at the sale. This suit is an action of ejectment brought on the strength of that Sheriff's deed to recover 60 vara lots out of the tract described in said deed.

It is matter of public record, and well known to those interested, that a great number of lots in and around the heart of the city—lots covered by Alcalde titles and other kinds of titles made by Commissioners' sales, etc.—and vast quantities of other lands in San Francisco, and elsewhere, are held in opposition to the same class of Sheriff's deeds. We have submitted, on a suggestion and merely as statement, the affidavits of twenty-four property owners in San Francisco, entitled to implicit confidence, who have sworn to a knowledge of the subject; and that, at least, nine-tenths of the lands covered by such deeds, are held adversely and in direct opposition to them. And they say that "an undertaking to subjugate such lands to said Peter Smith titles, could not possibly result in any public advantage whatever; whilst it would be well calculated to produce the most alarming, demoralizing and sweeping injustice of which the mind can well conceive. Because, in their opinion, the lands and improvements held in said city and county alone, adversely to such deeds, cannot be reasonably estimated at less than ten millions of dollars."

From said sworn statement, it will be seen there are some 4,000 50 vara lots held in opposition to such deeds, besides two unbroken tracts of about 12,000 acres of land, to which these Sheriff's deeds have been procured and recorded, since the said statement was made; and all of which lands are held adversely to such deeds. All such deeds, as the Court is aware, are known in San Francisco by the generic name of "Peter Smith."

It is also matter of public record, and seems to be well known to those interested, that the same species of speculation has been extended over all the lands in the old pueblo limits of the city of San Jose; that the same kind of Sheriff's deeds are there of record, and now only waiting the further favorable decision of this Court, when they will be attempted to be enforced against, at least, 150,000 acres of land in and around that city; all of which quantity is held in opposition to precisely the same species of Sheriff's deeds as that relied on for title in this case. The greatest portions of those lands are held under Mexican grants, to some of which patents have been issued by the United States, and these deeds are now claimed to convey a legal title, which, by relation, dates anterior to all others; and it is now actually urged upon property owners as superior to all other titles. In the ancient capital of Monterey, precisely the same schemes are on foot, and the same species of Sheriff deeds, now on record, cover all the old pueblo limits at that place, and include not less, it is believed, than 20,000 or 30,000 acres in and about that city. Whether similar schemes have yet been undertaken elsewhere, I have no positive knowledge.

None of these deeds were, in any instance, procured prior to the time the lands were settled on by Mexican or American citizens, or granted by the Mexican or Spanish Government; on the contrary, all these schemes are of recent origin. The first Sheriff's sale of the kind was held on the 8th of July, 1851, and the last of which we are advised was held within the last twelve or fifteen months. The rights of others, the boundaries of their grants, or their possessions, though very numerous, have never been regarded with the least attention or treated with the slightest respect. On the contrary, streets, houses, enclosed fields, ranchos, and even whole villages, have been included within arbitrary boundaries, knocked down at these sweeping sales and covered by these Sheriff's deeds, in San Francisco and elsewhere, without consideration and without the remotest resemblance to anything which could be deemed respectable, honorable or decent in the lawful transactions of human life.

The persons engaged in these schemes have, it is reasonable to suppose, exerted considerable influence in building up a notion in the public mind that the old Mexican towns were the owners of all the lands about them. And, as the towns were known to be older than any grants within them, the creation of a town title at these old settlements has been also encouraged by many respectable persons, upon the notion that they would assist to defeat adverse Mexican grants existing against their lands.

In 1853, American Alcalde grants to lots in San Francisco were decided by this court to be valid, *because* all such towns as San Francisco did actually own the lands within their boundaries.

Finally there was created a firm and dominant moneyed and speculative interest in San Francisco in favor of what was called "The Pueblo Title." The imaginary advantages of such a title, were so well presented to the public that those were regarded as the "enemies of the city" who were not in favor of making it a title, whether the law really and strictly upheld it or not At present I do not know of any influence at work, or of any desire entertained by any body, excepting only speculators out of possession, to have the titles to lands in San Francisco continued upon any such erroneous and merely opinionated basis, as was attempted by the "Pueblo Title" advocates.

There is, perhaps, no reasonable doubt that land titles in San Francisco would long since have been quieted and secure, had it not been for the decision rendered by this court in Cohas vs. Raisin, in 1853, and afterwards insisted upon, that that corporation owned all the lands within the boundaries of its former pueblo. The opinion was so extraordinary that the more discerning and steady capitalists seem to have lost confidence, where confidence is most indispensable for the security of property. Be the cause attributed by others to what it may, the fact seems to be that in less than thirty days from the decision of Cohas vs. Raisin, in the fall of 1853, lands in San Francisco sunk in value, and all confidence in titles, pretty much everywhere, was destroyed. The court seemed determined to inspire confidence by afterwards reiterating its views in subsequent cases, and where the question was not involved, with strong words. But the opinion prevailed that the court was exceeding its authority, and that titles to lands could not be created nor continued by any effort of this court alone, and contrary to what might be eventually determined by the Supreme Court of the United States—to which court it was intended to prepare a case and take an appeal. But it was not long before this court decided that the United States Courts could hear no cases brought in the courts of this State, either by transfer or by appeal. (Johnson vs. Gordon, 4 Cal., 368.)

I think it is due to the profession to say that the great majority of the members of this court at bar, have never been willing to declare that such decisions were sustained by the laws. And I believe that some of its leading members expressed, at the outset, the most serious apprehensions that the consequences would only be injurious to the communities they were intended to benefit, and would be likely to impair the usefulness of this court by shaking the implicit confidence of the public in the firmness and strict fidelity of its decisions. It is needless to disguise, and it would be wrong to forget that such really was the sad and most injurious result. I am aware that communities, in mental epidemics of folly, have sometimes thought the law inadequate to their protection, and have insisted upon their own sudden schemes of relief, as more wise and just than the wisdom and foresight of the law. But it is rare that courts of law have adopted and attempted by their judgments and decisions to uphold and enforce, as better than the laws, the sudden and short-sighted schemes of uninformed men. And it is equally rare that men who have arrived at a knowledge of the settled and fundamental principles of legal evidence, which are the only secure means to protect the rights of any and every man in a court of justice, have advised courts to depart from them, and attempt to find means for quieting titles to property superior to those which the combined learning and experience of ages have established and perfected. And we have here to-day, in these very suits, which foreshadow thousands behind them, and in the confusion of titles in all the old towns of the country, a new and severe lesson against the truly dangerous error of attempting to be wiser than the law.

The opinions by former justices of this court, to which I have referred, are: That, by the laws of Mexico, all the Mexican towns in California were invested with the ownership and title to the lands within their boundaries; and that a grant of a lot made by an Alcalde, whether a Mexican or an American officer, raised the presumption that the lands are within the boundaries to which the town's title extends. The judge who tried this case in the court below charged the jury that these decisions are law, and that the plaintiff in this case need make no further proof of title than his sheriff's deed, and proof that alcaldes had made grants of lots beyond the boundaries expressed in his sheriff's deed!

The jury, having no discretion, were forced to render a verdict for the plaintiff. These decisions seem, indeed, to have disturbed the very *foundations* of property and of the judicial power; and they seem not merely to justify, but to render it indispensable, in order that we may hereafter enjoy repose in our titles, to resort to the familiar principles which they have unsettled.

These decisions seem to have created a new title to large tracts of lands in this State, originating and depending, not on the will of the former owner, but solely on these decisions. They seem to have created two classes of claims to real property, opposed to each other, and covering the same lands; one class depending on such decisions, and the other class depending on laws opposed to such decisions.

The question in this case, underlying all others, is not whether the titles depending on such former decisions can be maintained and continued where they do not destroy the rights of others, but whether they can be extended against property which others are holding in opposition to such decisions, and be made to destroy the legal rights which those now in *bona fide* possession of the land have acquired, under the operations of the law of this State and of the United States.

In consequence of the immense extent and value of the property included in the speculations depending on such decisions, and the title which they are said to have established; and on account of the fact that this is agreed, on all hands, to be decided on its merits as a test case concerning the validity of titles acquired by execution sales against our local governments, it is deemed eminently proper and necessary to examine the whole subject; and, under all the circumstances, to evince neither impatience nor haste, nor a want of candor and sincerity in every view which is taken and in every statement which is made. And I most respectfully suggest that it is better and more economical in both money and time to take a week or even a month now, to the full and complete understanding of the entire subject of these titles, than to have both suitors and court occupied with interminable suits about them for years and years to come.

In point of fact thousands of our people in the oldest settled counties have been educated into the belief, and to-day confidently believe, that the towns and villages existing in California at the conquest actually own the lands within their boundaries. And it has become, at last, a subject of incalculable importance to all that portion of the State that the real truth of the matter should be fully and positively ascertained, in order that, if such titles do not exist, our people may be at once saved from longer depending upon them as reliable speculations, or as sufficient to protect them against other titles.

The views to be submitted have caused me so much study and examination that I may be excused for saying I have been inspired by a motive much higher, and to me more sacred even, than that which a counsel always owes to a client. For these cases have been carried so far that they are beginning to involve ourselves and the purposes for which our profession and our courts are or ought to be laboring.

It may seem a great tax upon the time of the court to allow me to occupy the time absolutely required, in order to deliver my argument at ease; but, inasmuch as these cases have been of six years' standing, and have never before been orally argued before this court, and inasmuch as property of the value, at least, of *fifteen millions of dollars* is actually involved, if not depending on the proper understanding and decision of the case; and inasmuch as it involves the constitutional powers of this court—and for the other reasons just suggested—great indulgence may, perhaps, be asked with more propriety than in any case which has yet been presented for adjudication in this court.

I promise to confine myself as closely as possible to direct issues, so that I may occupy no more time than may be necessary to a complete view of the case in all its parts, as well as my humble abilities will allow.

PART I.

HISTORY OF THE TITLES TO LANDS IN THE OLD TOWNS OF CALIFORNIA.

Whatever matters of public history and government ought to be generally known, courts will take notice of; and wherever the memory of the judge is at fault he resorts to such documents and histories as may be worthy of confidence. 1 Greenl. Ev., sections 5 and 6, and authorities there cited; also sec. 497; also Cooper v. Weaver, 6 Cal. R., at p. 556.

Directly after the general peace of Europe in 1763, Spain seems to have made vigorous efforts to secure the complete possession of the territory now included in this State. During the seven years from 1769 to 1776, that Government established towns along the whole coast of this State, from San Diego to San Francisco. In 1802, when visited by Humboldt, Spain had established eighteen villages or pueblos here, which were defended by her arms and maintained at her own expense. (Forbes' His. of Cal., 200, 201.) And Spain had also established the foundations or plans of two municipalities, San Jose in the northern, and Los Angeles in the southern portions of this country. Her plan of possession was, I should suppose, well arranged. She divided this country into four military districts (corresponding with the principal ports). At San Diego, Santa Barbara, Monterey and San Francisco, she established the main garrisons (presidios) for the defense of the respective Districts, and of all the settlements to be established within them. The settlements in each District were protected by the establishment of the garrison. To each garrison (presidio) was assigned (by the plan) two hundred and fifty mounted Spanish troops. (Forbes, 203, 204, 205; Jones' Rep., 9.) And to each settlement in each District, when established, was immediately assigned a detachment of soldiers from the garrison. (Forbes, 212.) These government settlements were established at the most desirable points in reach of the presidios, and all under the name and pious garb of missions. Indeed, a good supply of devoted priests formed a part, and a most important part, of the Spanish plan of possession; for by their efforts rather than by arms the Indians of the country were intended to be kept in subjection. To each priest the Government paid a salary of four hundred dollars a year, and the pious duties of the priests were to persuade the Indians (then "in immense numbers," Forbes, 91,) to take up on the side of the Lord and of Spain. (Jones, 58; Fig. Manifesto, 31.) The priests, (stimulated by a pious conviction that every Indian they baptized would be saved, Forbes, 98, 99,) by their amazing devotion, soon had thousands of Indian converts obedient to their will. And they thus acquired such power throughout this country that, at length, they dictated not merely its religious, but also its civil management. (Forbes, 209.) They became jealous of being interfered with by new comers. They dictated where, and to whom, grants of lands should be made; and "arrogated to themselves," says Forbes, "almost all the land in the country, so that free settlers could not settle here, except by their toleration." (Ib., 133, 209.) Spain thus established, in all, nineteen settlements here, which existed at the date of the Mexican Independence. After the Mexican Independence only two others were established, viz.: San Rafael, and San Francisco Salano (Sonoma.) Those established by the Spanish Government were all established prior to 1803. Colton asserts, but erroneously, that twenty were established prior to 1800. (Three years in Cal., p. 439.) It is quite certain that thirteen were established prior to 1794. (Report of Viceroy, December 27th, 1793; Jones' R., 9.) The territory included within the jurisdiction of each of these (so called) missionary settlements, was never definitely settled, and very seldom even defined. Some boundary lines were usually recognized. But about all that is certain in this respect seems to be, that the lands, or more properly the jurisdiction of the settlements, extended from one settlement to another, so that no portion of the country could be said not to be included in some one of them. (Jones' R., 9, 57.) But still, they continued to form new settlements within the jurisdiction of old ones, wherever they deemed it advisable. All writers seem to agree, and the orders of the Spanish authorities made at that time expressly show and prove conclusively, that from the beginning these so-called missionary but properly government settlements, were all intended to be eventually converted into parishes and towns, or *pueblos*. (Jones' R., 10, 11, 50, 55; Fig. Manifest., 41). The designs of the Governments of Spain and Mexico were often interfered with (as they are in Mexico even to the present day) by the religious power which they fostered. On the 4th of January, 1813, Spain passed a law expressly requiring that "all" *vacant* lands, and all "lands for municipal uses" in her "provinces beyond sea," "EXCEPT commons necessary for villages," should be reduced to private property. And that in disposing of lands the settlers in the towns should be preferred over others. (Law of Spanish Cortes, of Jan. 4th, 1813, Titles 1, 2, 3, 15, 16, 18, 19.; App. Jones' R., 48, 49, 50.) ("Commons," it will be observed, were not to be reduced to private property. They were not to be given to any corporation or individual, but were reserved by the Government for the commons.) On the 13th of September, 1813, Spain passed another law, expressly requiring that all her settlements beyond sea should be taken from the control of the priests, wherever they had been for ten years under their charge. That "the missionary priests shall immediately cease from the government and administration of the property of those Indians, leaving it to them to dispose of it through the medium of their Ayuntamientos;" and requiring "the superior political authority" to name "the most intelligent" among the Indians, to direct the disposition. And also, again requiring that the lands shall be distributed and reduced to private property conformably to the said law of January 4th, 1813. (Act of Sept. 13th, 1813; Titles 1 and 7, Jones, 54, 55.) The said law of January, 1813, also required the provincial deputations to signify, through the Viceroys, when it would be best to enforce that law in their respective provinces. (Title 4.) Nothing seems to have ever been done in California, under said laws of January and September, 1813, during the Spanish dominion. Indeed the fact is notorious, and probably will not be questioned even by the learned counsel for the respondent in this case, that all lands in California not conveyed by express grants during the dominion of Spain, passed to and became the property of Mexico, on the 27th day of September, 1821, the day recognized in law as the date of the independence of that nation. When Mexico obtained dominion over this country, there were probably over twenty thousand pueblo Indians supported by the Government of Spain, and residing in and about the villages which had been established here by that Government. And there were probably not then over two thousand human beings in this whole country, of any other nation or race excepting Indians and Mestizos, or children of Indian mothers. By authentic data, it appears that in 1834, all this vast territory with twenty-four towns and villages, did not contain five thousand human beings except pure *Indians*. (Forbes 201, 202, Fig. Manifesto.) And it was then declared that there were nearly twenty thousand Indians still living in and around these pueblo settlements. (Ibid.)

Mexican independence was promptly followed by an order to "liberate" all these pueblo Indians of "good characters," and grant to them lands for their maintenance. (Forbes, 135.) All the twenty-one pueblos or Mission settlements were then treated as the public property of Mexico. (Jones' R. and Manifesto, passim.) Mexico promptly ordered that the National salaries previously paid by the Government to the priests, at these Government settlements, should be stopped—that the settlements should be formed into parishes with a curate for each—that the country should support its own priests, and that liberal donations of lands should be made to the pueblo Indians, "who were supposed able to maintain themselves." But the Indians for the most part were mere slaves. (Forbes, 135, 185, 219, 224.) The order of their sudden liberation proved disastrous, and was modified in 1827 or 1828. (Ibid, 136.) In the Regulations for 1828, for the colonization of the Territories, it will be observed, express provision is made that "In those Territories where there are missions, *the lands occupied by the missions* cannot be COLONIZED *at present*. (Sec. 17, Regulations of 1828.) Some provision had to be first made for the Indians, whom the Government was supporting in these Government settlements. Forbes, who wrote in his history from 1833 to 1838, (Preface), speaking of the *Mexican* management over the affairs of this country, says: Various contradictory laws have been passed respecting it, "yet no change of government or system has been able to materially alter the original dispensation by the priests, which may still (1835 or later) be said to exist *in all its primitive purity*." (p. 137.)

Colton, who was "Alcalde" in Monterey in 1846 and afterwards, says: the padres impressed the Indians "with the conviction, that submission to the priest was obedience to God." And that the "vast (mission) establishments absorbed the lands, capital and business of the country; shut out immigration; suppressed enterprise; and moulded every interest into an implement of ecclesiastical sway." (Three Years in Cal., 440.)

On the 17th of August, 1833, Mexico passed a law on the basis of the said Spanish law of January 4th, 1813, (Jones, 14,) to force these settlements from this control of the priests; to organize local civil governments or Ayuntamientos over them; and to grant the lands they occupied to settlers, as had been directed by said law of 1813. (App. Jones, 55, 56, U. S. Exhibits, Mission Lands, pp. 1 to 3.) On the 4th of November of the same year (1833), Mexico passed another law to make the first still more effective; authorizing the Government to transport emigrants from Mexico to settle upon these mission lands in Upper California; and further authorizing and empowering the Government to "take all measures," and use as it pleased the funds raised for pious purposes, (Forbes, 132), so as to "assure the colonization" and "make effective" the secularization of these settlements. It was determined to relieve the Government from their care and management, and to convert them from clerical to local political rule. (Law is in Jones, 48, and in U. S. Mis. Exh.) To *secularize* is to appropriate church property or property under the control of a church, to secular or common uses; and to transfer the civil government of a place from a monastic to a secular or political government. (Webster's Dic.) These laws of 1833, with the view, perhaps, to betray the priests into their support, restored their salaries, made them again payable by the Government, and raised them from $400 a year to $2,000, $2,500 and $3,000 a year, besides $500 each "for religious worship and servants," and other sums. (Law, Jones, 55, 56, and in U. S. Pam. Mission Exhibits.) I believe no colonization grants were made of lands in these Government missionary settlements, until after the passage of the said laws of 1833. But those laws passed in 1833, expressly provided that all the lands within any of the said twenty-three Government pueblos, towns, settlements, or missions (whatever they may be called), should be subject to colonization, and expressly commanded that they should be "*colonized.*" And the Governors of this Territory, always afterwards, deemed themselves authorized to grant them in lots, in virtue of the Colonization Laws of 1824, and the Regulations of 1829. (Testimony of Gov. Alvarado and others; Evidence in case of City of San Francisco vs. The U. S., p. 40; Arch. Exh. U. S. "W.," p. 6.)

It was the very object of these laws, and the laws themselves declare their purpose to be, to enable the Government to convert the missions into towns or pueblos; to "assure the colonization" of the lands they occupied; to grant them *in fee* to the actual settlers who would locate upon them; and to establish local political governments over the missions and the districts (portidos) in which they were situated, and where the priests had held for so long a period complete and publicly injurious control. And in carrying into effect these plans of the Mexican Government for granting the land in such towns to settlers, it would seem that the law of January, 1813, providing for granting the lots to the settlers, and especially providing for the Indians, was to be respected. (Manifesto, p. 1; Evidence City, case sup., p. 35.)

On the 16th of April, 1834, the Mexican Congress passed still another law on the same subject, requiring that "all the Missions in the Republic shall be secularized," and "shall be converted into parishes, *whose limits shall be fixed by the Governors*," *etc.* (U. S. Exhibits, "Mission Lands," p. 8; Jones, 15.) This law of April, 1834, was not to take effect until four months after its passage. Under the laws of the Mexican Congress of 1833 and 1834, Hijar and Padres were dispatched from Mexico to this country in the Spring of 1834, with hordes of Mexican emigrants, all forwarded and maintained at the public expense; and intended to be given liberal donations of lands in these settlements, and to aid the Government in establishing local self-sustaining governments over them, and in relieving itself from their further care and support.

To Hijar was given the offices, and the commission of Governor of this Territory, "and Director of Colonization;" and to Padres the commission of "Subdirector of Colonization." (Manifesto, 7, 10, 12; Forbes, 142 to 146.) The instructions of the National Government to Hijar, required him to take possession of all the property of the missions of both the Californias," to establish villages (pueblos) by regular plans and streets, and to donate to every settler therein one lot in the village proper; and on the outside of the village four "cabalerios," i. e., about one hundred and thirty-three acres of lands. (Manifesto, p. 11; U. S. Exhibits, Sup. 9, 10.) Their expeditions (in separate companies) arrived at San Diego and at Monterey, in September, 1834. Bearing, as they did, directly on the positions of the priests, and their longer enjoyment of the wealth and power they had by that time accumulated in their "vast establishments," and also interfering with the expectations of those already in the country, the arrivals of Hijar and Padres produced an extraordinary excitement throughout this Territory. (Manifesto, 15, 16, 17.) The personal property alone, which this expedition sought to wrest from the priests, cannot perhaps be fairly estimated at less value, at that time, than three or four millions of dollars in stock and money. All the lands about them were constantly in use for the purposes of these "vast establishments." The poor mission of San Francisco alone, had some 150,000 cattle and sheep, 3,000 breeding and tame horses and other stock, "and $25,000 in specie," not long before. (Forbes, ch. 5; Colton's Three Years, ch. 23.) And when it is remembered that twenty thousand converted Indians had produced the wealth and improvements, and were being supported by these public settlements, and were then occupying and tilling the lands and attending to the vast herds of these public establishments, and that all of them were regarding the priests as their fathers; and that the priests were regarding them with pious affection, as poor nations whom they had redeemed; and when it is remembered that the Californians had then but feeble sympathies at best with Mexico, or with Mexicans, and that Californians proper, were Spaniards, and the descendants of Spanish soldiers and Mastizos; and when we remember the clashings of interests and races, unavoidably aroused by an actual and present attempt to donate the lands and property in and about these old establishments, to Mexican "ladrones" and "pobrecites," brought here into the country from Mexico; the revolutions against Mexico which soon followed, need cause no surprise, and were, in fact, creditable to the rude projenitors of our own political name and State.

Before Hijar had arrived, Governor Figueroa had received a dispatch, by express, overland from Mexico, directing him not to surrender the Governorship to Hijar. Upon Hijar's arrival, Governor Figueroa immediately convened his Council, or the Territorial Deputation, for consultation, and submitted to them the whole subject, and demanded their advice as to the future management and disposition of the real and personal property of the mission or public establishments. (Manifesto, 8, 18; Jones, 15, 16.) The Territorial Deputation made a report on the subject on the 21st of October, 1834, in which they declared that *all the property, real and personal, of the missions* belonged to the converted or pueblo Indians, and that they were "*its only owners.*" (Manifesto, 20.) That "the lands of the missions belong to the Indians and no colony shall be established in them." (Ibid 22.) That "Hijar shall not interfere in secularizing the missions, and that Gen. Figueroa retain the performance of that duty." (Ib., 21, 22.) This last expression referred to steps which had already been taken by Figueroa with the advice of the Deputation. This action, we observe, was on the 21st of October, 1834. On the 9th of August, 1834 (before Hijar had arrived in the country), Gov. Figueroa, with the advice of the Deputation, had adopted, to use his own language, "certain rules for that which was going to be established in this Territory," "for distributing the lands of the missions," etc. (Ibid, 28, 37 ; Mis. Exhibits, Sup., pp. 3 to 9.) The rules for disposing of all the mission-pueblo lands in this country, prescribed (to use Gov. Figueroa's own language), "the manner of distributing to the converted Indians of each mission the lands which they possess, and also a part of the other property of which they are also in possession, because they are the lawful owners of the whole." (Ib., 37.) These regulations adopted by Figueroa and the Territorial Deputation, also provided, that if the Indians should sell, encumber, or transfer the lands granted them, such contracts with the Indians should be void, and the land should "revert *to the nation*." And that the missions should be converted into villages or pueblos, and that where the pueblo Indians had rancherias outside of the missions, and exceeding twenty-five families, *they* (the rancherias), should be formed into "separate *pueblos*, under the same rules as the principal ones" —to be formed in the missions. (Jones, 16 ; U. S. Exhibits, "Mission Lands," p. 3, et seq.) These rules were to be first applied to ten of the missions (not named), and afterwards to the others (Art 1), Figueroa says this plan was very properly approved by the Deputation, "in order to present it for the approbation of the Supreme Government." And the Regulations, Article 4, expressly provided that they should be submitted to the Supreme Government for its approval. (Manifesto, 37 ; Mission Exhibits., Sup., p. 3.) Hijar, it may be mentioned, accomplished nothing. He was subsequently arrested by orders of Figueroa, and sent out of the country, together with his leaders and most of his followers. (Man. 97 ; Forbes, 145.) But the expedition of Hijar seems to have stimulated the Governor and Territorial Deputation to prompt action, in disposing of the lands and other property of these Government settlements, taking them out of the hands of the priests and converting them into pueblos, and establishing political governments over the country "wherever there were none." On the 3d day of November, 1834, the Territorial Deputation adopted further regulations, in addition to those of the 9th of August, 1834, for converting the missions into parishes, as to "matters appertaining to the spiritual administration ;" while they were to be converted into pueblos, as to matters appertaining to "the administration of the temporalities." (Exhibits Mis. Sup. 11. ; Arts. 1, 2, 3, Regulations August 9, 1834 ; Mis. Exhibit, Sup., p. 3. Read the Regulations.) Those Regulations, we observe, of August 9th, 1834, proposed to begin "in the next month of August," i. e. in August, 1835, to "partially convert into pueblos the missions of this territory, commencing at first with ten missions and afterwards with the remainder." (Art. 1, see U. S. Mission Exhibits, pp. 3 to 9.) These Regulations also proposed to give "to every individual head of a family," or over twenty-one years of age, a lot "out of the common lands of the missions" not less than one hundred nor over four hundred varas square.—Art. 5. And to equitably distribute among them one-half the live stock.—Art. 6. And one-half the chattels, etc.—Art. 7. And it was expressly provided that "The remainder of *all* the lands" and other property "will *remain* at the disposal of the Supreme Federal Government."—Art. 8. Art. 13 required "inventories to be made" of the property, debts, credits, etc. of "each mission," and to "be forwarded to the Supreme Government."

Art. 16 provided that "the vineyards, orchards and cultivated fields" remained "for the present undisposed of until the resolution of the Supreme Government." Art. 18 prohibits contracts with the natives concerning the purchase or pledge of the property to be given them, and declares, if made, they "shall be of no value" and "the government will reclaim the property." Art. 23 provides rules for the conduct of the Government Commissioner and Steward, to be appointed for each mission, to take charge of the public property, the distributions to the natives, and specifies the particular things to be enumerated in the "inventories" to be sent to the Supreme Government, "which (inventories) shall be kept from the knowledge of the priests," etc. etc. And among these directions is the following, showing the intention of the whole Regulations, viz: "The Commissioner will inform the natives—explaining to them with mildness and patience—that the missions are to be changed into villages (pueblos) which will (thereafter) only be under the government of the priests so far as relates to spiritual matters; that the lands and property for which each one labors are to belong to himself, and to be maintained and controlled by himself without depending on any one else; that the houses in which they live are to be their own, for which end they are to submit to these regulations, which are to be explained to them in the best possible manner." They also provided, under the same Article (23) that "what is called the priesthood shall immediately cease;" the children "being handed over to their fathers" who should be taught "their obligations as parents." Part 7th. Also that "the rancharias" (called "settlements" in this pamphlet translation, but see Jones' Rep., 16,) "situated at a distance from the missions, and consisting of more than twenty-five families, might form separate pueblos," (if they desired it,) "under the same rules as the principal one."

It will be seen that the regulations applied to all the missions in California: that the Governor was not to commence their enforcement until the month of August, 1835, beginning then with about one-half, and "afterwards with the remainder," i. e. *all* the remainder. The instructions of the Territorial Deputation of November 3d, 1834, to change the government over the northern district of the country; i. e. all of this country, from San Jose to the Oregon line, to change the government over that portido, from a military to a civil government, seems to have nothing to do with the subject of disposing of the lands of the mission of San Francisco, which, after the adoption of these regulations was called the village (or pueblo) of San Francisco. The forming of an Ayuntanuento for the immense partido (or district) called the partido of San Francisco, seems to have no necessary connection with the pueblo of San Francisco, except that after holding its sessions for two or three years at the barracks or persidio, the pueblo was the place where it afterwards held its sessions, until it was abolished shortly afterwards.

The instructions show on their face that the Ayuntanuento was to exercise the political functions with which the military commander had been charged, over "that demarcation." More will be said on this hereafter. The regulations for disposing of the lands in the missions applied to San Francisco as a matter of course, as much as to any mission in the country. And in the additional regulations of November 3, 1834, it is expressly named among the *inferior* settlements provided for. (Exhibit, Sup., p. 11, sec. 2.)

That resolution of November 3d, 1834, for converting the missions into towns, and that for establishing a local political "Ayuntamiento" or Government over the "Partido" of San Francisco, seems to have made no change in the regulations previously established for the distribution and management of the property of the "missions." (Jones, 16.) That resolution of the Territorial Department of November 3d, 1834, to establish an Ayuntamiento or local civil government in place of a military government over the inhabitants of the *partido* of San Francisco, is this respondent's proof that the *pueblo* of San Francisco, (four miles distant from where that Ayuntamiento war organized and held its sessions for two years), was incorporated and was given a grant or title, according to some of four leagues, according to Cohas and Rosin and the Judge's charge to the jury in this case, of "all the lands in its boundaries," and according to the very learned and very wonderful jurist, (?) —— ———, and those who agree with him, of all the lands in the present city and county of San Francisco. And the first document in evidence in this case by the plaintiff is to prove that the boundary of this grant or title is the Buri Buri Rancho.

There was no power in the Governor, nor in the Governor and his Council or Deputation, to pass acts of municipal incorporation. Governor Figueroa himself referring to their powers in making the identical orders of November 3d, 1834, says: "The Deputation never had the *vain pretension* to attribute to *any* of their acts the force of laws." (Manifesto 26.) The Territorial Deputation was not a "Legislature," but was a body strictly subordinate to the law. (V. Manifesto, 14, 15, 16 and passim; Forbes, 133, 134, 135; Mis. Ex., 113 to 115.)

Now, from the regulations of August 1834, from Governor Figueroa's "Manifesto" of the design of those regulations—it seems manifest that aside from provisions for the priests, their chief object and care was, that in disposing of the lots and commons of these pueblos, the rights of the pueblo Indians should be sacredly preserved. Certainly not less than four-fifths of the persons concerning whom and for whom these regulations were adopted were Indians. (Forbes, 202.) Indeed, they actually seem to refer and apply almost exclusively to Indians. Four-fifths of the entire civil population of San Francisco, at that very time, undoubtedly, were Indians. (Forbes, 201, 202.) The same regulations which authorized the missions to be converted into pueblos, as we have seen and as must have been judicious, authorized the pure rancharias of Indians at a distance from the mission to be also converted into pueblos: i. e. to have a local civil government of their own. If these regulations, or any acts of the Governor and Deputation in 1834, made *San Francisco* a municipal corporation, then the Indian rancherias were made municipal corporations wherever they chose their Alcaldes and other officers, which they did in some places. An Ayuntamiento—as this court knows—means simply a local civil government. And the establishment of an Ayuntamiento over a *partido* has no more to do with the incorporation of villages within the *partido* (district) than has the establishment of a county government, under our system, to do with incorporating the villages in a county. Besides the pueblo or village of San Francisco, there were at least two other villages in the partido of San Francisco, viz: San Rafael and San Francisco Salano.

In the territories under the Mexican Government, Figueroa says it was "one of the principal duties of the Territorial Government to see to it that Ayuntamientos, i. e. local governments, should be established *wherever there were none.*" (Manifesto 41; Jones' Rep., pp. 48, 50, 54, 57, and p. 42 "Art. 12.") There was none within the whole partido or district of San Francisco, and never had been until one was elected there at the presidio or garrison, under the order of November 3d, 1834, and communicated by Governor Figueroa, November 4th, 1834, which was for the *partido*, not the pueblo of San Francisco. Besides, it seems most manifest that the Territorial Deputation had no power to create municipal corporations and endow them with the power to receive and hold large and unbounded tracts of country, or any lands at all. San Jose, as is well known, was incorporated by the direct act of the King of Spain. And *the very next year* after this order of November 3d, 1834, to form a civil government over the *partido* of San Francisco, Los Angeles was incorporated by a special Act of the Supreme Government of Mexico. (Arch. Ex. W., p. 5.) If the Territorial Deputation was competent to create an actual municipal corporation, why did the Supreme Government do it? According to all our ideas and all our actual knowledge on the subject, the creation of municipal corporations seems to have always been deemed an act requiring the exercise of the sovereign power. And when we recollect the important powers of government they are to exercise, and know of their being created in some instances by the Supreme Government, why shall we suppose an act of the Supreme Government to have been unnecessary? Have we any proof that it was unnecessary? Do we know that the Departmental Deputation could create such municipal corporations without the express aid of the Supreme Government? Do we know that a resolution by them to elect an Alcalde at San Francisco would have made a municipal corporation at that place, and endowed it with the privilege of holding a vast tract of land in mortmain? Do we know a resolution to elect an Alcalde, and other local officers, or an Ayuntemiento for the local government of the district or partido of San Francisco would make an incorporated town or city of the place where the Ayuntamiento was to be elected? Conceding an Ayuntamiento to be a strict corporation, there is a vast distinction between creating one for the inhabitants of one town only and for the inhabitants of a vast district of country like the *partido* of San Francisco. Why should we believe that San Francisco, the most barren and insignificant mission in California, was a corporation and was granted all the lands about it, or any lands by this mere order of November 3d, 1834, to elect officers, and upon mere assertions and fanciful conjectures? There are persons who seem really to believe that such was the fact. And according to a sober law writer, there are persons "whose minds are *incapable* of overcoming the delusions of fancy." (Stephens' Introduc. De Lolme's Eng. Con., p. 63.)

But suppose the Ayuntamiento of the partido was the Ayuntamiento of the pueblo of San Francisco, and suppose it created the pueblo into a municipal corporation capable of acquiring and holding lands by the league, or in any quantity. Does that fact make it own the leagues of land? There is an immense distinction (painfully realized by most of us) between being legally capacitated to own lands and actually owning them. In De Armis vs. New Orleans, 5 Milter's Law Rep., it was plainly said: "As to the right supposed to arise from the establishment of a cabildo (Ayuntamiento) and the incorporation of a city, it may be disposed of by stating that acts of incorporation may confer a capacity to acquire, but do not of themselves operate as a transfer of property." (P. 209.) And there is also an immense distinction between a place being a pueblo and being actually incorporated. To say because the missions were pueblos therefore they were municipal corporations, seems to be merely jumping at conclusions—not proving them by competent evidence or by sound reasoning. Besides, the fact is notorious, and is actually admitted in Cohas vs. Roisin, that the Ayuntamiento of the partido of San Francisco, which held its sessions at the garrison and also at the village, never existed at all anywhere for over four or five years. What became of the corporate body and its immense estates after the Ayuntamiento was abolished? We are absolutely told in a serious and authoritative manner, by the said former decisions of this court, that they descended into the Justices of the Peace or Alcaldes who were afterwards appointed to reside in that place, and perform the functions of the Ayuntamiento. (Cohas vs. Roisin, 3 Cal., 449, 453.) It seems important to remember that there never was a local government or Ayuntamiento created expressly and *only* for the town or pueblo of San Francisco. There was one created for that *partido*, which was to *hold its sessions* there and whose chief officers resided and exercised official duties there. And after that was abolished, instead of leaving San Francisco without any civil local officer at all, Justices of the Peace and Alcaldes were appointed for that place. (See record in this case.) And no Ayuntamiento or incorporated local government existed there at any time from 1839 down to the American occupation of this country. (L. Com. Ex. O., p. 55.) And we defy the learned counsel to show any legal evidence of an incorporation. It would seem to be strictly true that the first regular local political government ever created by law, expressly and *only* for the inhabitants residing on the peninsula of San Francisco, was the one established in 1850, by the law of this State, creating for them a city government. But conceding that the old towns owned all the lands about them (instead of regarding any such ownership as a misfortune to the country, not to be inflicted nor tolerated except on clear and positive proof,) still, it is not easy to conclude that the Justice of the Peace who used to be the civil officer for San Francisco was the corporation which owned all the lands at that place after 1839, when the Ayuntamiento was abolished. By the law of Mexico, passed March 20th, 1837, there could be no corporation or corporations rights at San Francisco unless given by "special law." No Mexican law has ever yet been proved or seen incorporating the town of San Francisco. And if the Ayuntamiento which existed there prior to the law of March 20th, 1837, owned all the lands there, the ownership must of necessity have reverted to the nation, by operation of law, when it was abolished in 1839; and it was never again revived by any law, or authority of law, from 1839 to this day.

But I repeat, to concede that the Indians and the few white men residing amongst their settlements during the Mexican dominion, were possessed of incorporated towns, would seem to be *no evidence* that *such corporation* (or the Indians) owned the lands about them. The Government of the United States now has, in this State, a plan for the care of the same tribes of Indians. They are gathered, "through choice or force," upon the public lands of the United States, at places which are called Reservations, where lands are reserved for them by Government and are used and cultivated by them *in common*. As to the inhabitants of these Reservations, the lands are their common lands. Suppose the government of this State should now create all those Reservations into municipal corporations, what effect would that have on the title to the lands which the United States had reserved for their common benefit? If incorporated, would it not be for the purposes of local government? And do we know of any system of local governments which makes them own all the lands whereever they are established? And suppose boundaries were or were not established to the lands occupied by our government Indian Reservations, what could that have to do with the title of the United States in the lands? Why, then, should we suppose it has anything to do with the title of Mexico in the lands occupied by the Mexican Indian Missions or Reservations? Now again: Suppose the United States Indian Reservations in this country should be continued for seventy-five years, what would be said of the title to the lands occupied and held in common by the Indians for so long a period? Might it not be said or be claimed by good men that the lands belonged to the Indians, who had cultivated and improved them, and whose tribes and descendants should be found at that remote day still living upon them?

Now if our Government should hire salaried Missionaries to take spiritual charge of the Indians in our Reservations; if their captains, or afterwards some civil local officer, were authorized to grant lots to actual settlers within them; and if Government declared the intention to eventually convert all the Reservations into towns or villages, and should locate them over the country with that view; and having done this, should continue them under only one sect of devoted priests for fifty-six years, there would then be presented the same kind of public settlements, in every material respect, as the Indian Missions of California. And if our Government should, after so many years, undertake to change their nature from Government establishments into towns and villages, still reserving lands for them for commons, and make grants of the lands in lots to settlers, it would undertake to do what Mexico sought to accomplish by its laws passed in 1833. And wherever such Indian Reservations should be converted into villages or towns, we should have a precise parallel of our California "pueblos," established where there had been Indian missions. If our Indian Reservations should be continued in the common use of the Indians, and others, for from thirty to sixty-six years—as the Mexican Indian Reservations or Missions had been—it would have become no easy matter for our Government, with all our boastful superiority, to convert them into towns and make a just and wise disposition of the property which they would have accumulated, and of the lands which the inhabitants would have always claimed and used in common. And if the attempt were made to accomplish that purpose at a time when such Reservations had gathered within and about them nearly all the inhabitants of the country, the difficulties would be found infinitely increased, and the white settlers would probably be found, in a few years, in possession of the towns and their property, with little regard to the wishes of good men, or the just designs of Government towards the Indians. What would be likely to occur with us seems to be precisely what did occur when Mexico undertook to dispose of the property of her Indian Missions in California.

It is hard to realize, but not unimportant to remember, that down to 1835 this whole country was an unbroken wilderness, inhabited almost only by Indians, a few priests, and squads of soldiers at stations remote from each other. All the Spaniards in the country, if all collected in one place, would hardly have constituted one small village by themselves. They were so few that, notwithstanding their utmost kindness to the Indians at the missions, they were often in peril, and are said to have often endured trials and hardships of which we Americans have no proper ideas. (Pablo De la Guerra's speech in State Senate, 1856.) The Missions seem, in fact, to have been inhabited almost exclusively by Indians. (Regulations of Alvarado, 1839, Art. 11 U. S. Ex. Mis., p. 14.) The difficulty of converting into towns and disposing of the lands of such public establishments, filled with wild and half civilized Indians who had there endured a rude and irksome civilization, and (most of them) only a sort of pseudo residence for so many years, must indeed have been serious. The priests seem to have regarded the attempt as quite impracticable and unchristian. (Petition of the Bishop to the Sup. Govt., November, 1840; U. S. Ex. Sup., p. 22, etc.) I have endeavored to give a faint sketch of some of those difficulties. The good Figueroa seems to have been the earnest friend of the town or pueblo Indians of this country, and sought most earnestly to protect them. Just five days after signing the identical order of November 4th, 1834, to establish to Ayuntamiento at San Francisco, in an official communication, signed by him and addressed to the Supreme Government of Mexico, and dated November 9th, 1834, Governor Gigueroa says: "There are more than twenty thousand Indians settled in the missions in this country. (Manifesto. 32.) These Indians have, "*through choice or force*, been made Christians." (Ib. 33.) "The estates, the temples, the real and moveable property, and whatsoever exists in the missions, have been acquired by the labor and privation of these Indians." (Ib. 31.) And, "unquestionably," equitably speaking, they "only are its owners." (Ib. 32.) And "*for this reason*," continues the same able and distinguished man, "the deputation of this Territory *determined* that *half* the property of the missions should be distributed to these Indians, 'in full ownership,' reserving *the other half for the disposition of the Supreme Government*." (Ib. 31.) "This disposition of these missions," he continues, "is entirely in accordance with the directions which *the Supreme Government gave* to Echaudeia, Victoria and myself, in *the instructions* which were given us on confiding to us the office of Political Chief of California." (Manifesto, 31, 32.) What insane folly to have written thus to his own Government, if the orders made just before it was written to establish an Ayuntamiento at San Francisco did create, or if it was intended to create a corporation which was, "by the laws of Mexico," to own all the lands "within her boundaries." The lands of the missions were never granted to the pueblo Indians of this country. It is said that in New Mexico such lands were granted to the pueblo Indians, who are still, in some instances, in the occupation of them. But fortunately for us, our State has never been so incumbered. Administrators of the missions were appointed by the Governor, but before any disposition of the lands occupied by the missions had been made, viz: on the 29th of September, 1835, Figueroa died. And any grants to Indians were probably never afterwards urged with much vigor. Indeed, the great body of the mission or pueblo Indians in this country at that time were, perhaps, really incapable of being much benefited by receiving a title to lands. Thus we find from what seems to be indisputable authority, that the lands in all the missions of this country, including San Francisco de Asis, remained wholly undisposed of by the Government to any corporation or to individuals down to the 29th of September, 1835. Gutierrez succeeded Figueroa, but his position seems to have been uneasy and insecure, and the laws and regulations for disposing of the mission establishments were not enforced during his brief term of office.

In 1836, the Californians, constituting nearly the entire population, declared their independence; avowed themselves a sovereign State; established a Congress; elected General Vallejo Commander in Chief; imprisoned or drove from the country all Mexicans occupying any positions in this Territory, including Governor Gutierrez; and made Alvarado Governor. Forbes (writing in June, 1838,) says California has remained for nearly two years to do as it pleases; to have a government of its own manufacture or none at all, (p. 151.)

The missions and their property seem to have remained under the care of public administrators or commissioners from 1835 to 1839, when Governor Alvarado declared they had already been reduced to a "pitiful state." (U. S. Ex. Mis., p. 13.) Governor Alvarado proclaimed new regulations respecting the missions, dated January 17th, 1839. These rules require the administrators to render immediate accounts of their proceedings to the Government, with "an exact account of the debts owing by and to the missions." (Arts. 1 to 5.) They provide that under no pretence whatever shall they (the administrators) contract debts, whatever may be the objects, nor make sales of *any kind*, to anybody, without the *previous* knowledge of Government. And that if made, they "shall be null and without effect." (Art. 5.) Also, that no debts due from the missions to private persons shall be paid "without an express order from Government." (Art. 6.) And that no cattle of the missions shall be slaughtered except what is necessary for food, "without previous permission from the Government." (Art. 7.) That they shall no more traffic for woolen manufactures, but "the persons in charge will see to it that the looms are got into operation." (Art. 8.) That "at the end of each month they will send a statement to Government of the ingress and egress of all kinds of produce that may have been warehoused or distributed." (Art. 9.) That "the establishments of San Carlos, San Juan Bautista and Sonoma are not comprehended in these regulations." (Art. 13.) No others were excepted. That Government shall be informed "of all persons employed under them, designating their monthly pay, according to the orders which may have been given, including that of the reverend padres." (Art. 14.) That "the administrators will, under the strictest responsibility, fulfill their orders and send the information required of them in one month." (Art. 15.) And that Government will continue to make regulations respecting the police and the manner of making out accounts. (Art. 16.) And provided that an inspector should be appointed to have special charge of the accounts and other interests of these public establishments. The late Wm. E. P. Hartnell was appointed the inspector of the missions of Upper California. And it seems, from his instructions, that he was to personally inspect and report the condition and property of the missions, and among other things to recommend that the punishment inflicted on the Indians "be moderate and proportioned to their state of uncivilization."

Alvarado published further regulations concerning these Government establishments, dated March 1st, 1840. (U. S. Ex. Sup., p. 17, etc.) He declares that his regulations of the previous year "have not been sufficient to root out the evils which are experienced, particularly on account of the high salaries with which the establishments are burdened, and which they cannot support." (Ib.) He abolished the office of administrators and created the office of mayordomo for each mission; provided rules for their government, and fixed their salaries. To remove all dispute as to San Francisco having been and still being, in 1840, one of the very missions to which all these laws and regulations were applied, it is shown in these regulations what salary the mayordomo of "San Francisco de Asis" was to receive. (Art. 2.) These new officers were to be the channels of communication "*between the Government* and the *subaltern officers* of said missions." (Art. 28.) Showing that the management of all the property of these places was entirely managed by public officers, responsible to the Territorial Government, and not to the pueblo. These regulations of March 1st, 1840, are only remarkable for the total change of tone from those of 1839, which they evince towards the reverend padres. Judging from the petition of the Bishop, before mentioned, the padres must have grown quite exasperated. That petition says the conduct of the Territorial Government towards the missions here, was "very unsupportable." (U. S. Ex. Sup., p. 23.)

On the 7th of November, 1835, a law had been passed by the Mexican Congress, providing: "Until the curates shall take possession under the second article of the law of August 17th, 1833, the Government shall suspend the execution of the remaining articles, and keep matters in the condition in which they were before the passage of said laws." (U. S. Ex. Sup., p. 12.) This law could not have arrived probably before 1836. It may have prevented any disposition of lands to the Indians as proposed by the regulations of Figueroa (which had probably been forwarded to Mexico for approval.) But it does not seem to have been any further respected (if respected at all) during the administration of our good Governor Alvarado. The petition of the Bishops of California to the Supreme Government near the beginning of the year 1841, received a reply favorable to the priests again getting control of the missions.

In 1842, Micheltorena was appointed Governor, and sent from Mexico with a "battalion" to enforce obedience to his commands. He was instructed "to examine the situation of all the missions, with respect to their management, improvement, and state of accounts." (U. S. Ex. Sup., p. 31.) Under these instructions Micheltorena, having arrived in the country, issued a proclamation, dated March 29th, 1843, in which he declares it was one of the "ample or complete instructions or orders with which" he was invested, to inquire concerning the missions "in order to regulate them." And that "the Supreme National Government" had "transmitted all its powers" to him over the subject. He then complains "that the vast and immense landed property formerly belonging to the missions had been scattered or partitioned out to *individuals*." (Not to *corporations*—there seems to be nothing to indicate that any such thing was ever thought of, much less done.) That "the most reverend ecclesiastics have no support but charity." "That the Indians, naturally lazy, * * and in a state of nudity," * * "prefer to keep out of the way, and die impenitent in deserted woods, in order to escape a life of slavery. That this continual emigration of the natives from the service of individuals to the service of the missions, and from that of the missions to that of individuals, or to the woods, retards agriculture more and more, and frightens off, instead of drawing together the Gentiles, and keeps them without the pale of our holy religion. That, in the administration of the missions have been committed some frauds and notorious extravagance." And "that there is no other method of reanimating the skeleton of a giant like the remains of the ancient missions," except to restore them to the priests, or, as he terms it, to "the lovers of civil and ecclesiastical power." And in that first order he "denies" that twelve of the missions, which he names, and which were of the most importance, "be delivered up or restored to the most reverend fathers." (U. S. Ex. Sup., pp. 33, 34.) He further decreed that "lands *granted* prior to that date" should not be revoked; and closed his decree by binding himself "to defend and sustain" the missions "in the possession and preservation of all the lands they may hold from this (said) day." (Ibid.) But the California Regency of those days, headed by Jose Castro, who was the Warwick of this country, and Commander-in-chief and Alvarado Governor, were not to be so easily overcome. A revolution against Micheltorena was begun in 1844, and energetically pursued until he was forced to leave the country. (U. S. Exhib.; my Law Pamphlet, vol. 4, pp. 258 to 288.) And on the 15th of February, 1845, the Departmental Assembly passed a decree declaring Pio Pico Governor ad interim. (Ib., 288.) And on the 22d February, 1845, Micheltorena abdicated, and, according to the official report, was allowed to march out of the country with his battalion, "with all the honors of war." (Ibid, p. 291, 292.) During this domestic war no disposition was made of the lands occupied by the missions. In fact the great wealth which had been accumulated in the Indian missions of this country seems to have enabled the Californians to maintain quite an independent political position towards Mexico, from the death of Figueroa to the day of the American conquest.

When Santa Anna, the champion of the Church, sent Micheltorena, with an army, and ample instructions and authority to restore the missions to the priests, and he made the attempt, we find him driven from the country, and a Californian elected in his place, as had been done in the case of Gutiernez.

Indeed, during the administration of Alvarado, which continued from 1836 to Sept., 24th, 1842, (U. S. Ex., No. 1, p. 3, "N"), all the moveable property of the missions seems to have been disposed of, more to the personal advantage of the rancheras than to that of their rulers. And the twenty thousand Indians, under the care of the Government, at the missions, only eight years before, had melted away "into the woods," and upon numerous ranchos granted to individuals, and supplied with stock "loaned them" from the missions.

The stock, goods and other personal property being disposed of, and the Indians mostly dispersed, nothing more was left to be disposed of excepting the buildings and lands in and about the missions. The fear that the United States would acquire this country had probably been entertained for some time before; but, in September, 1844, official information was received here that the annexation of Texas to the United States was proposed, and that "the integrity of Mexico must be defended." (U. S. Ex., Sup. Digest, 107, etc.) At all events the fear of war with the United States seems to be the excuse for urging a rapid conversion of all the lands and buildings of the missions to private individuals then in the country, reserving only such buildings as might reasonably be required for public purposes or religious worship.

On the 24th of August, 1844, a Committee of the Departmental Assembly, two members of which were David Spence, of Monterey, and Pio Pico, (shortly afterwards Governor), both still living, and who had been instructed "to point out means whereby the Government can defray the expenses of the war with which the Government is threatened by a foreign nation," (Mission Exh., p. 35), submitted a report, which report was "unanimously approved" by the Departmental Assembly. By that report it was unanimously agreed by the Territorial Deputation, substantially, that "the Government of the Department expose to sale, mortgage or lease *the property*, chattels and *cultivated lands* of the missions of Upper California, including the whole *from San Diego to Sonoma*, and dispose of them to defray the expense of the war, their respective legal debts being first paid out of the price they may bring." (Ibid, 36, section 1.) The missions of Santa Barbara and Santa Inez, are alone excepted from this resolve. (Ib., sec. 2.) Not only the commons of the missions which were not cultivated, but also their very "cultivated fields" were "unanimously" deemed saleable by the Government, as much as the chattels which had been accumulated at such Government settlements. And it was also "unanimously" declared and agreed by the Departmental Assembly that "the missions, when their lands had been sold, should thereafter hold the character of pueblos or villages." (Ib., 37, sec. 5.) By a decree of the Departmental Assembly of May 28th, 1845, it was ordered that the Government "call together the Indians of the missions of San Rafael, *San Francisco*, (called in the decrees by its other name of 'Dolores,') Soledad, San Miguel and La Purisima, which are abandoned by their Indians, by a proclamation," which shall give them one month to return "for the purpose of occupying and cultivating," and informing them in such proclamation that "if they fail to do so, said missions will be declared to be without owners, and the Government will dispose of them." It will be remembered that the deputation, with Figueroa, had taken the ground that the lands of these missions belong to the Indians. Said decree further provides "The Carmello, San Juan Bautista, San Juan Capistrano, and San Francisco *Salano shall be considered as pueblos, which is the character they have at present ;* and the Government, after separating houses for the church, etc., "and court-house," for these particular *pueblos*, "will proceed to sell the remaining premises at public auction." (Ib., Sup., 38, 39.) Thus, San Francisco is expressly called a mission, in section 1 of that decree, and is not mentioned in that decree as being a village at that time, but is expressly called a mission, and no provision is made for reserving a court-house, or any other building, for San Francisco. This also is shown in the most positive manner, that no distinction existed in those places which were pueblos and those which were missions as to the title in their lands. And by another act, passed by the Departmental Assembly on the 28th of October, 1845, the premises of five "*pueblos*" so expressly and officially called, were, after reserving a court-house, school-house, etc., again expressly required or directed to be sold by the Government, at public auction. Thus, proving conclusively that such pueblos had no ownership in the lands about them, not even *in the public buildings existing in them.* Their very *court-houses* were allowed to them by these orders of the Government, made not eighteen months prior to the acquisition of the country by the United States. (Miss. Exhib.) And it will be remembered that in the law of the Mexican Congress of August 17, 1833, for colonizing the lands of these settlements and establishing town governments over them, provision was expressly made to allow each pueblo or local government to have such of the mission buildings as they should require to use for "a town-house, primary school, public establishments and offices." (Art. 7 of said law.) And it will be observed that in the decree itself of the Departmental Assembly, the same places which are admitted to be pueblos, are called indifferently "pueblos" and "missions." (Ib., p. 39, art. 2 ; p. 40, arts. 2 and 4.) By that decree of the Mexican Government of California, passed just eight months and nine days before this country passed to the United States, it was expressly provided that *the entire town of San Francisco should be sold by the Government at public auction to the highest bidder*, and that the sale should take place at Monterey, on the 23d and 24th days of January, 1846, and that "the total proceeds of these sales shall be paid into the Departmental treasury." (Ib., 40, 41, arts. 1, 4 and 6.) Prior to the time fixed for the sales, viz: on the 14th of November, 1845, the Supreme Government at Mexico, ordered the "immediate suspension of these sales until the determination of the Supreme Government." (Ib., pp. 47–48.) But this order seems to have been but little attended to.

We thus find the truth to be, that during the Spanish and also the Mexican Government over this country, the *title* to the lands in California where towns had been established, *including our own town of San Francisco*, was just the same as it was to lands where towns had not been established, *i. e.*, in the nation. And we find, what this Court itself has expressly decided since the Cohos and Roisin decision, (Nobile vs. Redman, 6 Cal., 325), that the missions of California were actually neither more nor less than regular Government establishments, whose property and management had to be accounted for to the Government; and that not only their ungranted and uncultivated lands belonged to the Government, but the very fields or "cultivated lands" which their inhabitants had held in common; and the very buildings on the ungranted lands of such pueblos or towns were all and everywhere, including San Francisco, the property of the nation. I have been as candid in this inquiry as I could have been, had it been prepared without any reference to its use in this judicial controversy. The official orders, decrees and correspondence, and all Government acts concerning San Francisco, show and prove that it was a mission, just the same as Santa Clara was then a mission. Indeed the fact is so notorious, that to this very day it is called "the Mission." And there is no more ground nor excuse to question that it was a mission July 7th, 1846, than to question that Santa Clara was then a mission, or, to question that Sacramento, to-day, is Sacramento. We do not make this statement with any idea of denying that it was also a "pueblo," for it was also called the pueblo of San Francisco. And none but men who seem "incapable of overcoming the delusions of fancy" can possibly suppose, that whether it was a pueblo or not, or whether there existed there a Corporation or not, has any more to do with a question of a title to lands, than the question whether there was a man there or not. Of course there was a "*pueblo*" there, because a pueblo is a pueblo just the same as a town is a town, or a village is a village. And the existence of a village or pueblo under "the laws of Mexico," has just as much necessary connection with the *title to lands*, and of itself produces just the same influence to *pass a title* to lands as does the establishment of a village, town, or city under our laws, or the laws of any civilized country, *i. e.*, none whatever. And we have just seen that the Mexican authorities "unanimously" offered for sale the lands of the *pueblos just the same as of the missions.* But the reason why I insist that San Francisco was a mission is, because it proves that the case of Nobile vs. Redman, 6 Cal. Reports, is inconsistent with Cohos vs. Roisin, and virtually overthrows it.

PART II.

HISTORY OF LAND TITLES IN SAN FRANCISCO.

Let us now confine our history of titles in these old settlements, to San Francisco alone. On the day this country passed to the United States, there were three small adobe settlements within the limits of the present city and county of San Francisco. One was the Mexican garrison (Presidio) at Fort Point, established by Spain, on the 17th of September, 1776. (Record in this case.) The soldiers of three successive nations have *continually* occupied the lands in and about that garrison, *for National purposes*, from that remote period down to the present moment. The first and immediate object of that garrison seems to have been, to protect a town to be established near it by the Government, as may be inferred from the instructions of the Viceroy, dated Nov. 12th, 1770. (U. S. Exhib., No, 1, "S." p. 1. Those directions required the Commander of an expedition "to examine by sea and land, the port of San Francisco, situated to the north of Monterey, for the purpose of establishing a mission at that point, *in order that a place so important may not remain exposed to foreign occupation*." (Ibid.) Immediately after the garrison (Presidio) was prepared for defense, viz.: on the 9th of October, 1776, the missionary settlement, so ordered to be established by the Government, from the said motives of Government policy, was with considerable pomp and superstition duly founded at the same place where it still continues. (Record in this case.) The name of that settlement then duly given and proclaimed, was that of the father of the order of priests, who had the spiritual charge of all the missions in California—they called it "The Mission of Our Father San Francisco."

That mission (in after years frequently called "Dolores") and the said military garrison, were *the only inhabited places, within the boundaries of the present county of San Francisco*, during the period of sixty years after the time they were first established. Not *until the 3d day of July*, 1836, (only ten years before the conquest, and two years after the celebrated order for an Ayuntamiento had been made), was there a human being residing where the present city is chiefly erected. On the 3d of July, 1836, Jacob P. Leese, of Monterey, (still living), built a house at Yerba Buena, which was the first dwelling ever made at that place, and he was the first human inhabitant who ever resided there. (Ev. in City Case, 30, 54.) Yerba Buena was about two miles north-east of the pueblo or mission of San Francisco, and some four miles easterly from the garrison (Presidio). The fact is notorious, that the place was never known by any other name than Yerba Buenà, until since the conquest.. The fact is notorious, that no Ayuntamiento ever met at Yerba Buena, except the Ayuntamiento of

Americans elected there by the crowd, in 1849, and then supposed by new comers to be acting under some Spanish law, for the reason that they called their council by a Spanish name. The fact is now notorious, that the Ayuntamiento (authorized by the Resolution of November 3d, 1834), existing at the presidio, at first, and afterwards at the pueblo of San Francisco, (*the present mission Dolores*), was officially abolished in 1839, (Ev. in City Case, 46, and Sup.), and that no law or legal authority existed for electing any such body at any time afterwards, and that no such body had at any time been elected or been in existence, within fifty miles of San Francisco, during a period of at least seven years next before the conquest. In 1841, the boundaries of the partido of San Francisco were duly established by the Departmental Government of the Californias, and probably for the last time. They seem to have been established by the Departmental Junta, in compliance with an express law to which they refer. By that legal decree, the boundaries of the San Francisco of which "*the establishment of Dolores*" is expressly named as *the Capital*, were "the anoyo de las Llagas" on the south, and the "*northern* frontier of Sonoma" on the north. (U. S. Ex., No. 1, "W.," pp. 11 and 12.) These boundaries seem to have included over one-third of the entire limits of this State. The *Partido* of San Francisco for which the Ayuntamiento, under the said order of November 4th, 1834, was organized, included the same boundaries, unless on the south. In 1839, it was called "the frontier of the north." (Land Com. Ex., "O.," p. 29.)

The fact is notorious in the Mexican history of our State, that when the Ayuntamiento was organized, which did exist at the garrison of San Francisco in 1835 and 1836, and at the pueblo or mission in 1837 and 1838, (Ev. in City Case, p. 46, etc.), it was not organized for the government of the garrison, nor for the government of the mission or pueblo of San Francisco, but for the government of the *partido* of San Francisco. And the "second Alcalde" of that Ayuntamiento elected under said order of November 3d, 1834, was elected from the east side of the Bay, in the limits of the present county of Contra Costa, where he continued to reside after his election. (Ev. in City Case, pp. 10, 42, 43, 45, 46, 61, 62, and Exhibits 5 and 10.)

The fact is notorious, *and has never been controverted by any evidence whatever*, (and never can be,) that the mission of San Francisco, or of Dolores, is the pueblo of San Francisco, and the only pueblo of San Francisco which ever at any time existed in that county or in this State. (Ev. in City Case, pp. 11, 13, 14, 38, 39, 45, 46, 47.) It is also a further material fact, proved by the face of Mexican grants of lots at San Francisco; (Land Com. Ex. "O," pp. 41, 42, 43, 44, 45; Review in this case); by the oaths of Mexican Governors and Mexican local officers who made such grants of lots at San Francisco; (Ev. in City Case, 38, 40, 44); and by the oaths of some of those who received such grants; (Ev. in City Case, 55); and by the express orders of the Departmental Government of California of Sept. 22d, 1835; (U.S. Ex. "W.," p. 6); and which orders were modified by Government in 1841, as to the extent of the lots to be granted by the local officers; (Land Com. Ex. "W.," pp. 41, 42, 43); it is proved by all these evidences, and uncontradicted by any evidence, that the local officers of San Francisco, under Mexico, did not grant or pretend to grant any lots of land in the limits of the present county of San Francisco, in virtue of any title in the town or pueblo of San Francisco; but on the contrary, that every such grant was made under and in virtue of the *Colonization Laws of*

Mexico, authorizing donations of the public lands, and the laws of 1833, directing the missions to be colonized with the instructions and regulations of 1834, under such laws; (U. S. Miss. Ex., pp. 1 to 11); and that the authority of said local officers to grant lots at San Francisco and at the adjoining place, called Yerba Buena, was derived solely from the Governor and the Departmental Assembly, who delegated it to them during pleasure, (Ib., Sup.), the Mexican Governors themselves deriving their own authority to grant lands in towns from the Colonization Laws of Mexico of 1824, and Regulations of 1828; (See Articles 1 and 15, of the latter.) The last Governor of the Territory of California made grants of lots at the pueblo of San Francisco, down to as late as the 6th of May, 1846, and at the pueblo of Yerba Buena down to the 29th of the same month. (Official Rep. of City Com'rs., 1851; Wheeler's Land Titles, 26, 27.) No evidence is shown in this record, and none has ever been seen elsewhere, showing that lands were ever surveyed or marked off to any town in that county, prior to July, 1846, even for commoners, much less for a grant to a town, even supposing there had been a municipality there capable of holding a title to lands. (Ev. in City Case, 39, 40, 63, "D.") And it is an amazing fact, that the corporation of the city of San Francisco, completely infatuated by speculators, has paid out at least over $100,000 to establish a title to lands, against the titles and the interests of all its own inhabitants, excepting the owners of less than one hundred lots, who had possession and held under *Mexican* grants made prior to July 7th, 1846. And so extraordinary was the public insanity which had seized that community on this subject, that without hesitation that city purchased, at an enormous price, a smoked document, that excited the exultation of the then flourishing house of Palmer, Cook & Co. That document is Exhibit No. 18, in the Record in this case. (V., also Ev. in City Case, 11 and 12.) Its object was said to be to establish the *southern* boundary of the lands of the "Pueblo of San Francisco." The object it did tend to accomplish was, to establish the northern boundary of the Santillian or Bolton grant. Extraordinary as it really is, that boundary line so established at the cost of the city, completely excluded and shut out the lands and the entire settlement of the pueblo of San Francisco, and ran over a mile to the north of it, and included within it only the garrison or presidio of San Francisco, and the new settlement of *Yerba Buena*. (Ev. in City Case, pp. 10, 11, 20, 29, 32, 39, 42, 48, 50, 51, 54.) That smoked document, having nothing whatever to do with any title in the city, and manifestly manufactured for other purposes, was apparently quite well proved in the City Case, to be a forgery, by the oaths of Gov. Alvarado, Gen. Castro, and William E. P. Hartnell. (Ibid, 34, 41, 47.) Two persons have since stated on oath, and another published a card, in the newspapers of San Francisco, stating when, how, and by whom, that document was procured. I do not know that any one now regards it as genuine. When it was offered in evidence in this suit, the counsel who tried this case for appellants produced their witnesses, and offered then and there in Court to prove it to be a forgery. And the judge who tried this cause, as this record proves, actually refused to allow the proof to be made! And an exception to this having been duly taken, ruling, it will of course be necessary, so far as this case goes at all events, to regard it as false and unproved.

The site of the mission or pueblo of San Francisco (as is shown in the Record in this case), was selected with great care, and after careful examinations at all points about the bay. And that oldest town in the county may yet become the heart of the new city. But Yerba Buena was the most convenient for landing and receiving goods from ships, as the shore then and there was, the town increased most rapidly. That San Francisco would become a great city had been predicted eighty years prior to the conquest. (Record in this case.) When Yerba Buena, the recent and new settlement, became the property of the United States, it is said by disinterested spectators to have contained "about half a dozen houses," and in all, perhaps, one hundred human beings. (Reeves' Tour of Duty, p. 52; Evid. in City Case, pp. 31, 41, and passim.) The American flag was no sooner raised in token of the conquest, than all knew it would never again be lowered, and a scene of lawless speculations in lands almost immediately commenced, which is the sole origin of all the confusion and difficulty about titles to lands in that city, which has since ensued. The confusion and injury of titles was wholly unnecessary. It was occasioned by the gross error of supposing that individual or local lawlessness, if persisted in, will finally become lawfulness. Instead of continuing the Mexican system of disposing of the lands, and giving possession of one lot to every citizen who came, and on condition that if he did not take actual possession and inclose it, or put a house on it, in a fixed time, another might receive possession of it; a totally different system was adopted. It was determined by the few Americans in the country in 1846, that the persons to be elected Justices of the Peace, or Chief Magistrates, should make absolute grants of lots. At first, it was expected that some regard would be paid to the Mexican law, and that not more than one lot would be granted to any one person. It was found that the Mexican Justice of the Peace (Juez de Paz) had continued to make grants down to as late as the 22d of June, 1846, but that only one lot had ever been granted to the same individual. The grants which had been made at the pueblo of San Francisco and at Yerba Buena under Mexican authority were as follows, and by the following officers: In 1836, three; one by the Governor, and two by the Alcalde, under the special direction of the Governor. In 1837, three by the Alcalde, under special directions from the Governor. In 1838, three; two by the Alcalde, and one by the Governor. In 1839, six; two by the Alcalde, one by the Prefect, and three by the Governor. In 1840, ten; nine by the Justice of the Peace, and one by the Governor. In 1841, none. In 1842, four by the Justice of the Peace. In 1843, sixteen; fifteen by the Justice of the Peace, and one by the Governor. In 1844, seventeen; fifteen by the Alcalde, and two by the Governor (Micheltorena). In 1845, thirteen; eleven by the Justice of the Peace, and two by the Governor. And in 1846, nineteen; sixteen by the Justice of the Peace, and three by the Governor. All the grants of lots ever made in the limits of the present city prior to July 7th, 1846, seem to have been less than one hundred and twelve.

The Americans determined to grant lots in about ninety days from the time they first occupied the city. And in 1846, during November and December, they granted thirty-four lots, "by virtue of the authority in them vested," which was equally good for the granting of cattle as for granting lands. In 1847, they granted five hundred and forty-two lots. In 1848, they granted three hundred and ninety-two lots. And in 1849, they granted nine hundred and forty-nine lots. Meantime the crowd in San Francisco had chosen a number of persons (under the advice of Gov. Mason, I think), to act as a Town Council, or Board of Trustees, and they wisely called themselves an "Ayuntamiento." The mere name of that self-constituted body, absolutely served the ingenious purpose of protecting its own members against the necessity of explaining their powers, or having any knowledge of them, whilst our countrymen, newly arriving in a strange land, were wholly subdued by its mysterious orthography and unquestioned antiquity. Under the authority of this Ayuntamiento, the slow progress of granting lots on petitions was soon dispensed with, and they began to put them up at auction and knock them down in whole platoons to the highest bidders, to whom the Chief Magistrate (called an "Alcalde") would make deeds. And in this manner, by the 5th of January, 1850, our enterprising countrymen had made deeds to each other, for three thousand one hundred and fifty-three fifty vara lots: equal to twelve hundred acres of land, exclusive of streets! And all this land is in and around the very center of the present built up city. So far from paying any attention to any law, or shadow of law, they granted not merely at auction sales, but on petitions prior to the introduction of auctions, as many as four, and eight, and ten, and twenty, and even as many as sixty fifty vara lots, in the heart of the city, to the same individual. (See Lists in Wheeler's Book, Land Titles.)

Now, on the outside and far removed from all these transactions, beyond Larkin street on the west, and Johnson street on the south-west, beyond which streets these speculations never extended, the lands were peaceably but actually settled upon, in 1847 and in 1848; but nearly all of it, in 1849 and 1850. The actual settlers on those lands were usually poor; they were mostly gardeners, brickmakers, milkmen, poulterers, butchers, and other laborers, carrying supplies to the city. And in not over two or three instances, so far as I know, were any such possessions taken and continued by mere speculators. And, in but few instances, did their possession include over twenty to fifty vara lots in the city limits. Why are such settlers worse off, because they did not obtain void papers for their lands? I confess I know of no reason why they should be. Was there any law whatever against their taking such possession? None whatever. Were the rights of the town interfered with by their taking such possession? Not at all; for we have already seen there were no town rights to be disturbed by such possessions. Were the rights of any individual interfered with by such possessions? Not at all; for when such possessions were generally begun, even the Limantour grant and the Bolton grant had not been heard of; and no private valid title was interfered with so far as was known, or could be ascertained. Was any principle of law or of equity violated or infringed by taking such possessions? Not at all; for even Chief Justice Kent declared, concerning a person who had taken possession, without title, of a lot in the heart of the city of New York, that "a peaceable entry upon land, apparently vacant, furnishes, *per se*, no presumption of wrong. The benign and legal intendment is otherwise." (Smith vs. Burtis, 6 J. R., at p. 218.) We have seen that beyond all rational controversy, the title to all the lands in and about San Francisco, which had not been previously granted to individuals, passed to and became the property of the United States. We shall see that the laws of the United States, as they have existed for the last fifteen years, not only authorize persons to take possession of its lands without title, but require them to be in possession, if they wish to be preferred over all others in obtaining its title. So far, then, from their being any just or legal ground for this Court to have ever interfered for the protection of inside speculators, and for the ruin of the outside speculators or possessors, the latter had really the strongest claims upon the Court, for the reason that they have never violated the laws, but have always asked for the protection of them whilst the former commenced in the school of lawlessness, and were the grand original and powerful causes of a most pernicious public sentiment, *i. e.*, that the laws cannot always accomplish justice, as well as other means.

The lands in the heart of the city (where one foot front is worth acres of interior lands) were gravely "granted" to a few persons, in the manner I have mentioned, and those who hold the outside lands are holding them in precisely the same way and by precisely the same tenures, excepting only that they do not hold these void papers made by Americans amongst each other. Not one of these void papers, however, has ever been made against their lands. They are outside of all such titles, and are wholly free from them. The outside owners do not interfere at all with (so called) Alcalde titles, nor do the (so called) Alcalde titles interfere with them. Both can be let alone. For many years those Alcalde titles have been regarded by all just men, as equitable titles. The condition of the country at the time rendered their creation excusable, and if they had been made with the obligation to inclose or take possession of the lots, the laws need not have been violated and would always have rendered them secure. And owing to the fact that they were created over the whole heart of the city, and that two-thirds of the city lot holders held under them, they became popular titles. And they ought to have been confirmed by an Act of Congress, and probably would have been had the citizens generally chosen to take that course. In December, 1850, these American Alcalde titles came before this court for judicial decision. In that case the ground was taken that the lands in the city belonged to the "pueblo," and that consequently its chief magistrate had the right to grant them. And I have been assured by one of the Justices then presiding that tremendous efforts were made by outside persons to induce the court to so decide. But he was firmly of opinion that an immediate and firm recourse to law and to the necessary legislation was the only fit and wise remedy. In this view he was greatly strengthened by a private opinion on the subject, which had been obtained from the Hon. John A. Campbell, of Alabama, then regarded as "one of the first lawyers in the Southern States," and at present probably the best acquainted with the Spanish law of any of the Justices of the United States Supreme Court. This court then decided what we have clearly seen the law to be, that the lands in the county of San Francisco, the same as in any other county which had not been granted previous to the conquest, "still remained a portion of the public domain." (See Woodworth vs. Fulton, 1 Cal., at pp. 305 and 306.) So far as I have ever heard, the intelligent members of the Bar of San Francisco then and now admit that decision to have been an honest and fearless adherence to the laws. The next great event in San Francisco was the Vigilance Committee of 1851. Instead of resorting to law where immediate and just relief would have been offered by legislative aid, a miserable system of denunciation was resorted to. And by the sheer power of wealth and denunciation, the pueblo title came at length to be generally considered as a thing which must and should exist whether it did or not. And I think an honest conviction that it did exist, at length prevailed. And the final determination of popular opinion was, at one time, that all the lands in the charter limits ought to be sold and the proceeds applied to pay off the city debt. It was not proposed to sell inland lots illegally acquired, nor to sell any by authority of law, but by virtue of the lands being the property of the city corporation. And it was probably owing to these opinions and determinations that a new set of speculators set to work and sold every foot of lands in the city limits, on executions against the city, and now claim that they own the "pueblo title" in virtue of their Sheriff's deeds. In 1853 Congress legislated on the subject of titles in all the towns in this State, to which I will refer. But after ample provision was made by Congress, and late in 1853, this court declared that the said "pueblo title" did exist. And in 1857, four years afterwards, this court decided that such Sheriff's deeds do convey a title mainly on the ground of the former decisions of this court. It is said that this court is bound by such former decisions. I shall hereafter submit that this court is bound by nothing but the laws, and that it does not possess the constitutional power to administer its own decisions when known and admitted to be in violation of law and of legally acquired rights. I now respectfully submit that all the former opinions of this court, which are now claimed to be *stare-decisis*, have been already reversed. It is well known to the court that such decisions have been continued on the strength of the decision in Cohas vs. Roisin. During the whole time that the Cohas vs. Roisin decisions were being made by the former members of this court that the city owned the lands, the identical city against whose interests those decisions were made was a private litigant in the courts of the United States, in a suit brought by itself to recover against the United States the identical lands which this court was deciding to belong to it.

That suit, brought by the city itself to try the truth or falsity of its title to lands, was prosecuted regardless of expense and in a manner which, in my opinion, was as foolish as it was reckless and immoral. As a specimen of its conduct, it could find no legal evidence that the settlement at San Francisco had ever had any fixed or defined boundaries. That difficulty was suggestive to its pueblo title advocates. And the result was the payment of $7,500 for the Zamerano Document, (No. 18 of the Exhibits in this case), a notorious forgery, to which I have already referred. And by that forged document alone they established one boundary line, and the Land Commissioners, with no evidence whatever, so far as I know, established the other boundaries. The pressure brought to bear on the Board of Land Commissioners and the United States District Court to confirm the "pueblo claim" of San Francisco, no man knows, or ever can know, who was not watching its progress. Every effort short of bribery was resorted to. A pervading and senseless madness was created in the public mind against bringing the titles to lands in the city under operation of the laws of the United States. Any law was preferred except law. Horrible pictures were drawn of the consequences of defeating the "pueblo title." It was declared they would, in such case, be governed by no laws, but would be compelled to resort to force "to defend property." And every man who had the common sense to advise that land titles in San Francisco would be sooner settled if they would place them at once on law and fact, and not seek to quiet them on errors and known falsehoods, was declared to be a "squatter" and an "enemy to the city." But notwithstanding the tremendous efforts continued for three years and a half to procure a decision in favor of their "pueblo title," it was found so utterly baseless that the Commissioners were forced to reject it, as just such claims had always been rejected before in the countries acquired by the United States from Spain and from France. Although to allay the public excitement, as I suppose, for I cannot conceive of another reason, they did decide that the United States *intended*, by the Act of 1851, to give a title. It may be conjectured what the outside pressure was when the Board rejected the claim and confirmed it on a title derived from the United States. This part of the decision I will refer to hereafter. Thus, in January, 1856, by the unanimous decision of the United States Court of Land Commissioners, all the Cohas and Roisin decisions made by former members of this court, *so far as title to lands in the city derived from Spain and Mexico is concerned*, were judicially ascertained and declared to be unfounded in law and unsupported by evidence. (See the Decision.)

The conclusion which the United States Board of Commissioners unanimously agreed to after three years' investigation by them, and with the aid of all that was in human power to do for the title, and so far as any right or title "derived from the Spanish or Mexican Government" is concerned, is in these words, taken from their decision and immediately preceding the decree entered by them in favor of the city of San Francisco, namely: "1st. That under the laws of Spain and Mexico, *no right of property in lands* assigned to pueblos or towns *was ever vested in those corporations*, by which they could alienate or dispose of them in any manner; but such arrangement only conferred a right to use and occupy them in the manner prescribed by the laws *under the direction of the superior authorities.* 2d. That the right to alienate or dispose of such lands whenever exercised by the municipal authorities, was by virtue of powers specially delegated to them for that purpose by the King or Nation, *in the same manner as the authority to dispose of other portions of the public domain* was conferred on other functionaries specially charged with the subject." Immediately after these conclusions which, as we have seen, are unquestionably correct, the Board of Commissioners proceed to render a decree, *not* in virtue of any right or title derived from Spain or Mexico, but in virtue of a title derived from the United States. And to do this they proceed as follows, in brief: "1st. There was a town established under Mexico, on the site of the present city; 2d. That town did exist on the 7th of July, 1846; 3d. Lands were assigned and laid off for the use of the town and its inhabitants, and 'the boundaries of said lands derermined;' 4th. 'The boundaries so established are those described in the communication from Governor Figueroa to M. G. Vallejo, dated November 4th, 1834, a copy of which is filed in this case, marked Exhibit No. 18, to the deposition of Said M. G. Vallejo.'" (This boundary, and the only one shown, is the now notorious forgery to which I have referred.) Next after these findings, the court used these words, which are the last words of the decree itself: "These conclusions bring the case, in our opinion, clearly within the operation of the presumption raised in favor of a grant to the town *by the 14th section of the Act* (of Congress) *of the 3d of March*, 1851, *and entitle the petitioner to a confirmation*." And on the strength of this title, supposed to be derived from *the United States*, and on *a United States title only*, did the said Board of Commissioners render a "decree of confirmation" in favor of San Francisco.

That decision of the United States Commissioners was simply "affirmed" by the United States District Court for the Northern District. And that decision *establishes the United States titles* and *denies any other.* Can it be pretended that the Cohas and Roisin decisions of this court are binding on the United States? Can it be pretended that the United States has acquired no title to any lands in any of the Mexican towns of this State, because it has become "*stare-decisis*" in this court, that all such lands belong to the towns themselves? This court could not defeat a private title to lands by deciding in a hundred suits that no such private title existed, provided the owner of the private title was not a party to any one of such suits. The United States was never made a party to any of the suits in which this court undertook to destroy its title. How, then, could this court destroy its title without ever giving it an opportunity to be heard? Besides, has this court jurisdiction to try and decide on the validity and the extent of the original titles to lands acquired by the United States from Mexico by treaty? Where a private grant to lands is shown to this court and proved by legal evidence to be a valid and perfect private title, this court may eject the United States or persons claiming its title, because such evidence is made by law conclusive proof in all courts that the United States had acquired no title in such lands. But were this court to undertake the same thing without the production of any grant at all, and in the absence of legal evidence to establish a private title, it certainly could not make its decisions binding on the United States, because there would then be no evidence against the title of the United States. If this court, by the simple process of making decisions and repealing them, could take away or affect the title acquired by the United States to the lands in the limits of our towns, it would then, as a matter of course, be competent to do the same thing with regard to its title to lands throughout the State.

It seems plain that any decision of any court on the question of the existence of a private title to lands, when expressed without any trial and without any evidence, to ascertain the existence of such a title, is not a judicial decision, but is a mere avowal of opinion, entitled to great respect considering its source, but binding neither on this court nor on any body. And it certainly cannot be binding on a nation, (whose rights this court cannot determine), after its own courts, in a suit brought by the land claimant itself, have judicially ascertained there is no such title as that declared by the such decisions of this court. But the Court of Land Commissioners, having rejected the pueblo title, and yet entered "a decree" confirming lands to the city "north of the Vallejo," or Zamorano Dourment line, has, instead of clearing away difficulties, tended to prolong the confusion.

By reference to the law of Congress, it will be seen that "the reasons on which the decree is founded," are expressly required to be given, and to be certified to the District Court, (section 8.) No decree could be certified to the District Court, and therefore none could become final, unless accompanied with the finding or reasons of the Court of Commissioners. Being made and certified to the District Court, as required by the act of Congress, Mr. Attorney General Cushing, evidently ignorant of the subject and ignorant of the fact that the decree confirmed the garrison of the United States at Fort Point to the city, ordered the appeal in the case to be dismissed. And, consequently, the *decision* of the Board of Land Commissioners stood affirmed, and a decree was so entered. The city, however, has since taken an appeal to the Supreme Court of the United States; and, therefore, there is not at this time any final decision or decree in the case. And, I submit, the decree which was entered, that the United States had or would confer a title on the city to the lands described in the decree, was entered without any authority of law. Such decrees being designed to blight the prosperity of our oldest settlements, by covering their lands with a cloud of title which may be long continued, renders it not only excusable, but right and proper, that this court investigate the authority under which they have been rendered. It is not the courts of the United States, but this court to which our people must finally look for protection in their titles to property.

This court is, of course, bound to know that the Court of Commissioners was a tribunal created for one single object, and was destitute of any jurisdiction beyond that object. And that nothing could be done by that tribunal nor by the courts of the United States, under the act of Congress of March 3d, 1851, excepting only to carry out that object. That object was, and is expressly stated in the law, to be "to ascertain and settle private land claims in the State of California," (sec. 1,) which existed in favor of "each and every person claiming lands in California by virtue of any right or title *derived from the Spanish* or *Mexican* Government," (sec. 8.) Excepting, however, and "the provisions of this act shall not extend to any lot of any kind in any city, town or village in said State, existing in 1846," (sec. 14.) *All holders of city, town or village lots were exempt from their jurisdiction.* And all lands in the State of California, known as the lands of the missions—those held by civilized Indians, "and those occupied by Pueblos or Rancheros Indians,"—were not to be subject to their decisions, the law making it their "duty" to perform a totally different service concerning all such lands, viz: it was made the express duty of said Commissioners to merely report to the Secretary of the Interior the tenure by which all such lands were held, (sec. 16.)

No law could seem more plain, clear and explicit than is the act of Congress itself of March 3d, 1851, against any court, or authority therein mentioned, deciding or entering a decree of confirmation in favor of a title not derived from either of the governments, to which they are by said law specifically confined. It is not improbable that the United States Supreme Court has been advised of the extraordinary proceedings of the United States tribunals in this State, concerning the lands occupied by the old missions and pueblos of this country. At all events, at the last term of the U. S. Supreme Court, it approved the following language: "The matter submitted by Congress to the inquiry of the U. S. Land Commissioners and to the courts of the United States, under the act of 3d March, 1851; are the claims by virtue of any right or title *derived from the Spanish or Mexican Government, and it will be at once understood that these comprehend* ALL 'private land claims' to lands in California." (The U. S. vs. Fosset, 1 Howard.)

Now, the decree of the U. S. Board of Commissioners, "with the reasons on which it was founded," as the same was certified and is now of record in the U. S. District Court for the Northern District, *proves on its face* that no decree of confirmation should have been rendered. The Land Commissioners expressly decided, without a dissenting voice, that the city of San Francisco had no title "derived from the Spanish or Mexican Government." That decision, I submit, is all they were authorized to render in any case. But, after unanimously deciding that the city had established no claim which they were authorized to investigate, they then render a decree of confirmation in favor of a city on the ground that it had acquired or should acquire an American title, with which class of titles they had nothing to do. Now, I insist, this court is bound by the decision, if it were final, so far as it applied to the case they were authorized to decide, *but no further.* In rendering a decree that San Francisco had acquired or may acquire a title from the United States, their action, I most respectfully submit, exceeded their authority.

The eighth section of the law expressly confines their jurisdiction to claims "derived from the Spanish or Mexican Government. The eleventh section enumerates what laws and rules shall govern in deciding on the validity of claims brought before them, and does not include acts of Congress, nor use any terms by which it can be inferred, that it was intended any title from the United States should be passed upon. The thirteenth section declared that all lands the claims to which they should reject should be deemed part of the public *lands of the United States*, which is evidence of the intention of the law to ascertain what lands belonged to the United States, not what lands the *United States* had granted or confirmed. It was, therefore, plainly without any authority to pass upon titles not derived from the Spanish or Mexican Government. And any decision by it in favor of any other title is simply extra-judicial and intemeddling, and of no binding force or effect on the rights of any individual, much less those of this court. And when, in addition to this, we see the act of Congress making other provision for lands in the missions, (sec. 16), and excluding from all interference the mere lots claimed in the cities, towns and villages, (sec. 14), and still further see that no final decree has yet been rendered in the case of San Francisco, there seems to be no actual and legal difficulty in that quarter.

Now, moreover, there is nothing in the decision of the Land Commissioners to controvert the fact that the lands about San Francisco were public lands and passed to the United States, so far as they had not been granted to individuals by Spanish or Mexican authority. The finding of the Commissioners so proves, and so far from their decree contradicting this fact, it is solely based upon it, and the decision of the Commissioners so expressly shows and proves. This important fact is clear and certain, that the lands about San Francisco *were public lands of the United States on the 3d of March*, 1851. And the thirteenth section of said act of Congress expressly declares that "all lands, the claims to which shall have been finally rejected by the Commissioners in the manner herein provided," shall be deemed, held and considered as part of the public domain of the United States. Now, we submit, conceding it to be true, that the lands were part of the public lands of the United States, then this law of Congress declaring they shall be so held and considered, is binding law on this court, and renders it impossible to disregard it, in order to adhere to any former opinion of this court, in opposition to the title in said lands being in the United States.

As to any former decisions against us, and in favor of Peter Smith titles being rule of property, we deny that they are a rule of property, and defy the respondents to the proof. They are not a rule of property. They are a rule against property. Properly speaking, no uplands are held under that title. If any body holds under it it is an exception to the rule. The only case in the county of San Francisco in which a lot above high-water mark is held by virtue of the Peter Smith title *only*, so far as I have ever heard or known, is the lot acquired by the decision and judgment in the case of Welch vs. Sullivan. And as a just rebuke against seeking to *maintain* and *enforce* land titles which really do not exist, it may be stated that since this court ejected Sullivan in that case, a new title has been confirmed to the same lot in favor of claimants under Shereback. If the question is to be determined on the inquiry whether the decisions of this court favorable to Peter Smith, favor more property than they injure, then let the issue be tried and the proof demanded. We deny it in toto. And it is a plain proposition that if such decisions of this court cannot be binding on the United States, and be made sufficient of themselves to deprive the United States of all right and title in the lands, they cannot be made to produce such an effect against persons holding title under the United States.

PART III.

THE TITLE OF THE UNITED STATES HAS BEEN CONVEYED TO AND VESTED IN THE PRESENT OWNERS IN POSSESSION.

I now beg leave to humbly submit to the court, not as necessary to the defense of these appellants, but as part of the history of the subject matter, that these appellants do hold the national right to the lands, as well as the city title whatever that may be. We claim that, by means of the joint exercise of the legislative powers of the United States and of this State, all the title acquired by the United States to the *locus in quo* has been actually and legally passed to and vested in these appellants. In all, I say, I am well aware I am giving no information to this court, but only recalling to the recollection of your honors what, I trust, you will admit to be correct, or find to be so on examination. I make this remark not only with reference to what I have yet to say, but also with regard to all I have said. The United States has at last a settled, well defined, liberal and impartial system for disposing of its title to lands. This system has almost entirely originated and been perfected since 1840, and it seems to me it is not only wise but eminently just for the courts of new States to pay great attention to the principles of these new laws and their application to old principles, and to second and further the liberality of their provisions on every just and proper occasion. Because it seems manifest that there can be no policy more precious to a free State, or more consonant with national justice, than the ownership of its soil by the greatest number of its citizens. The present system of the United States is almost a free donation of its lands in fixed and limited quantities, and under regular plats and surveys, to all its citizens who will peacefully and without injury to the legal rights of others reduce them to actual possession and use. It is a policy which, more than any other, perhaps, brings inhabitants into new States, insures their permanency, contentment and means of support. Whilst mere speculators in titles to lands are, on the other hand, a useless and injurious class, who need neither take possession, nor cultivate, nor improve, nor even be residents in the country.

Under the present land system of the United States, all violent proceedings by the United States against "squatters" on its lands, and all sales of its lands in large quantities to speculators, have ceased. Its unvarying legislation for fifteen years, and its settled land policy seem to fully warrant the proposition as a fixed, settled rule of law, that there are no *vacant* lands, the title to which is in the United States, which its citizens may not lawfully take possession of and hold in small quantities, until disposed of by the United States, and that at the disposal of it by the United States, those in possession will be preferred over all others, excepting only where there may be some law of the United States expressly *prohibiting* settlement on some particular land. Under this rule of law, clearly sanctioned by the spirit of the present land system and by the legislation of Congress in behalf of residents on its lands, the mining lands of this State are now lawfully held and dealt in as private property. Its present land system goes further; it invites its citizens to take possession of its vacant lands. And where the lands are not expressly reserved or exempted, it gives the possessors the guarantees of express laws—that if they will give notice of their possessions to the Government, where a notice is required, and comply with the reasonable regulations which the laws prescribe, they who will first acquire and afterwards continue the possession, shall eventually receive the title of the United States at a fixed price per acre, no matter how valuable it may be, and no matter how much greater sum may be offered. It is, therefore, clear that the right acquired by citizens on the lands of the United States, under the preemption laws of the United States, is a higher right than mere naked possession. By compliance on their part with the laws and offers of the Government proprietor, they acquire an equitable right to the lands, with a public agreement made by express law and not to be broken without public perfidy, that they shall receive the legal title to the land at the stipulated price per acre. This agreement is tendered to all citizens, and is made with all who comply with the conditions expressed in the laws. The possessions of such persons not only create in their favor the usual presumption of law that they are the owners, but it is notice to any one seeking to obtain the title of the United States, of an express agreement by the Government to convey the title to them. By no government in the world, perhaps, are the possessors of property more favored than by the government of this State. Even possessors of lands belonging to the public and expressly reserved by the laws of the United States from being subject to pre-emption, have been declared by this court to have acquired absolute rights of property in the soil. (Hicks vs. Bell, 3 Cal.; Irwin vs. Phillips, 5 Cal.; Conger vs. Weaver, 6 Cal.; State vs. Moore, 1859.) It would be folly to say that a preference of employment on lands gives a preference to the soil in law or in natural justice. The destruction of the soil to obtain a product from it, can give no superior claims to these created by cultivating it or erecting dwellings upon it. (V. Opinion by Ch. J. Field in —— vs. ——, Oct. Term, 1859.) But where the laws of the United States sanctions possession and expressly provides for securing its title to the possessors, there they enjoy not only the presumption of title in fee, raised by the common law, but also an express security or further assurance of title, from the "true and only legal source of title." Such a right is plainly an indefeasible right to the soil as long as the possession is continued, and becomes an absolute right of property, wherever the law for passing the title to the possessors has been carried out. Now the requirements of the laws of the United States for obtaining the title of the United States to country lands, are only concluded and completed by issuing the patents of the United States to the possessors, but as to lands in "towns or villages," no patents are required, and I do not know that any have been issued since the law of May 23d, 1844.

In Tartar vs. Spring Creek Water Company, 5 Cal., 397, this court used the following emphatic language, concerning the line of public policy which the legislative branches of this Government have recommended, in favor of settlers in any capacity and on any kind of lands of the United States, and even if expressly reserved from settlement. The observations are made in a case concerning lands in the mines which have always been reserved from settlement, while the lands in the towns of California have never been reserved from settlement under any laws of the United States. The court said: "The *current* of decisions of this court go to establish that the policy of this State, as derived from her legislation, is to permit settlers, *in all capacities*, to occupy the public lands, and by such occupation to acquire the right of undisturbed enjoyment *against all the world but the true owner*," *i. e.*, against all the world except the United States, or this State. If there are any places in this State where such laws are applicable, and where they ought to be firmly and promptly administered, it is certainly in the old "cities, towns or villages" of this State where so many people are living, and where all the lands not previously granted to individuals passed to the United States. Now the *pre-emption* laws of the United States do not extend, and never have extended, to lands occupied as town sites prior to the time they are settled upon. And consequently the pre-emption laws never have been applicable to the old towns in this State. But before referring to the laws of the United States which do provide for acquiring its title to the lands in such towns, I beg to refer further and more particularly to a principle in all our laws which applies everywhere alike, and which seems to me to be the most remarkable feature in the land system of the United States, and perhaps distinguishes it particularly from the land systems of other nations. The principle to which I refer is this, that titles to lands are not given on condition that possession shall be taken. But the grand object of our Government which is to have its lands in limited quantities in possession of citizens, is sought to be accomplished before not after it gives them titles. The consequence is, that no man can calculate upon obtaining the legal title to lands of the United States unless he first takes possession of them. For the law practically requires possession as a condition precedent to the issuing of the title; and invariably prefers those whom it finds in possession over those who are not in possession. Under the old system, when settlers on the public lands were prosecuted and driven off by the Government, it used to lay off towns itself and sell town lots at fine prices. (V. U. S. Laws, April 30th, 1810; April 27th, 1816; and lots in N. O., April 20th, 1818.) But that whole policy has been abandoned since the triumph of the democratic land system by the passage of the pre-emption law of September 4th, 1841. Since that law the policy of Government has been not to speculate in lands, but to let all citizens make the most they can out of them who will first take actual and *bona fide* possession of them. In the discussions of Congress when our present land system was adopted, the most scathing and bitter denunciations ever uttered, were poured out against the heartless speculators who buy up titles to lands in the peaceable possession of others. It was insisted that the Government should not tolerate the practice. And the intention and most earnest determination was avowed, to crush out and destroy to the utmost power of the law, all purchases of the lands which others held in peaceable and *bona fide* possession. No difference has been made in the application of these principles where the lands are in towns. The same principles seem to have universally applied to lands in towns as well as out of towns; that the first possessor shall be preferred over all others to the extent to which lands shall be allowed to him. And that never, in any instance, will the Government voluntarily part with its title so that mere speculators may acquire it over lands in the peaceable, *bona fide* and adverse possession of others. A uniform and rigid preference of possessors over all others seems to be adopted as the universal and fixed policy of the United States. And I undertake to affirm, after a careful examination of all the laws of the United States affecting this subject, that no law has been passed by the United States within at least the past fifteen years which, either in design or in words, either as to lands in towns or lands not in towns, has preferred claimants to its title who were out of possession over claimants in possession, or which has rendered it possible under any legal, just, or honest construction of its laws, to make the United States Government responsible for any such sweeping and scandalous schemes of speculation over the lands of others, as have been attempted by means of these Sheriffs' sales, which are now presented for the approbation of an honorable and impartial tribunal. A tribunal whose duty it is to determine between the rights which the laws have secured to speculators, and which they have secured to those who have been continually, from eight and thirteen, to even twenty and fifty years, in peaceable possession of the lands which the speculators now seek to wrest from them.

Now, bearing in mind the intention, object and policy of the land laws of the United States for the encouragement and defense of those in possession, let us learn precisely how those principles have been applied and what the laws are in cases of lands situated in the "cities, towns and villages of California," and whether the laws have really been so lame as to sanction these sweeping schemes. The provisions of law for one hundred and sixty acre tracts are familiar to all. But the laws for disposing of the lands occupied by towns *in California* have never been judicially investigated and construed. It seems that, down to the passage of the general pre-emption law of September 4th, 1841, lands in towns were sold at public auction in the same manner as other public lands. (Acts of Congress last above cited ; also, Acts of March 2d, 1833, and others.) When the pre-emption laws were passed, the lands in towns were expressly excluded from their operation. In the said Act of September 4th, 1841, it is expressly enacted that no lands "included within the *limits* of any incorporated town shall be liable to entry under and by virtue of the provisions of this Act." (Sec. 10 of said Act.) Thus the pre-emption laws left all lands "within the limits" of towns to be disposed of under such regulations as Congress might continue to make.

We can affirm, then, with certainty, the truth of this proposition—that the *pre-emption laws* have never made, and do not now make any provision for the disposition of lands of the United States, within the corporation limits of cities. It was not until three years after the general pre-emption law was passed, that Congress finally agreed upon a general plan for disposing of lands occupied for purposes of towns, "and not agriculture," or lands within the corporate limits of towns. This law would exist in perfection, if all laws and parts of laws securing pre-emption rights were abolished. It is not a settler's law, but a law of the United States, passed for the protection of property, and for the adjustment and settlement of titles to lands *in towns*, within the United States, and where, as is manifest, the pre-emption laws securing the rights of settlers would be totally insufficient. The law of Congress of March 3d, 1853, provides for the disposing of the United States title to lands in California, under two distinct and separate plans, one applying to "the whole" of the lands which are within the corporate limits of towns, and therefore not subject to the pre-emption laws ;

and the other offers to dispose of its title to all lands which are subject to the pre-emption laws. It is difficult to conceive of two classes of cases more completely dissimilar, and requiring a more completely dissimilar plan of disposition than lands in towns and cities, and lands for agriculture. It would have been as preposterous and iniquitous to have extended the pre-emption laws over the lands "within the limits" of cities, as to have extended them over the mines. The Government does not make the distinction between the lands in towns, and the lands not in towns, on account of any advantage to the Government, but because it is of great moment to those holding property in towns, that the title of the United States be not disposed of to such lands, except with great care, and under special laws to meet the peculiar exigencies which may exist. Indeed, twenty thousand citizens in possession of one hundred and sixty acres of land in a city, are as much entitled to the protection of Government against disposing of its title to encourage and benefit speculators, as one man would be on the same quantity of land in the country. As far as the United States is concerned, it does not receive any more nor ask any more for one hundred and sixty acres of land, covered by brick buildings, than it does for the same quantity on the plains of the Colorado. What, then, is the object it seeks to accomplish in making disposition of its title in cities? It is, of course, to extend equally the same protection, as far as it might be just to do so, to its citizens in towns as it extends to its citizens out of towns.

There is no denying the fact, that this Court would hold that the United States has made ample provision for disposing of its title to citizens on public lands not "within the limits" of cities. Now, why should it be supposed it has not made ample, and as was its duty, more expeditious, and even more careful provision, for those settled on its lands in cities, where thousands may be interested, and millions worth of property may be depending on the proper disposition of its titles? Congress has not taken the greatest pains where the least was necessary; nor has it exercised the greatest care where there was the least danger to be apprehended from the presence of schemers. On the contrary, what the wisest men would do after years of reflection, seems to be just what Congress did do in 1844, whilst the wisest men were yet present in its councils, for disposing of its titles to lands in cities. It took care, in the first place, that no lands "within the limits" of cities should be subject to be claimed by squatters or settlers, in one hundred and sixty acre tracts. It took care in the next place, to avoid any expression as to how much or how little any person should be allowed to have of such lands. It did nothing further than to render it certain that *no claim to the title of the United States in cities could be legally asserted by any body, under any law passed by Congress alone.* And also, to render it certain that the price to be paid should be the same as for other lands, and that no disposition of such lands should be made in violation of the just rights of those in the occupation or actual possession of them. Having done this much, it most wisely refused to assume a responsibility which it could not, in the nature of things, perform as well as the governments of the States in which the lands should be situated. For example, it would be no easy matter for the remote Legislature at Washington to determine what would be the wisest and most just rule to adopt for disposing of the title of the United States to lands in San Francisco. The annoying difficulties and heavy expenses which have been imposed on all the possessors of lands in that city, by enormous taxations, and by two, three, and sometimes four "titles" being created against the same lands, and which the possessors have been driven to contest at their own expense, seem to render their claims of more than ordinary merit. I have been somewhat familiar with their difficulties, and I do not suppose any prudent man can be found who would contract to pay as much for their lands, as it has cost them in a thousand ways, to maintain their possessions for the last nine, and ten, and thirteen years. It has kept many of them poor. Perhaps no community has ever existed in the United States, which has suffered so much, or paid so much to be enabled to obtain the Government title to their lands, as the law-abiding citizens of San Francisco. How could Congress understand or be made acquainted with their difficulties, and with considerations which ought to be weighed against them, as well as the Legislature of this State. The difficulties justly entitled to consideration, both for them and against them, were too numerous, too important, and too entirely local, to render it either expedient or necessary, for the remote Congress of the United States to attempt to adjust them. The United States had no interest in the subject, except to secure the best interests of the citizens who held its lands, and of the community, and it could best leave it to the Legislature of the State to secure those interests. Congress, therefore, did the best thing that could have been done. Having settled the chief principles which should govern the disposition, it transferred all its authority over the subject to the Legislature of this State. The very act of transferring the disposition to the State was a guarantee against injustice to *bona fide* holders. It dispensed with the delay and expense of each citizen obtaining a patent to his lot; and rendered no patent necessary in order to vest the title of the United States in every person in whom the State Legislature should, by law, vest the title. What could have been done more likely to insure the protection, to a just extent, of all *bona fide* possessors of lands in the cities of California? Congress could not have granted the lands to the State, to be again granted by the State to such as it deemed proper, with no directions to protect the possessors, for that would have subjected the people of the cities to less security, and would have been a temptation to the evil-minded to commit impositions, which the Legislature ought not to be empowered to impose. The *plan* of the disposition, therefore, was a trust for the occupants. The United States could not have granted them to the cities, to be by the cities conveyed to those entitled, because that would have been less likely to occasion a disinterested and intelligent disposition; and because of other plain and serious reasons. She could not grant them to the inhabitants of the cities in possession of lands to the extent of their possessions, for such a grant would be too sweeping and careless, for it was not possible for Congress to know or easily ascertain, whether that would be the best and most just course to adopt. Congress, therefore, passed *the entire power of vesting the title* from itself, and appointed the Legislature of the State to make the disposition; and invested the State Legislature with full powers to do what Congress itself could only do as well, by being as well informed of what was most just to be done. As to the dollar and a-quarter an acre to be paid to Government, *there is no condition that the title shall not vest until that is paid.* It seems to be required rather as a matter of equality and precaution, than as a thing to be insisted on. A bill was introduced in Congress, just at the close of the last session, to relinquish it as to the lands "within the limits" of San Francisco, in 1851, and it is understood no objections exist to its passage. (V. U. S. Senate Jour., for 1858–9.) In any event, the price to be paid is only a matter resting between the Government and those who have acquired its title. It is, of course, not a matter for just complaint by the United States, until some law is passed authorizing the amount of lands to be ascertained, and authorizing the money to be paid. And the fault of its want of payment is, of course, a matter interesting only to the government which is to receive it. Its payment or non-payment has nothing whatever to do with the vesting of the title under these special laws for our towns. Because they do not so provide. They authorize this State to *dispose of the lands*, and of the proceeds of the *sales* (if sales be ordered). Congress has never yet passed a law *authorizing* the quantity of lands so entered *in California* to be ascertained, nor *authorizing* the money to be paid, nor is there anything whatever forbidding the State to make the disposition until after the ten bits an acre be paid. The United States being the *proprietor*, authorizes the absolute "disposition" of the lots, and also the disposition of "the proceeds of the sales of the lots," under just such rules and regulations as this State shall prescribe. And this sovereign nation in which they are situated has disposed of the lots, under the full and unreserved authority of such political proprietor. Now, who can call in question the disposition which has been made? The disposition would have to be gross and monstrous, before it would be either becoming or just to question the conduct of a sovereign State, in endeavoring to perform so imperious a duty as to *quiet* the titles to the lands covered by its cities. To deny this disposition is to defeat the very object of quiet and security in titles, sought to be attained by the joint legislative powers of the United States and this State. Besides, the State does not make the disposition as a trustee, but as an independent and sovereign power. The authorities entering the lands are the trustees, not the State. This policy of transfering the adjustment of titles to lands in towns from the United States to the States, was adopted fifteen years ago. It being then an experiment, it was cautiously proceeded with, and at first expressly limited to only three hundred and twenty acres, and the entries were to be made "in conformity to the legal" surveys of the public lands, and no entry was authorized except the legal entry known to the pre-emption laws of "the surveyed public lands." The law was never a special act, afterwards made general, as some have supposed. It is the general law of the United States concerning the lands in cities, towns, or villages. For the last fifteen years no other system has prevailed or existed, for obtaining the title of the United States to town, city, or village lands. And I know of no system to be devised more perfect in itself, or more liberal to the States, when rightly understood. It being a beneficial statute, it is, of course, to be constructed liberally, and in a manner most favorable to the expressed and manifest object of quieting titles, with as little delay and upon as equitable a basis as the State government might deem it just and advisable to adopt. The authority conferred on the State, is an absolute and unlimited authority over the whole subject. There is not an intimation of any bounds whatever to the authority, excepting only that no basis of adjustment is directed which should wholly fail to prefer those in *bona fide* possession of the lands over all others. We have seen that the same just preference was required by the laws of Spain, and of Mexico, concerning identically the same lands in this State. And it is manifest, that no other system could be easily devised, likely to accomplish, on the whole, the same extent of benefits, and at the same time to effect the transfer of the National title to individuals with so little disturbance, and an equal amount of quiet and of general satisfaction, as to prefer the possessors over all others. In my own opinion, it would be just and proper for the State to limit or curtail the quantity or value of the lands which each occupant should hold, and such ought always to be done, provided it were ascertained that some held "too much;" and provided, especially, that such a plan could be adopted without causing scramblings, law suits, and public turbulance, ten times worse *for the grand object in view*, and for the interests of the public at large, than would be caused by a mere excess of justice to a few above that received by others. In San Francisco, a few persons held lands in the heart of the city worth millions; and in the adjoining portions of the town some two persons, perhaps, held "too much" in quantity, though not of equal value with inside claimants. The fee to all these lands, we knew and have seen for a certainty, was in the United States. We desired to obtain that fee, and place the titles to lands of so much present and perspective importance, upon a firm and secure basis. The grand object in view was to *quiet* our titles without longer delay. Were we to stop and quarrel as to the precise quantity which each citizen should hold in a town, oppressed by forged and sham titles, and which had continued for ten years an American city, without legal titles, and where the lands in possession of its residents, were held under various kinds of titles and numerous claims of right?

The only opposition which has ever been made to adopting the law of Congress and quoting titles in San Francisco, (except by speculators), has been because those who proposed the plan of disposition did not attempt to take away some of the lands from two or three persons, who never received any Alcalde grants, but who may be admitted to have received more land than should have been conceded to them. But no way could probably have been devised by limiting the quantity, which would not have been met by the time it was passed, by the requisite number of claimants and possessors. So that little or nothing could have been gained by the city excepting litigation and disputes, which were the very things we sought to avoid. Hence, it was determined to settle everything by leaving everything, after nearly ten years' of American occupation, as it had settled itself. And on the 20th of June, 1855, the authorities of the city passed an Ordinance, introduced by Mayor Van Ness, then a member of the Board of Aldermen, "for the settlement and quieting of land titles in the city of San Francisco," based upon the said special law contained in the eighth section of the Act of Congress of March 3d, 1853. That Act being an amendment or extension of the Act of 1844, expressly provided that the lands could be entered in trust for the occupants and could be disposed of by the State, whether they had been subdivided or surveyed or not, and whether they covered 320 acres or 320,000 acres, provided only they were actually occupied as town lands or were actually a town site. It will hardly be disputed that the *locus in quo* are town lands, in the meaning of the Act.

It could be held with much force that some lands in San Francisco, beyond the confined corporate limits fixed in the city charter of April, 1851, (Laws of 1851, p. 357), are properly within the lands "actually occupied by the town." But, in order to admit no doubts on this point, the "corporate authorities" confined themselves to the said charter boundary of 1851, and to that extent did enter the lands and did give legal notice of their intention to hold them in trust for the benefit of the occupants, at the place, in the manner and to the extent specified and authorized by the eighth section of the said Act of Congress of March 3d, 1853, and by the general law before alluded to of May 23d, 1844.

These two Acts of Congress must, of necessity, be construed together, for the last Act expressly requires it. I will quote them as, I submit, they will read when so construed, referring, in parenthesis, to the date of the law in which each preceding sentence may be found. (See Laws of the U. S., May 23d, 1844, and March 3d, 1853.) Read together, they disclose the following most important law, viz: "Lands in the State of California not being mineral lands, and occupied as towns or villages, (1853), or occupied by *the town* as a town site, (1844), shall not be subdivided, (*i. e.*, shall *not* be surveyed by the United States), nor be appropriated under *this* Act, (1853), but '*the whole* of such lands,' whether they have been surveyed or whether they have not been surveyed, (1853); whether they are settled upon now or whether they shall be settled upon hereafter, (1853); the whole of *such* lands (1853) *may be entered* (1844) by the corporate authorities (1844) at the proper law office, (1844), in trust for the several use and benefit of the persons in actual possession of the same, (1844), according to the respective interests of such persons so in possession, (1844.) The *disposal* (1844) *of the whole of such lots in such town*, (1853), the proceeds of the *sales* of all such lands, (1844), (if sales of them shall be ordered), and generally *the execution of this trust*, (1844), shall be conducted under *such rules and regulations* as *may be prescribed by the legislative authority of the State* (1844) of California, (1853.) *Provided*, (1844), this entry of such lands shall be made at any time before a sale by the United States, of the body of surrounding lands out of which such lands are taken, and that the entry shall include only such land as is actually occupied *by the town*, (1853); *i. e.*, within the limits or actually occupied by the corporation or its people '*as a town site*,' (ib.); also, that any Act by the said *corporate authorities*, 'said trustees' (1844) not made in conformity with *the rules and regulations* prescribed by the authority of the State (1844) shall be void and of none effect, (1844.)" This is the only law in existence for obtaining the title of the United States to lands in this State "within the limits" of cities. It gives ample authority to the State government to provide every needful regulation which justice could require. By the term "occupants" being used in the law, some persons jump to the conclusion that the law is good for nothing. But it does not seem *necessary* to attribute any such sweeping consequences to the mere use of that word, especially as it is the most appropriate word Congress could have adopted. Nor is it a legal mode of interpretation to attach more consequence to one word in a law than to all the other words it contains, and their whole scope and intention. It is, I submit, only a narrow and erroneous view of the law to suppose it is applicable to nobody but occupants actually living on their lots. It expressly authorizes all "the whole" of lands actually *occupied by the* TOWN, not by *individuals*, to be disposed of under the rules and regulations of the State. It *secures* occupants, and at the same time in express terms contemplates the existence of lots not in possession of occupants which can be sold or be otherwise disposed of as the State shall deem best. And I most respectfully submit, there is no power in any court, nor in the Government of the United States itself, to arraign this sovereign State for the manner and form in which it has deemed it right and proper to prescribe rules and regulations for the execution of a trust, after it was expressly authorized to adopt just such rules and regulations for the purpose as it should deem proper. I see no power anywhere to invalidate such rules and regulations after they have actually been established. Being vested with full and constitutional power to adopt them, after it has fairly executed the authority and vested the title in express terms, the Act seems to be final and conclusive, and to be invested with all the guarantees of an executed contract. It is to be observed and remembered, that not a person in San Francisco had acquired any such legal right to the title of the United States prior to 1853, as to make it obligatory on that Government to give him its title at all. The United States never having previously adopted any law for acquiring its title to any lands in this State belonging to the United States, it was free from any legal obligations to any body, and could dispose of its title as it pleased. And it pleased the United States to authorize this State to act in its behalf, and adopt such rules and regulations as it should deem just and proper for disposing of its title to lands in any city, town or village in California, not being situated on mineral lands.

The intention is plain to give its titles to lands in cities immediately as soon as the town authorities and the State Legislature would act. This is not only apparent in the fact that the entry in the land office is expressly authorized before any survey, and without any knowledge of the quantity on the part of the United States being first required; but also in the fact that immediate disposition of the lands in the mining towns *was then made* in the same section. The entry being expressly authorized by the Act of 1853, and the quantity being by express words unlimited, so far as the same should be "occupied as towns," the Act of 1844 is manifestly to be construed accordingly. And the sovereign State having disposed of all the lands in the old corporate limits of San Francisco, and above high water mark, under this authority of Congress, it would seem to be conclusive, both against the United States and against any pre-emption claimants, or other claimants under the United States, that such lands were lands occupied as a town. It is, at all events, *prima facia* evidence, and *prima facia* proof is conclusive until overcome by conclusive proof to the contrary. As to the lands in mining towns, "the inhabitants" are expressly given, in the same section, the right of occupation and cultivation until Congress shall dispose of them. Though not yet given the legal fee, they are given *a vested right of property*, which only Congress can take away or disturb. But Congress very properly refused to make or authorize a final disposition of such lands until better advised.

These laws of Congress impose none of the duties nor requirements contained in the pre-emption laws, I repeat it has nothing whatever to do with those laws. It applies no condition of citizenship; it protects the rights and possessions of resident foreigners as well as native citizens, and leaves all like matters to the just discretion and disposition of the State Legislature. And the rules and regulations adopted by the State are, to all intents and purposes, the rules and regulations of the Congress of the United States itself.

Congress does not "appropriate" *such lands* under "this act" of 1853, but it does do so under the act of 1844. It does not make the State a trustee. It simply transfers to "the legislative authority of the State" the legislative authority which Congress itself had, as the proprietor, to adopt rules and regulations for the disposition of the lands, making the city authorities the trustees, and expressly prohibiting them from making any disposition of the lands, except by and in accordance with the rules and regulations prescribed by the State. And that authority, I submit, is just as absolute and conclusive when exercised by the State as though it had been exercised by Congress directly. The idea of attributing to the acts of a sovereign State, authorized by the United States to regulate the mode and manner of *disposing* of its title to lands in its towns, anything less than the authority of the proprietor itself would seem contrary to the just dignity and powers of the States. *Without the existence of the United States, the acts of this State so disposing of the public title to lands within it, would have been conclusive. The act being performed by express delegated authority from the United States does not render her sovereign act any less conclusive.* No rational construction of the authority delegated, I submit, can raise a reasonable doubt that the authority of the State is, and was intended to be ample, conclusive and final. If any citizen has any right to complain of the action his State has taken, or may take, possessed as it is of direct authority and supreme constitutional powers, let him apply to the United States to call his State to an account for disappointing his expectations. We deny the propriety, and insist it would be useless for him to enter here and charge his State with any useless legislation, or with any dereliction of duty. No action could ever be taken by any State in so troublesome a matter with more unanimity or more justice than the action which was taken last year by this State, with the consent and authority of the United States, to quiet titles to lands in the city of San Francisco.

That action, I insist, completed and executed by "the corporate authorities" as far as their powers and consent could go, and, by the State, including in its authority the express sanction and assent of the United States, the only other power whose consent was required, renders the titles so obtained absolute legislative or statute titles; which, I submit, no power on earth can now lawfully divest or divert, without the consent of those to whom the title has been so passed. (Laws of 1858, p. 55.)

It is, I submit, owing to the very fact of the multiplicity of interests and of different kinds of possessions, existing in towns, more numerous and important than the mere abstract rights acquired by possessing or occupying (such, for example, as the rights created by leases, by contracts of sale, by deeds, by mortgages, and other agreements about lands, and which were well-known to exist in all towns, and especially the old towns of California,) which induced Congress to transfer the duty of adjusting such interests to the Legislature of this State, where they could be inquired into, understood and provided for, as the necessities of every city or town would naturally and necessarily require. There is no definition of the meaning of the word "occupant" in the law or out of the law, which *prevents* the Legislature from making it include *ex vi termini*, the persons described in the second section of this State law, as well as the others therein described. And tenants in possession of leased property are occupants. But, because tenants can be called occupants, is the object of the law to be forgotten, the power and sole control it confers on the States to be overlooked? Suppose the term used had been possessors instead of occupants; tenants are possessors. What reason or authority is there in mere quibbles? What propriety would there be in supposing that the U. S. Congress have passed a law, and repassed it *for all the new States*, which is a mere abortion, and prevents the just disposition of lands which it was the very object of the law to bring about. What reason or good sense is there in the idea that wherever it is attempted to be carried out, it insures its own defeat and want of adaptation to the very places it specifically mentions; and, instead of enabling justice to be done, is to be held to cripple the Legislature in doing what is just. What could be more unreasonable than to adopt such a construction of any law where the language used does not require it, nor the sense admit of it?

It is to be remembered that the State, being authorized to establish the rules for disposing of such lands without Congress attempting or having the power to control or limit the legislative power it trusted, the State has done so as a supreme legislative power, not as any inferior or subordinate power. It has claimed to be authorized to dispose of the lands and has disposed of them, and vested the title in these appellants, as far as legislative power can vest a title. If there had been no United States, the State, I repeat, would have been sole proprietor, and then, of course, the disposition she has made would be final. Congress gave the State power to adopt the rules for disposing of the lands, knowing the State to be as supreme as Congress itself in passing any laws which it is not, by the constitution, prohibited from passing. Therefore, the disposition which has been made by the State we insist and confidently submit, in any view of the subject, is precisely as powerful, conclusive, complete and obligatory, in every particular, as though precisely the same rules had been adopted directly by Congress itself. And the Act of this State, approved March 11th, 1858, is, in reality, a law passed by the sanction and authority of both the legislatures of the United States and of this State. No authority is assumed in that Act which was not conferred, and it contains nothing which is in violation of any constitutional provision. And no man's just or legal rights have been injured by it. And all things considered, a more just or more judicious or more universally sanctioned law among all who have studied and comprehended it, was probably never passed on the same difficult subject in any other State. I have referred to every objection to it which I have heard urged with any tenacity. A few more may be referred to. It has been said the lands were never legally entered. This is another error occasioned by confounding it with provisions about entry contained in the pre-emption laws. It not only has not been, but could not be entered *under the pre-emption laws*, and, therefore, could not be entered under the ordinary rules, nor in the ordinary sense of the word entry. The pre-emption laws do not permit the same entry. Those laws, as we have seen, expressly forbid it. No such entry was made or attempted; nor could there be an entry made under the law of 1844, for that also requires the quantity to be first ascertained, and also limited the quantity. But the "entry" which was made was merely that kind of "entry" authorized by the law of 1844, "*as modified* and made applicable to the State of California by the act of the 3d of March, 1853." (This language is that of the Congress which passed said law, and is used in an act of March 1st, 1854.) The law for disposing of lands in towns here did most materially modify and make applicable to our condition the said law of 1844. *It expressly authorized an entry.* It expressly made "the whole of such lands" subject to the provisions of the law of 1844, no matter when settled upon, and without any survey or ascertainment of quantity. "The whole of such lands (says the law) * * shall be subject to the provisions of said act of 1844." Whether yet settled upon or not, made no difference; and whether surveyed or not, made no difference; it was to be "entered," that is an "entry" was to be made of it at the proper office, subject to said law. Said law of 1844 applied only to "*surveyed* public lands" which had been "settled upon and occupied as a town site, and, *therefore*, (says the law), *not subject to entry*, under the pre-emption laws." And said law of 1844 provided how the lands could be entered, because it applied only to *surveyed* public lands. Our law provided that the lands should not be sub-divided, and no law of Congress permits them to be sectionized, which seems to render it certain that the usual entry of lands was not the kind of entry contemplated. And this view is further strengthened by the fact that our law expressly reserves the lands from sale by the Government. And no law has ever passed permitting the lands in our towns to be sectionized or to be offered for sale by the United States. It is fair to presume, therefore, that nothing of that kind was intended. And no subdivision being allowed, and the law being that such lands shall not be sold at public auction at all, it seems plain that the ordinary entry is not referred to, because that renders the law nugatory. Whereas it is manifest the law intended to afford relief for cities on public lands as well as for mere single individuals, as has been already urged. Indeed, the entry which was authorized is manifestly nothing more than a notice to the Government by town or city authorities, of the lands which were within the limits of their towns, and which they claimed as being the lands occupied as town sites; and the fact alone of their being town sites prohibited their survey and their sale at auction. It seems to be simply an entry in the sense of a *record*. To enter land in the land office means necessarily only to file a notice, or cause a record in the office, of the land claimed. The word "entry" is an old law term for that sort of record. (Note by Blackstone, 3 Com., 271; Burrill's Law Dic., "Entry, *intratio;*" Pike vs. Dyke, 2 Greenleaf, 213; Preble vs. Reed, 5 Shepley, 169; Evens vs. Osgood, 6 Shepley, 213.) It is most manifest that we were not expected to wait for a survey before making an entry, where a survey is expressly forbidden, and where, as we have just seen, it is really unnecessary. And it is equally plain that the inhabitants of our cities were not expected to wait before receiving their titles until a survey and a sale, or until the Receiver should be authorized to receive the money; for, as the law stands, these steps are prohibited. What reason can be suggested why the Government should be supposed to wish or permit a perpetual or indefinite delay in our obtaining its title, where it is so necessary to have it as it is in our towns; and what benefit could be gained by postponing an entry and disposition under the laws of the State. Would it not be the same to the United States whether done this year or next year, or whether done five years ago? Besides all this, the State has deemed the authority to enter, and the entry which was made, as sufficient; and there seems to be nothing in reason or justice, or the language of the law, rendering it necessary or proper to invalidate and annul in this court what the Government has done. If anybody has been injured, it is the United States. When that Government complains of a want of proper or legal notice, or a want of payment of the price, it will be time enough to raise and decide such points. Nobody, claiming under the law, is dissatisfied, and nobody else is affected in his legal rights. *The United States alone can complain of what has been done.*

It will be observed the law gives the State Legislature the power to "dispose" of the lands, and the Legislature has "disposed" of them. Where is the object, and where the power to take them back and make another and totally different disposition of them. Will it be better, will it be more lawful, more equitable to try and wrest them from those in whom the Congress and the State Legislature have jointly and legislatively vested them, and bestow them on Peter Smith speculators? That is the only question which can concern the respondent in this case.

The power to "*dispose*" of the lands which was given the Legislature, is the most ample which could have been expressed. It means to part with, to sell, to alienate, to distribute. (Web. Dic., 1 Watts Rep. 386; 3 Atk. 287; 14 Peters 529.) The lands have now been thus "disposed of" by Government, that is certain. And it is certain that Government can never dispose of them again. (Jackson vs. Murray, 7 J. R. 5.) The persons to whom the disposition was made were in possession of them when the disposition was begun and when the disposition was finished. And it was therefore according to plain policy and uniform authority in similar cases, not necessary to do more than was done to pass the Government title to them. In Mayo vs. Libby, 12 Mass. R. 339, it was decided that a release by a mere resolution of the Legislature, is sufficient to pass the title of the Government to persons *already in possession.* (See also Sumner vs. Conant, 10 Vermont, R. 9.) So a release by proprietors of a town by vote, has been held conclusive and incapable of being revoked by a contrary vote at any subsequent time.

A freehold title can only be conveyed at common law, by deed; but by statute, a title may be acquired without deed. (Jackson vs. Wood, 12 J. R. 73; Jackson vs. Wendell, Ibid, 355. See also Ward vs. Bartholomew, 6 Pick. 144, and Thorndyke vs. Richards, 1 Shepley, 430.) In Strother vs. Lucas, 12 Peters, 410, it was decided that a grant may be made or confirmed by a law, as well as by a patent pursuant to a law. So a grant by the provincial Legislature, though depending on the approval of the Crown, which was never given, but which grant was confirmed by legislative resolutions after the revolution, was held to be a valid title from the date of the act in that behalf by the provincial Legislature. (Proprietors, etc., vs. Jones, 12 Mass. R. 334.)

It has also been decided that a State Legislature has a right to pass laws for quieting the possession of occupants and settlers; and that such laws will be enforced unless *plainly repugnant* to acts of Congress. (Pettyjohn vs. Akers, 6 Yerger, R. 448.) So far from the law of this State of March 11, 1858, being "plainly repugnant to Acts of Congress," I have endeavored to show it was in plain conformity with the express authority of Congress.

In concluding the history of the subject matter, involved in the case now before the Court, I beg to refer to the authority under which the grant from the city to the inhabitants was made, and to acts in connection therewith which will perhaps be the subject of comment, by our learned brothers on the other side.

In 1853, and when the first decisions of this Court of 1850 to 1853 were still in force, the Congress of the United States passed the said law authorizing our Legislature to adopt rules and regulations for disposing of the title of the United States to any lands in this State, not mineral lands, and occupied as towns, and *the whole thereof.* In 1855, the Legislature of this State passed a law, authorizing the Common Council of the city of San Francisco "*to confirm, dispose of, and make all needful rules and regulations respecting the title to lands of the city.*" (Laws of 1855, p. 266, sec. 65.) And under these two laws, one to dispose of any title of the city to lands, and the other to take steps to acquire the title of the United States to lands in said city, in behalf of its resident citizens, the Common Council of the City, with the consent and approbation of the leading and best property owners in San

Francisco, passed an ordinance "for the settlement and quieting of land titles in the city of San Francisco." And by that ordinance, and under the said express authority of the State, the city relinquished and granted "all the right and claim of the city to the lands within its corporate limits, to the parties in the actual possession thereof by themselves or tenants on or before the first day of January, A. D. 1855, and to their heirs and assigns forever;" excepting only some slip property and the water property outside of the water-lot boundary of 1851. And providing that Alcalde lot holders should be deemed and held to be the possessors of the lands granted, wherever they had a grant for lands made prior to July 7th, 1846; and wherever they had a regular and recorded grant at any time afterwards down to April, 1850, of lands in the angle of Johnston and Larkin streets. And in the same proceeding the city gave notice to the United States in the proper land office, of the extent of its claim, in trust for the benefit of the lot-holders. And recommended rules and regulations, to be adopted by the Legislature, (see sec. 10) for "disposing" of the lands, as authorized by the Acts of Congress, of 1844, and extended, and made applicable to the unsurveyed lands in the towns of this State, in 1853. And, as before shown, the State expressly adopted, ratified and confirmed said rules and regulations, and "enacted" that the lands so entered in the land office "shall *pass inure to and be deemed to have immediately vested in* the said occupants," *as in said rules and regulations defined* and *expressed.* And further enacted, that all courts shall take judicial notice thereof. And further enacted, that the grant and relinquishment of title made by the said city in favor of the said possessors "shall take effect, as fully and completely, for the purpose of transferring the city's interest, and for all other purposes whatsoever, *as if deeds of release and quit claim had been duly executed and delivered, to and in favor of them individually and by name;* and that *no further conveyance or other act*, shall be necessary to *invest* the said possessors with *all* the interest, title, rights, benefits, and advantages which the said order and ordinances intend or purport to convey or transfer, according thereto. (Law, 1858, p. 56.)

Now all *these laws* of Congress, laws of the State, ordinances of the said city, and said former decisions of this Court, from 1850 to 1853, have created "a rule of property" and a *stare decisis* as fully, and during the very same periods of time, and in our favor, as any other decisions of this Court have created in favor of these speculators. It has been already shown, and will not be denied, that the constitutional legislation of the country is the supreme law of the country. How then is the rule of property fixed by decisions or opinions of this Court, to reverse, annul, or overcome the rule of property fixed, and settled, and vested by the supreme and express law of this State? Are the laws of Congress, and of the State, and the ordinances of the city made in our behalf, all or any of them unconstitutional and void, because they interfere with some decisions of this Court on the same subject? Are they unconstitutional because they interfere with the titles here sought to be created and originated on the doctrine of *stare decisis*? Is this the legal meaning of *stare decisis*? The very idea is preposterous. If, then, these laws of our State are not unconstitutional, they are the supreme law on this subject, as between them and any more opinions or decisions by former members of this Court. If the decisions of this Court have created any rule of property at all in opposition to the rights of persons not parties nor privies to such decisions, it cannot be denied, it seems to me, that they have been created only in favor of water-property lots, and of Alcalde grant lots. And as to these, the very legislation referred to has confirmed them, or all which were in possession, which is certainly all which deserved to be confirmed. And, at all events, and under any view of the subject, these laws did not militate against any decisions in favor of such lots. Such decisions can now stand as the rule of property sanctioned by legislation. But as to any rule of property in favor of Peter Smith titles above high water mark, it is a monstrous error. And every man who will inquire of the possessors of the lands, south-west of Johnston street and west of Larkin street, to whom said laws have conveyed the title of the United States, and the title of the city, can immediately discover that they are nearly entirely held against Peter Smith titles and not under them. And if the *stare decisis* in the Cohas and Roisin cases, that the city owned the lands, be adhered to, it, by no manner of means, ensues that these speculators have got the title. We have the direct and absolute grant of the city title. Can decisions convey it to others? This Court cannot make a title by *stare decisis* which it cannot at any time afterwards annul; because the Court *is utterly incapable* of making any contract. and no person or power can possibly make any contract or have any contract with it. Such a thing would at once incapacitate it from impartially passing upon contracts, by enabling it to have contracts of its own. Besides it cannot be a party to any transaction, but is carefully and rigidly confined to passing on the transactions of others. It cannot give its consent to any bargains, because it has no faculties except the faculties of the law; and it cannot, of itself, express any consent to any thing. The only consent it can express is that which the law has previously expressed, before the Court is asked to announce it. Being incapable of making any contract, of course, it is incapable of making any title. All it can possibly do, or rationally hope to accomplish, by adhering to the decision which we attack (the decision rendered in 1857 of Welch v. Sullivan) is to confuse, disturb, and keep eternally depending on the decisions of this Court, titles to twenty millions of property, which ought, by this time, to be placed beyond the control and disposition of this tribunal, and where the laws to which we have referred have securely placed them.

It has been suggested that the grant to the city by the possessors might be objected to, on account of the city being in debt in 1855, when it was made. But, in the first place, that objection could only be raised by the creditors of the city, and on their complaint. And, in the next place, there are no creditors whose claims are recognized in law as valid, whose demands have not been settled and paid by the bonds of the city, with provisions of law to pay such bonds, principal and interest, by taxation, excepting some judgments. And all the judgments against the city are now fully provided for, by special law of last Session, and are now all being paid by special taxation (Laws 1859, p. 157). So that not a lien on the lands, or on any of them existed or now exists, which is prejudiced by the grant of the town. And the creditors of the city, who are its bond holders, doubtless consider their bonds more secure since all the lands formerly kept from taxation, by reason of the supposed pueblo title, have, for the past two years, been by law required to be taxed, the same as other lands of the inhabitants. (Laws, 1858, p. 6, sec. 8.)

And besides, it would be a bitter subterfuge to hold that the town grant made to us is void against creditors, but that these speculators can take them from both the town and the people for nothing. And this, in order to admit the *stare decisis* title, which not only equally deprives the corporation of any title it had, but bestows it, without any consent of the city, on these speculators; and bestows it where it can only lead to turmoil, conflict, and bitter litigation; and thus defeat the whole object of the city and of the State, in trying to settle and quiet titles to land in that city, the confusion and insecurity of which is a disgrace to us all. I say it is a disgrace, because it is perfectly manifest that the whole trouble has been brought upon us by a system of falsehood and lawlessness of which we ourselves have been guilty; and by the exercise of every species of sense and ingenuity except common sense and the ingenuity of adhering firmly and rigidly to the laws—which constitute the only basis of land titles which, by any possibility, can be true, lasting, and forever secure. For as long as our titles are kept afloat, with nothing to rest on but mere judicial decisions, and they admittedly erroneous, how can any man of common intelligence or good sense, really feel or admit that our titles are upon a secure and immovable basis? But once place them where they belong, and where they can be reposed, without a single jar or disturbance of any property, and they then become forever after incapable of disturbance, either by this Court, or by any court or power on earth. Because they then become legal contracts with the city, and with the State, and with the United States, and will forever after enjoy what preserves all genuine private titles from disturbance, *i. e.* the guarantee of the Constitution of the United States against impairing contracts. We have already seen, and no intelligent lawyer will deny, that where a private title to land is legally vested, it is a contract which cannot afterwards be annulled.

If these laws disposing of the property are unworthy of respect and obedience, then, of course, we must continue subject to just such decisions as it may forever please our courts to vouchsafe. Because, they are the only laws we have; and, besides, we can never hope to obtain any laws which *to-day* can accomplish more good for the city of San Francisco. Whatever may have been justly urged in 1855, I am assured by gentlemen who will defend their statements, here or elsewhere, that there are not three *not three persons* in San Francisco, or out of it, who now hold possession of thirty acres of lands, exclusive of the public streets, within any portion of the limits to which said laws extend. And not only is the justice of said laws now manifest, but we need never hope to hereafter obtain any law, passed by the assent and approbation of any higher or more numerous legislative bodies. And, moreover, it is to be steadily observed, that, by these laws, whatever title the city had on the 20th of June, 1855, it has relinquished and *granted* forever to the possessors. (State laws, sup. sec. 2.) And whatever title the city ever hopes to get, or ever hereafter can get, from a patent of the United States, in pursuance of the "Decree of Confirmation" in the United States District Court, has also been specifically relinquished and granted forever to its resident people. In the language of the law, "The patent issued, or any grant made by the United States to the city, shall inure to the several use, *benefit*, and *behoof* of the said possessors, their heirs, and assigns, *as fully and effectually, to all intents and purposes, as if it were made or issued directly to them individually and by name.*" (Ib. sec. 3.) And it also declared that its claim for lands shall be presented "for the several use, benefit, and behoof of the said possessors mentioned," and for "the corporation as to all other lands not hereinbefore *released* and *confirmed to the said possessors*." (Ib. sec. 11.)

It has already been shown by competent authority, and should, perhaps, be deemed manifest without any authority, that such acts, once actually adopted, are, and ought to be, forever after binding on the corporation. If any individual should make such a contract with residents or possessors on his lands, he would not only be held afterwards unable to violate or destroy the contract so voluntarily entered into, but he would be justly despised and condemned, should he attempt it. Lest any should imagine said act of the city was passed in haste, or without due deliberation, it is also to be remembered (and it is shown in the law) it was first passed during the mayoralty and approved by Mayor S. P. Webb, a lawyer and an honest man. And during the administration of James Van Ness, also a lawyer, and one of the best meaning, most intelligent, and able men in this State, the self-same grant and contract with its own citizens was again expressly "re-ordained, ratified, and confirmed *in all its parts*." (Laws 1858, p. 55.) Thus two successive and honest-minded lawyers, at the head of that corporation, seeing clearly the means of placing land titles in that city upon a permanent and secure basis, honestly endeavored to do so, whilst others, the pests of that city, have endeavored to keep our titles still unsettled. That city corporation never has and never can make a contract more deliberately, and it never has and never can make a contract better calculated for the improvement and prosperity of the city, if it is only, and in good faith, strictly enforced and adhered to. But the very next year, after this grant and contract to and with its inhabitants had been passed and repassed, and after the United States Board of Land Commissioners had, by unanimous vote, rejected "the pueblo title," and this *stare decisis* title, San Francisco again passed under the cloud of a Vigilance Committee. That committee purchased "the Green papers," which Green papers are the papers spread out in this record in this suit, and which any man of common intelligence, much less any lawyer, it would seem, ought to know are not legal evidence to prove a title to lands, even if they tended to do so. But, in point of fact, they do not purport to prove any, nor tend to prove any. Nor do they tend to prove, nor purport to prove, any fact whatever, from which any lawyer could rationally infer the existence of a title to lands in a corporation at San Francisco.

The "Pueblo title" was rejected in January, 1856; and if it had not been that the Vigilance Committee of 1856 lent itself to the opinionated efforts of the same leaders who flourished over the Vigilance Committee of 1851, and through whose wilful ignorance these green papers were purchased, the evil moonshine of "the Pueblo title" would have caused no more derangement. That Pueblo title, after having been decided by this Court in 1850, to have no existence; after having been decided in 1856 by the Land Commissioners (who were manifestly anxious to confirm it) to have no existence; and although never established in this Court, by any evidence, or any pretence of evidence, but only by assumptions, and suppositions: and although every one knew or should have known, that the corporation or local government of San Francisco, was by law incapacitated to take and hold any such vast tracts of lands; still, the same cry was heard after 1856, as after 1851, not by the people, *but only* by the same deluded leaders, chasing the *ignis fatuus* called "the Pueblo title." And in the winter of 1857, before the last Judge of the Superior Court of San Francisco, who warmly concurred with the same leaders in what they felt, and what they did, and who also had thought that a "war existed;" this case was tried. In vain was an effort made, as this record shows, to get the case removed into some other Court. The case was to be tried before him, and was tried before him; and before him all these amazing *Green papers* were introduced, and admitted in evidence, and here they are now before this Court, in spite of our objections to their being admitted as evidence. But even the Judge himself found they proved nothing towards showing a title to lands in the corporation at San Francisco; and he therefore fell back upon Cohas and Roisin. And he actually charged the jury, as this record, approved by himself, shows, that if they found that any Alcalde had been granting lots about the lands in controversy, that fact was proof of a title to the lands in the judgment debtor, and they must find for the plaintiff. (See the charge.) And upon the charge by that Judge, and not upon any legal evidence of title, this respondent procured his judgment against these appellants. * * * That was in 1857; and it is material to observe that the judgment in this case was obtained *before any decision by this Court in the case of Welch vs. Sullivan.*

And now I beg to refer to one more instance of lawlessness, by the blind who have been leading the blind; and also by the blind who have been lead by the "Pueblo title" pests, the Peter Smith speculators. In 1858, when the Legislature was about to ratify by law, and make completely valid and final, the relinquishment and grant and contract between the corporation and its resident citizens, an ordinance was introduced in which it was proposed that the same corporation should withdraw the relinquishment and grant it had made, and annul its own contract! Such an ordinance had been passed to printing and was being published, but had never been finally acted upon, nor finally passed by the Board of Supervisors, nor been delivered to the President of the Board for his approval or rejection, but was still lawfully in the office and in the custody of the Clerk of the Board, when news was sent from Sacramento by telegraph, that the law was passed, or that the Governor was about to sign and approve it. Whereupon the President of that corporation rushed to the public office of the Clerk of the Board of Supervisors of the city and county of San Francisco, and knowingly mutilated the said "document," "ordinance," "minute," or "proceeding," by signing and approving it, in its embryo or unfinished state, and in plain violation of the eighty-seventh section of the law of this State "concerning crimes and punishments." (Laws of 1850, p. 240, sec. 87.) With what intent, or motive, the act was perpetrated, I leave it to the conscience of him who did it to decide; for it concerns him most. A majority of the Board of Supervisors of March, 1858, excused his conduct. But there is no reason to doubt or question the probability, that if we had been guilty of the same uprincipled and lawless conduct, to acquire our rights from the city, which were exercised against us, in March, 1858, to take them away, we would have been held up before this Court, as we would have deserved to be. And we would have been accused of not only having attempted the commission of an undignified, and unprincipled act of legislation, but also of having been either the perpetrators, or the apologists, of one of the most grave and most severely punished offences known to our criminal laws. Nay more, *we* would not have been allowed to rest in San Francisco; we would have been denounced from one end of the city to the other; and those of us who had rendered ourselves amenable to the laws, would have been at least indicted and tried for our offences. But so lost had become that sentiment of reverence for the laws, and so dead had become that obligation which all good citizens, and most especially all public officers owe to the laws, for equal justice's sake, if not for their own, that numerous offences, wisely and necessarily punishable by our laws as crimes; such as illegally demanding money as a compensation for entering a public hospital, established for the express purpose of affording relief to the unfortunate, without money and without price from the poor unfortunates themselves; and such as disposing of the effects left by the dead, who died in the public hospital, instead of religiously passing them to the value of every farthing, to the public officer, chosen by law to take charge of all such estates, and made by law accountable for their proceeds; and such as knowingly trying to give the force of a law to an ordinance which had never been passed; and knowingly mutilating the the proceedings or the records of one of the public offices of the local government of which he was the head, and where it was made his special duty, by express law, to go with a complaint before the Grand Jury, and have any other officer of the same government punished, if he had caught him in the perpetration of a similar act. (Sec. 68, Cons. Act.) All such offences as these, not done by accident, but repeated many times, excepting the last mentioned, were publicly acknowledged and publicly excused, by this same officer, and a majority of this same Board of Supervisors, who undertook to repeal a grant and destroy a contract executed and completed as far as it could be by that corporation over two years before. Why should we wonder, that men who could perpetrate, or freely excuse such lawless conduct, on the ground that the corporation received the spoils, were found willing to attempt to repeal the "Van Ness Ordinance," and get back a grant of lands, on the same principle! We shall presently show by authority, that a release of title by a town *to its inhabitants in possession*, when once made and passed, cannot be revoked even at an adjourned meeting, and where the release is only by vote. Here the release and grant had been made two years before, and had been deliberately and regularly passed and repassed by two successive and politically opposing city governments. First, during the American or Know Nothing administration of the city government, and next by the Democratic administration, which suceeded them in 1855, when the Know Nothings themselves had control of the most important ballot boxes. And when the general election of the general officers of Mayor and members of the Legislature, were as fair as any which have since been held.

We have already shown that a grant is a contract executed. (Fletcher vs. Peck, 6 Cranch 87.) The only question to be determined seems to be, whether consent of the corporation was actually given or not. As for any fraud, the law expressly says *that* question "shall be deemed a question of fact, and not of law." (Laws of 1850, p. 268, sec. 23.) Therefore it must be proved, and cannot be presumed. And hence no such pretense can have any influence in the decision of these cases. For there is no proof, nor was there a shadow of fraud in point of fact, or it would have been shown. And if the corporation did lawfully consent to a grant, and release all its title to its citizens, as mentioned, and did lawfully express that consent, and make the grant and the release, how was it possible for it afterwards to take it back and destroy it? The grant and release is unconditional, unqualified and absolute. Suppose an individual had done the same thing, could he, I repeat, afterwards annul it and take it back? How, then, could the corporation? How would this President of the Supervisors, and his followers who passed this repealing ordinance, be pleased to have all those who have made any of them a grant or relinquishment of title, seek to take their titles back, and destroy their conveyances? And who but persons destitute of principle, or ignorant of what they were about, can have supposed that public bodies are not bound by the ordinary rules of respectable dealing, which prohibit mere individuals from destroying their past contracts? If the State Legislature itself makes a grant, it cannot afterwards destroy, take away, or at all impair it, by any subsequent legislative act. (Town of Paulet vs. Clark et. al. 9 Cranch 292.) It is not in the power of the Crown after a grant is executed "to resume it again at *its* pleasure." (Co. Litt. 333; Com. Dig. Grant [F]; do. [G 3] and 9 Cranch, ib. Sup.) And to do so, as we have already submitted, and as we all know, would be one of the very acts which the Legislature of the State itself could not do. We have already shown that the State Legislature in 1855 gave express authority to the corporation to make the relinquishment and grant, which it made. And, besides, we have shown that the town actually did make the grant and relinquishment, in due form, and by due and lawful ordinance. And that the town actually ratified and reordained it a second time. It is plain that if the State Legislature itself had afterwards passed a law to destroy that grant and relinquishment, and retake from the inhabitants whatever rights they acquired by it, this Court would feel bound to regard the act as a direct violation of the Constitution of the United States, (and of this State,) prohibiting the State from passing any law "impairing the obligation of contracts." (Act 1, sec. 10.) Can there be any question that this repealing ordinance did impair, or would impair, if admitted to be valid, the obligation of the said contract previously entered into and executed by the corporation? How could the mere corporation do what the State itself could not do?

And besides all this, since this repealing ordinance was suddenly and in excitement rushed through, between the time the law went to the Governor, and the time he returned it to the Legislature, the law of the State was passed annulling their repealing order; for no ordinance can exist in opposition or contravention of a law of this State, any more than the creature can resist or countervail the will of the creator. Why then shall this law not be obeyed?

It is as much in force, and has been passed by the same authority as that which passed the charter itself by which the corporation of San Francisco exists. If those lawless wiseacres can by ordinance defeat a law of the State, they can by ordinance defeat the act of incorporation itself under which they held office. Is it for them to say what laws of this State shall be enforced, and what laws shall be annulled? If this be not a law of the State, then the State has no laws. And if this law is to be any longer trifled with, sneered at and disobeyed, because the thoughtless example has been set by thoughtless men in San Francisco, then why not further adopt the same thoughtless examples and disregard any other laws which the same wiseacres in San Francisco may advise to be disregarded? It is time San Francisco wiseacres were taught better examples than they yet have been, on this subject.

At the first session of the Legislature succeeding the second passage of said grant and relinquishment, by the city, in the act to incorporate the county of San Francisco, the said ordinances were agreed to by the delegation from that county; and their express confirmation proposed and recommended in the consolidation bill as introduced and printed by the Assembly, at the session of 1856. And the law to confirm the said ordinances then passed the Assembly. It did not then pass the Assembly without opposition. But on a distinct vote on the question to strike the provision from the consolidation bill, it was lost; two to one of the delegation from San Francisco voting against striking it out, and nearly two to one of the entire Assembly voting the same way. (Assembly Journal, 1856, pp. 474 and 633.) In the Senate at the same session, the confirmation of said ordinances was favored by three-fourths of the delegation from San Francisco; was reported in favor of, and was agreed to in committee of the whole. But, solely owing to a senseless and untrue charge that it was only a measure for the benefit of squatters, together with the bitter opposition of one of the delegation from San Francisco, who was a member of the then dominant Know Nothing party, it was lost in the Senate of 1856 *only by a tie vote*, on refusing to concur with the committee of the whole. (Senate Journals, 1856, p. 758.) At the session of 1857 the entire San Francisco delegation, with one exception, who were present during that session, had been elected by the Vigilance Committee, whose leaders bought these "Green papers." And although the delegation, even then, or at least several of them, were in favor of passing a law adopting the said ordinances as the rules and regulations of the State, for disposing of the title of the United States in said lands, as already explained; and of adding to said town grant and relinquishment, the sanction and authority of a State statute; still it was deemed best, on the whole, to let the subject pass for that session, and let the people of the city and the country see what a precious lot of "green papers" the wiseacres of the Vigilance Committe had purchased in 1856, and paid $12,500 for by subscription. And which precious "green documents" constitute the great bulk of the matter of which this immense record was made up, in this said trial, had during the closing months of the legislative session of 1857. In 1858, with a delegation from San Francisco entirely Republican, and a Legislature entirely Democratic, the said law of this State of March 11th, 1858, was passed without opposition in the Legislature, and, as I believe, by an almost unanimous vote in both houses. The law has therefore received the sanction of all parties; and of nearly all persons except the opinionated few who seek to keep land titles in San Francisco still longer in confusion and insecurity.

What they can accomplish, by longer indulging their propensities against those who have procured the written, legislative and vested grant of the city in spite of their opposition, is of little consequence. For they are few in number and never to be feared, except when they obtain a place in the Executive Council of Vigilance Committees. Whenever and wherever truth and respectable dealing, towards men and families who ride in carts and go on foot, as well as towards others, is indulged; and wherever laws and the superior policy of adhering to laws, and to solemn contracts entered into and confirmed by law, are involved; it would seem that such men are not to be depended upon.

Certain it is, that what with the Bolton & Baron title, the Larkin title, the Sherreback title, the Limantour title, and the Peter Smith title, the possessors of lands in the city of San Francisco have had, and still have quite enough to contend against, without any man of good sense, good principles and good nature being able to begrudge them any assistance which the town grant can give them. And as to those who do begrudge it, we can only say we feel, and feel keenly, that it is high time this Court should throw over us the shield of the laws, and defend us, as the law does defend us, against unprincipled slanders against our rights and our titles. For whatever others may have done, we have steadily and hopefully, and for many years, placed our whole reliance on *the truth* and on *the laws*. And upon every principle of of justice and of uprightness, as well as of policy, they ought not to be disappointed who have trusted in the laws; but on the contrary, they who have so confidently trusted in their violation, should be deceived. And according to the religious principles on which our common laws are founded, the rewards of justice should be bestowed on those who have, and will now obey "the statutes, and the ordinances, and the law." (2 Kings, 17, 37.) And they ought not to be withheld, to please and uphold those "who have departed out of the way of the law;" (Mal. 2: 8, 9, 10,) and whose "lips have spoken lies, and whose tongues have muttered perverseness." (Isaiah, 59, 3.)

I know of no example so frightful, so utterly disheartening and discouraging; so reproachful, and so well calculated to drive communities in disgust and shame from the country in which they live; as would be the example of attempting to drive American citizens from the lands which they peaceably possess, without being able to produce the title on which the attempt is asked to be made. So far as I know the feelings (and I ought to know them well) of the people settled on and interested in the "outside lands" in the old corporate limits of San Francisco, they would unanimously prefer to see this Court assist to uphold any of the numerous outstanding titles against their property, in preference to this "Peter Smith" title. Because, the Bolton, the Larkin, the Sherreback, and the Limantour, are each founded on titles, which are produced and shown, and which we can examine, criticise, construe, and overcome by legal proofs. But this Peter Smith title, this title from execution sales of "the Pueblo rights," or rights hoped for from *stare decisis*, has no such origin, and is not accompanied by any of those evidences by which its genuineness or its falsity can be tested. The others are regarded as forgeries and frauds, and no doubt are so. But the feeling about this title is entirely different. It is regarded as far more frightful than any other title ever before created against a civilized community. Because it is incapable of examination; it is incapable of criticism and of construction, and they cannot read it favorably or unfavorably for themselves, because it is incapable of inspection. And it has been held and decided in this case, to be a good title to the lands of all who hold in opposition to it; and to be sufficient to eject them from their lands, without being produced in any writing, or being shown to include any particular lands at all.

The difference felt between opposing any of the other claims against them, and opposing this "Peter Smith" or *stare decisis* claim, seems to be about the difference there is between rational opposition and disarmed terror; or the difference between opposing a title which they can see, and a title which is invisible, and has never yet been seen; or the difference between opposing a fraud, which they have the evidence to detect, and overcome in court, and opposing a fraud which has overcome the court itself, and seeks to render the very evidence inadmissible which insures its exposure!!

PART IV.

WHAT HAS BEEN PROVED; AND THE THREE TITLES UNDER WHICH THESE PETER SMITH SPECULATORS HOLD.

We have now ascertained, I trust, beyond the power of rational contradiction, that the "Missions" of this county, those which were given local governments and called *pueblos*, *the same as all the others*, were government settlements, and all their personal property as well as the lands they occupied, which did not belong to private individuals, was the property of the government, and continued so down to the time they passed to the United States, so far at all events, as San Francisco, Santa Clara, San Juan, in Monterey Co., and many others are concerned, which were not actually sold by the authority of the Mexican Government at public auction. Also, that the fact of San Francisco having no title to any lands derived "from the Spanish or Mexican government," has been judicially ascertained and decided, since the decisions of this Court to the contrary, in a suit brought by that city itself against the United States. That in such suit the issue was, whether that city had a Spanish or Mexican title to lands or not, and that that was the only issue which could be passed upon under or in virtue of the Act of Congress of March 3d, 1851; and that the judgment and decision was, that the City of San Francisco had no title "derived from the Spanish or Mexican government," to any lands.

And that the decree of confirmation which was rendered in the Board of United States Land Commissioners, and "affirmed" on the ground that the United States has signified its willingness to make a title to San Francisco, is *coram no judice*. And that its affirmance in the United States District Court, by reason of carelessness of Mr. Attorney-General Cushing, does not render it any more valid. The law of Congress being express and plain, that the authority of said courts to enter decrees was confined to titles "derived from the Spanish or Mexican Government," and that they therefore could not be extended to titles derived from the United States, any more than to titles derived from the government of California, or from any other government not mentioned in the law of Congress. And that the settlement and quieting of titles to lands in California, and the law of Congress passed for that purpose neither required, nor at all excuse, the entering of such unauthorized and purely mischief-making decrees.

Also, that this State Government, with the consent and authority of an Act of Congress, has expressly enacted, that all the lands within the limits of the city of San Francisco, as they existed in 1851, "shall pass and inure to, and be deemed to have vested in the occupants" thereof, as defined and specified in said law. And that the grant or relinquishment of title, by that city to the several possessors of its lands, as declared in said law, "shall take effect, and be as complete as if deeds had been duly executed and delivered to, and in favor of them individually, and by name;" and that "no further conveyance, *or other act*, *shall be necessary to invest the said possessors* with *all the interest*, *title*, *rights*, *benefits*, *and advantages* which the said" law and ordinances, and regulations "intend or *purport* to transfer or convey." (Laws 1858, at p. 56.)

Now to leave titles in San Francisco, on the secure basis where said law of 1858 has placed them, and where the statute of limitations of this State, now about to expire for the second time, will place them, it is only necessary to remove the so-called "title" claimed by the respondent in this case, and known as before stated, as Peter Smith.

This title, I shall submit, (and my colleague, Mr. Williams, will more fully argue), is void, because the execution under which his Sheriff's deed was obtained, was plainly void. But for the present we will suppose him to hold a valid Sheriff's deed, obtained against the city as a judgment debtor, on the day it bears date, June 22, 1852, and we will suppose the deed to date back, by relation to the date of the sale, Nov. 26th, 1851; what title would be conveyed by such a Sheriff's deed? The Respondent claims that his Sheriff's deed has conveyed to him a good and complete title. Because, 1st, his judgment debtor had a title to the lands derived from Mexico. Because, 2nd, his judgment debtor had a title to them derived from the United States, by the 14th section of the Act of Congress, of March 3d, 1851. Because, 3d, his judgment debtor had a title to them on account of what this Court has decided in some other cases. If any inference is to be drawn from the fact of this respondent bringing into Court such an enormous collection of Spanish and Mexican documents, as this record contains, that inference must be, that he has hitherto placed little reliance on showing any title from the United States, for his benefit.

And if he is able to show a title in him from the United States, he has little occasion to ask the assistance of the Court to make a title for him out of the Cohas and Roisin decisions, because proof that he had a title from the United States would, of itself, be sufficient.

And if he can prove no title in himself from either Spain or Mexico, or the United States, and shall conclude to fall back as did the judge in the court below, on the assistance of this Court to help him to a title, existing in spite of any title, from any of said governments, and sufficient to defeat and overcome the titles from either of said governments, he will certainly then accomplish more than he can rationally anticipate, and more than he can honestly wish to see bestowed upon any person, for any purpose, if he considers that a respect for the laws of the country, is of more consequence to the country, than his success in this judicial "enterprise," in which he is engaged. For it cannot be possible that any honest or respectable man can desire success, if the laws of the country are against it.

This extraordinary suit of ejectment seems to be based on the said *three fees*, or three separate sources or claims for title.

PART V.

UNIFORMITY IN THE APPLICATION OF THE LAWS, IS COMMANDED BY THE CONSTITUTION, ETC.

About the first and most important thing to be desired in any country, is uniformity in the operation and administration of the laws established for the protection of liberty and property. Without such uniformity, all do not enjoy the same protection, and justice is not administered. We have to do in this case, only with the general laws established by this State for the protection of property in this State. If those general laws could be made to apply only for the protection of such citizens and such cases as a court might chose to prefer, no matter what pretense it should set up to justify the preference, the protection of property would not be equal, and the titles to property, in cases of ejectment, would not be made to depend on the laws, but on the court. But our Constitution has been careful to render such a catastrophy impossible, and it has guaranteed the same application of the general laws of the country to every citizen within its limits. To accomplish this, it has expressly commanded all its courts to give to "All laws of a general nature a uniform operation." (Art. 1, Sec. 11.) If any attempt were made anywhere, said this Court, to violate this provision of our Constitution, "it would be the duty of this Court to interfere and prevent the commission of so grave an injustice." (People vs. Coleman, 4 Cal. at p. 56.) The laws of this State, fixing the only kind of evidence which shall be received in any case, in the courts of this State, to prove a private title to lands in the adverse possession of others, are, in their terms and provisions, the same in all parts of the State. So likewise, are all other laws governing suits of ejectment, laws of a general nature, just as much as the laws governing suits of forcible entry and unlawful detainer, and the laws governing cases of robbery and theft. These facts being plain, the conclusion seems inevitable, that there can be no such thing as one kind of evidence to prove a private title to lands in San Francisco, which would not be received to prove a private title to lands in Amador or any other county of the State. The inhabitants of San Francisco are as much entitled to the protection of the laws, against schemes of public plunder and general private robbery, as those coming here from other counties. And that which is made law for ejectment suits in San Francisco, must be law for ejectment suits from San Jose and Monterey, and such other towns as judgment sales shall hereafter be obtained against. And the principles made appliable to the decision of this suit, must be applied, where precisely the same kind of title is to be presented; and whether in favor of plaintiffs now possessed of them, or those who may hereafter acquire them. And generally, "the settled and fundamental principles" of evidence, which constitute the Law of Evidence of this State, for trying and deciding suits of ejectment in the courts of this State, must be made to prevail, and be applied alike in all cases, where the facts of the case are the same. It would be monstrous to assume, that this Court could itself create a state of facts concerning titles in any one county, which could relieve it from enforcing all such general laws in San Francisco, as well as elsewhere. Because that would be assuming that the court can, by its own acts if persevered in, relieve itself from being obedient to the Constitution, and to the principle of equal justice to all suitors.

And the very fact that the law of this case must be settled so that it can be applied to the same kind of titles everywhere, causes the decision of this case to affect more or less, the titles to lands *in seven cities*, and in at least *twenty-one different villages* or communities, in this State; all of which have preeisely the same common origin and history, and have always been governed by the same general laws, so far as regards their title to lands. The proper decision of this case, therefore, is really of vast and *permanent* interest; and it must have an incalculable effect to excite litigation, or to quiet titles and remove litigious clouds which are rising over a very large portion of the oldest settled and choicest lands in the State. The decision of this single case will, undoubtedly, affect directly more than five thousand resident citizens and land owners.

Indeed, the decision of this case involves clouds of titles, which are being gathered over large portions of fourteen counties, besides the county of San Francisco which many persons are industriously endeavoring to *entirely* envelop. This case, therefore, is of more extended importance than has, perhaps, been supposed. And whatever we may think of its present importance, it must necessarily vastly increase as the country becomes more settled, and the desire to have the titles to lands quieted becomes still more universal in our agricultural counties. According to the best estimate I have been able to make, these litigious and pestilential clouds of *title* are floating and gathering over about one million acres of the oldest settled lands in this county.

Now, we will assume for the present, (and I shall hereafter endeavor to prove) that these cases must be decided *according to law*, and not according to judicial errors which have been committed. We have just submitted, and we insist upon it as too plain to require argument, that the laws governing actions of ejectment, are "laws of a general nature," and must be applied, without the slighest variation or change being countenanced, or even thought of, on account of their coming here from the county of San Francisco. Conceding then, that the laws are general and uniform laws, and the same throughout the State, and conceding then, that they must, therefore, require the same degree of proof to establish a legal title to land in one part of the State as in another, what law is it which is to fix and determine what that proof shall consist of? This brings us to the next point.

PART VI.

WHAT LAW MUST GOVERN ALL SUITS OF EJECTMENT IN THE COURTS OF THIS STATE?

This is a suit of ejectment brought into our own courts, and confined to our own citizens. What law then, must determine the evidence which the plaintiff must produce *in this suit* to warrant our conviction of the unlawful withholding of the property? No doubt, our learned brothers on the other side, are primed and ready for a four days' seige against us, about the Spanish law and the Mexican law. But, I submit, those laws have nothing to do *with determining the kind and degree of evidence* which these claimants must produce, before we can be convicted of the offence with which we are charged. We are being tried in our own country, are we not? Is not our own country governed by our own laws? We are being tried in our own courts, are we not? Do the modes of trial or the rules of legal evidence which would govern suits of ejectment in the courts of Mexico, govern suits of ejectment in the courts of this State? It would seem to be as rational, to apply the Mexican rules of legal evidence to the settlement of controversies between our own citizens, in our own courts, concerning personal property, as it would be to do so concerning real property. Indeed, as we all know, the rules of legal evidence which prevail in the courts of Mexico, cannot prevail in our courts; because they are not in force in this State. They, in common with all the laws of Spain and of Mexico, have been repealed and abolished, and are now purely the laws of foreign countries. And not one of them can now be referred to as having any more force in this State as laws, than have the laws of France, or of Russia, or of any other foreign nation whose system of laws we have not adopted.

All the laws of Spain and of Mexico, therefore, are foreign laws, and must be regarded as having no more force in this State, in any respect whatever, excepting as mere matters of evidence, than they have in the States of New York and Virginia. Now, *with the abolishment of these laws, all the rights which existed under them have been swept away; excepting only* vested rights acquired prior to the act of repeal of April 22d, 1850, and such as were guaranteed by the Treaty of Peace of 1848, between the United States and Mexico.

What are the rights which the repeal of those laws have not disturbed nor destroyed? *They are not the rights of political or public corporations*, for, as I shall hereafter submit, *these pertained only to the political systems of local government* which prevailed; and were necessarily subject to be controlled, modified or entirely taken away, according as the interests and success of the new nation and the new constitution might demand and provide. But, the rights vested, and which the repeal of all former laws did not disturb, were simply and only, *the rights of private property.* And the laws which once prevailed here, and which are now abolished, may now be referred to in connection with these suits, merely as evidences to prove the existence of past contracts, and vested rights or interests, concerning lands. But, I most respectfully submit, until the legal evidence is duly introduced to prove the facts, this Court cannot attempt to judicially determine when, where, by whom, and to what extent, the former laws of this country, either general or special, have created private rights and titles to lands in this State. When the laws are produced which did create them, then of course it will become the duty of counsel to argue, and of the Court to judge and determine their relevancy, and their sufficiency *under the laws of this State*, to prove a private title to lands. And if it be found in a case in court that *according to the law of evidence of this State*, they are sufficient to prove a private title to land, the Court will then determine what kind of title it is; whether the legal title absolute, or a title in trust; and in a case like this, whether it could be sold and conveyed by a Sheriff or Constable under an execution; or whether it was merely a community right, prevailing in idle countries, and continuable only during the pleasure of the sovereign or national proprietors.

But to go into the judicial inquiry and decision of these, and other purely secondary and consequential inquiries, before any cause is legally shown or proved, we insist is not merely unreasonable and contrary to all logical investigation, but is in plain and direct violation of the law of evidence of this State, established for the very purpose of insuring accuracy and certainty in precisely such controversies as these now at bar.

The kind and the sufficiency of evidence, which will be deemed competent to prove the existence of a private title to land good against our government, or good against persons in adverse possession, and claiming the protection of our laws, or claiming title under our governments; and the time within which such evidence must be produced, or the claim prosecuted, in order to entitle it to be heard in our courts; are matters which, from the necessities of the case, and by the assent of all governments, are, and must be, left to the reasonable laws of the country in which the lands are situated, and in whose courts the right must be tried, and decided, according to the production or non-production of precisely that kind of evidence which such reasonable laws exact.

Indeed there can be no rational controversy as to the right of this State to fix by precise and careful laws, the only kind of evidence of which its courts shall take notice, or to which they shall listen, as competent to prove a private title to lands. In fact it seems to be the first and highest duty of every State government to do this. And wherever it is not done, it cannot be said that the rights of property can be legally enforced. Because the real purpose of such a law of evidence is to insure the protection and enforcement of all private titles to lands which do exist; and at the same time insure the country against the establishment and enforcement of any title which does not exist. And no titles can be enforced which do not exist, without interference with those which do. The highest authority on this subject says: Suits and controversies touching lands, *ex directo*, are generally if not universally recognized as belonging "to the forum of the *situs*, and not elsewhere." And that "it would seem a just and natural, if not an irresistible conclusion, that the law of evidence of the situs touching such rights, titles, suits and controversies, *must*, and *ought exclusively to govern in all such cases*." (Story Confl. Laws, sec. 630 b.) For example, he says even a complete deed to lands cannot be received in evidence as competent to prove an existing and valid title, unless it be proved to be duly recorded "according to the *lex loci rei sitæ*;" at the time. (ib. 631.)

In the case of the United States vs. Crosby, 7 Cranch 115, the United States claimed title to lands in Maine, (while under Massachusetts,) founded on a deed duly executed and delivered "at the Island of Granada in the West Indies, before a notary public, according to the existing laws to pass real estate in that colony; and both parties were at that time residents therein." The Court refused to recognize the deed as evidence of title because it did not conform to the laws of Massachusetts, which were precisely the same as the law of this State respecting the evidence required to prove that any interest or estate in lands have been conveyed from one owner to another. The Supreme Court of the United States (Story J.,) said: "The question presented for consideration is, whether the *lex loci contractus* or the *lex loci rei sitæ* is to govern in the disposal of real estates. The court entertain no doubt on the subject; and are clearly of opinion that the title to land is to be acquired and is also to be lost in the manner prescribed by the law of the place where such land is situated." Of course titles acquired before the laws of this State existed, cannot be destroyed by acts of this State. And when it is shown that any legislation of this State has destroyed a pre-existing valid title, by violating the contract which created it, this Court will, of course, hold such violation void as to such title. But there is no legislation of the kind. The legislation is only of that character, which requires all pre-existing individual titles to be proved, and prohibits the recognition of any which are not proved, according to the law of evidence of this State; which law is not unconstitutional nor unreasonable, and cannot impair any title to land which actually does exist. The laws previously existing here are the law of the private contracts of title, previously made here. But the courts and the laws which then existed for their enforcement, have all been abolished, and new courts and new laws have been substituted. And under these new laws all the old private contracts can be enforced so far as they actually were private contracts, and provided those who held them will comply with the new regulations; which do not tend to impair them, but which require all of them to be recorded, and require all of them to be sued on within a reasonable time, and require all of them to be established by conclusive written proof. Each and all of which requirements, either actually were, or could have been imposed by the former government, without causing or tending to produce any violation of the contracts. And therefore their imposition by the present government cannot be held to have produced any injurious effect. In fact if our courts are to enforce them, they must either be enforced according to our laws, and the evidence required by our laws, in such cases, or not at all. Because all the former laws being totally abolished, nothing of them remains. But nevertheless the private contracts made under those laws, we recognize as still valid and obligatory; but we will not be imposed upon, nor allow those who have good contracts to be imposed upon; and therefore we have adopted laws to prevent it. And the same principle which makes the *lex loci rei sitæ* govern in cases of contracts made after the law exists, justifies the application of the law of the situs to contracts made before the law existed, provided no violation of the contract is occasioned. And to require a contract never existing except in writing, to be proved by producing the writing; and to require a contract to be publicly recorded, which was before required to be so recorded; and to require a contract to be enforced within a certain time, or not at all, when this also was required by the former laws; renders it unquestionable, that our laws in these respects so far from tending to impair any rights, are indispensible to the security of all rights in real property; and ought to be adhered to with the utmost firmness and rigor. For they are the very means *and the only means*, of removing the deadening incubus on this state of uncertainty in titles to lands. The laws do not create nor admit of the uncertainties as to original titles in lands, which have so afflicted this country. I insist it is owing to a laxity in adhering to the fixed rules of legal evidence of which this record presents only one instance, which has at last produced the deadening and destroying pestilence, of rendering everything about land titles in California uncertain to everybody. *In the law, land titles wherever they exist, are certainties;* never *uncertainties.* In Kerr v. Moon, 9 Wheat. 655, the Supreme Court of the United States (Washington J.) said: "It is an unquestionable principle of law, that the title to and the disposition of real property, must be exclusively subject to the laws of the country where it is situated." And the same principle is reiterated by the same Court in McCormick v. Sullivant, 10 Wheat., 192.

But the decision of this Court, in Nims v. Palmer, 6 Cal. 13, is so emphatic and plainly conformable to law, that no more need be said to warrant us in affirming positively that this case must be tested by the laws of evidence of this State, referred to. In that case, this Court (Heydenfeldt J.) said: "*This State has the most perfect right to determine* what shall constitute evidences of title, as between her own citizens, *to all* the lands within her boundaries." (Nims v. Palmer, 6 Cal. R. 13.) Now, this State has constitutionally exercised this "*most perfect right*," and not in any manner to destroy vested rights, but to render vested rights secure, against all attacks, by whatever individuals attempted, and by whatever department of the government undertaken.

PART VII.

THE LAW OF EVIDENCE OF THIS STATE CONCERNING PROOF OF TITLE TO LANDS.

And First, The Common Law.

In determining what evidence shall be admissible to prove a private title to lands, in ejectment against those in peaceable and *bona fide* possession, this State has justly determined, in the first place, that it shall be that degree of evidence required by the "Common Law of England," in all such cases. (Laws of 1850, p. 219.) According to that law (as is well known to us all) there is only one "true original source of all private titles to lands." In England that original source is the King. And in this State, and throughout the United States, we have applied the same doctrine to our republican government, and "it is a settled and fundamental doctrine with us," that the only true original source of all private title to lands are our own State and National Governments; excepting only where such titles have been made *and perfected* by former and recognized national proprietors. (See 3 Kent, 377, 378.) In this State, then, according to "the settled and fundamental law of this country," every private title to lands must be derived either from the Government of Spain, or Mexico, or the United States, or the State of California. No city, and no court, is included or to be recognized as capable of being the origin of a legal private title to lands. It has been wisely suggested that the object of this "fundamental principle" requiring only one common source for all individual titles to lands, is not for the profit, or the aggrandisement of the King, or of the National Governments, but for the benefit and security of individuals in their titles. (Angel Tide Waters, 20.)

Such being the law, it is important, in this case, to recall the character of the national title, and the fact, that it is *an impossibility* for it to be passed from the national owner, to any individual, or to any local or private corporation, except by an actual grant or transfer in writing.

Things (as we are taught in the books) things have their existence in nature, independent of any idea of ownership, in anybody. (Introduction to Powell's Wood's Conveyancing, vol. I. p. 8.) The title which is created in them and exists separately and independently of the possession of them, has no existence except only in "contemplation and notion of law." (Ibid.) "Every nation has, by consent or agreement among its people, established rules, by which to determine men's interests in all things, admitted by the laws of each particular State to be capable of ownership. These rules—prevailing in every civilized nation where lands are transferable—admit, from nature and from necessity, of two kinds of property in lands: One kind created by "actual corporal possession and use," of the land; and the other created by having a legal title to it, which carries with it an "ideal possession," existing only in contemplation of the mind, and "in notion of law." (Ib. 1 and 8.) That acquired by actual possession is called the corporeal right. And that acquired by an estate or interest "considered distinctly from the land in which the interest is," is called the incorporeal right. (Ib. 2: 2 Bl. Com. 21.) "Estates in things, considered in the abstract, and distinctly from the things themselves," (says Powell) are incorporeal hereditaments. (Ib. 22 and 25.) Now, of course, this is the nature of the title held by a nation or a King, in their remote territories. How can such a title be passed to a private person or corporation? The corporeal title could be passed with or without any writing, because that title is transferrable by transferring the actual possession of the land. But how can the abstract, and incorporeal title be transferred, without a writing? How can a purely ideal and abstract right of property, having no existence excepting in the contemplation of the mind, be taken hold of and delivered to another, so that it can be retained and shown by that other? It is absolutely impossible, except in one way, and that way the law has fixed, and no other is countenanced in law, or noticed by our courts, and that way is by a writing. And hence the maxim or truism of the common law, that incorporeal property does not lie in livery but lies in grant, and can pass by grant only. (Ib. Introduc. 25.) (That property of a *corporation* may be called a "hereditament," see Ib. Introduc. 6 and 7, and 3 Kent, 401, and 2 Bl. Com. 19.)

The title then, which the nation has, is not the possession of lands, nor is it affected by the possession of others, without its consent. Its title is simply the right of possession. It is an incorporeal property, or an incorporeal right to the property, considered distinctly from the land in which the interest is. (3 Kent, 401; 2 Bl. Com. 17.) It is a right incapable of manual delivery. It is a right incapable of being transferred by delivery of possession of the land. It is precisely the same class of property as an incorporeal hereditament, "which lies only in grant." (2 Bl. 108, 109, 317; Co. Lit. 96, 172 *a*; 4 Kent, 490; 2 Hilliard, Real Prop. 604; French vs. French, 3 N. H. Rep. 255; Powell's Introduc. Wood's Conveyancing, pp. 22 and 25.) And the transfer of title to land by any nation, is the transfer "of a virtual or ideal possession (or right) existing in the contemplation of the mind alone."

And not only the nature of this title, but the nature of the national proprietor also, is such as to preclude the possibility of an actual transfer of the title except by writing. The national proprietor, whether it be the republic of the United States, or the republic of Mexico, is a corporation. (A. and A. on Corpo. sec. 15.) And, of course, it is impossible for it to transfer its title verbally, or in any manner except by a conveyance or transfer in writing. Hence, another learned author of the past century, "All conveyances by the King, and by bodies politic, were *grants*, for they *could not convey but by deed*." (Sanders on Uses and Trusts, 251, v. also, 272.)

And hence Kent decided, while Chief Justice, and expressly and unqualifiedly declares in his Commentaries, that our Courts of Justice, "*cannot take notice*" of *any* private title to lands, *not in possession*, unless the same be derived from the proper national owner, and *be "duly verified by a patent."* (Jackson vs. Ingraham, 4 J. R. 163; 3 Kent Com. 378; Jackson vs. Waters, 12 J. R. 365.)

And upon this point, every member of the Supreme Court of Louisiana, in their very able and very learned and separate decisions in the case of De Armis vs. New Orleans, argeed. They unanimously held, in that case, that by the laws of France and of Spain, as well as our own laws, an actual written grant or patent *is indispensible to transfer the title of the nation to an individual, or to a town or a city.* (De Armis vs. N. O., 3 La., 132; see pp. 156, 187, 197, 214.) The accuracy of that decision, upon this point, was not questioned by the Supreme Court of the United States, on the appeal to that Court by said city in said case. (10 Peters R. 726.) Indeed the Supreme Court of the United States has acknowledged itself bound by the same "fundamental doctrine;" and has carried it so far as to decide that *until the patent of the United States is actually issued, the legal title of the United States to its lands cannot be deemed to have been conveyed;* and that when its patent does issue, the patent transfers of its own force the absolute and conclusive title. (Bagnal vs. Broderick, 13 Peters, 450. See also to same effect Mosier vs. Smith, 3 Blackford, 132; McConnell vs. Wilcox, 1 Seammon, (Ill.) 367; Goodlet vs. Smithson, 5 Porter, (Ala.) 245.) No allusion is made to our titles transferred directly by national statutes, for, of course, they are valid, provided the statute does transfer or vest the title. It is equally well known to this Court and to all lawyers, that under the common law, parol proof can never be received in any case, nor under any circumstances, to prove a private title to land. (Jackson vs. Sherman, 6 Johns R. 21; Jackson vs. Cary, 10 ib., 302; Jackson vs. Miller, 6 Cowen, 751.) There is, I submit, nothing whatever in the whole range of the common law more perfectly settled than what Kent calls "the settled and *fundamental* doctrine," that all such titles must exist, where they exist at all, in written deeds or grants from the proper government. And it seems equally well settled, and is the express statute law of this State, that where there must be written evidence of such title, if there be any at all, *that written evidence must be produced, and cannot be dispensed with under any pretext whatever*, except the pretext that the laws can be dispensed with. (4 Cow. and H. Notes, 264; 1 Greenl. Ev., secs. 85, 86, 480; 1 Bl. 68, Practice Act, sec. 447.) (It is not pretended in this case that the document proving the title of the judgment debtor has been lost.) It is, as we likewise all know, equally well settled law, that what is not made to appear by legal proof, in each case, concerning the material issues in dispute, must be regarded, for all the purposes of the case, as not existing at all. Indeed this doctrine, as this Court is well aware, has been received for ages among our most familiar truisms or maxims of law, viz: *Quod non apparent, non est*, and *Idem est non probari, et non esse.* And to the same effect is the other familiar and long established maxim of law, that what is not sufficiently proved is not proved at all. *Idem est nihil, probare et non sufficienter probare.* (3 Co. Inst. 158; 2 ib. 178; Vaughn 169; Birch vs. Alexander, 1 Wash. C. C. R. 34, 37.)

Again: It seems also equally long and well settled, in the common law, and results, I submit, from the fundamental principles already noticed, that every person claiming a title from the government must show it, and subject it to the actual sight and inspection of the Court, unless it is proved that it has been lost, of which there is no pretense in these cases. "If a man pleads letters patent to him (says Comyns), or to another under whom he claims, *he must show them to the Court.*" (Com. Dig. Pleader, O. 3.) "So a man who claims any estate or interest by deed (says the same accurate authority) must show the deed, though he is no party to it." (Ib. O. 4.) "Although (he continues) he has only part of the estate granted by letters patent, *he must show* the letters patent." (Ib. O. 5.) The title must be "duly verified by a patent," said Chief Justice Kent. And where there is a patent it is the best evidence, and must be introduced, say all the authorities in the law. Judge Adams, in his learned work on suits of this sort, says, the principle that the plaintiff *must be clothed* with the legal title to lands in order to recover, is attended with such *clearness* and certainty as to amply compensate for any inconvenience it may sometimes occasion. "The plaintiff must be *clothed* with the *legal title* to the land." No lesser or equitable title will avail. This principle (says Adams) is "*fixed* and *immutable.*" "So fixed and immutable that (even) a trustee may maintain ejectment against his own *cestui que* trust." (Adams Eject. 43, 44, and numerous authorities, Ib.) The rule is universal that the plaintiff in ejectment "*must show the right* of possession to be in himself. It is immaterial to his right whether it be in the defendant or not, for if it be not in himself he cannot recover. (Love vs. Simms' lessees, 9 Wheat. 515; Chief Justice Boyle, in Colston vs. McKay, 1 Marshall Ky. 251; Lane *et al.* vs. Raynard, 2 Serg. and R. 64; Covert vs. Irwin, 3 ib. 383; Walker vs. Coulter, Addison's Rep. Pa. 390; Clark vs. Diggs, 6 Iredell, 159; Chief Justice Kent, in Jackson vs. Demont, 9 J. R., 60; also, Winn vs. Cole's heirs, Walker's Miss., 119; Robinson vs. Campbell, 3 Wheat., 212; Talbot vs. Callaway, Hardin's Rep. Ky. 35; also 36 ib.) In ejectment the legal title, and the legal title only, is in question. (Sinclair vs. Jackson, in error, 8 Cowen, 543.) "It is necessary" for the plaintiff not to allege, assert, or claim, or reason himself into a title, but "*to show,*" to exhibit before the Court, a "good" and "sufficient" "legal title" to the land. (Adams Eject. 310; also 33, 199, 378.)

Again: It seems also a well settled rule of the common law, as applicable to suits in ejectment, as it is to suits on indictments, that a man in possession of land, claiming it to be his property, cannot be presumed guilty of claiming another man's property. The law does not seem to afford any authority for regarding persons in the peaceable possession of lands as *prima facie* criminals; not only that, but also as persons who must prove their innocence. But the law regards the possessors of lands as it does the possessors of money, or of any other property which they claim to be their own. It regards them as acting truthfully until they are *proved* to be acting falsely. It regards them as innocent of trying to deprive another man of his property, until they are *proved* to be guilty of it. Chief Justice Kent said (as before mentioned) in reference to a lot in the heart of the city of New York, which a person had taken possession of without a title: "A peaceable entry upon lands apparently vacant affords, *per se*, no presumption of wrong; the benign intendment of the law is the reverse." (Smith vs. Burtis, 6 J. R. at p. 218.) "*The law* (said Justice Story) will never construe a possession to be tortious unless from necessity. It will, on the contrary, presume every possession lawful the commencement and *the continuance* of which are not *proved* to be wrongful." (Ricard vs. Williams, 7 Wheat. 59.) Naked possession alone (says Blackstone) even by a wrongdoer, may by length of time, "ripen into a perfect and indefeasible title." (2 Bl. 196.) The law would be chargeable with an absurdity (said the old Supreme Court of New York) if it preferred a person not in possession, who does not produce a legal title, to a person in possession, who cannot produce any. It is against law, against principle, and against right, to hold that a defendant in possession showing no title, has no right to complain against being ejected in favor of a person who also proves no legal title. (*Vide* McRaven vs. McGuire, 9 Smedes & Marshall, 34.) By nature all places previously unoccupied may be held on the land, the same as on the sea. But by *law*, land is made an article of property; and, in order that property may be secure, the possessor must be ejected where he is proved, in a suit by the owner himself, and by the evidence required by the law, to be guilty of withholding the legal right to the property. But the complaint cannot be listened to if made by anybody else except the true owner in law; nor can it be listened to unless made within the reasonable time prescribed by law. The law has so provided that every private person, who is the true legal owner, can prove himself to be so by a written chain of legal evidence. And the right of no private person is listened to against the person in possession, except in the manner authorized by law; *i. e.* by producing his title, and showing it before the possessor and before the Court. A possessor has as plain a right to see and examine the title brought against him, as a prisoner has to see and examine the witnesses who are to be introduced to prove his guilt. And to presume the prisoner guilty without producing a witness against him, would seem as just and as legal, as to presume the possessor guilty without showing or producing a title against him. And the rule of law that every man shall be presumed innocent until proved to be guilty, is certainly no better settled, and can scarcely be more important in cases of felony than in cases of ejectment. And the rule is immutably established throughout England and America, and affirmed and re-affirmed, and never denied by any decision of this Court, that the peaceable possession of land, under claim and acts of ownership, shall, of itself alone, be deemed and regarded as *legal evidence* that the possessor is the true and legal owner of the land *in fee*. (Adams on Eject., 30, 94, 275, 281, 282, and numerous authorities there cited; and also numerous American authorities cited in note [2] to p. 275 ibid; 2 Tucker's Black., 176; 2 Chit. Black., 196 and note [1]; Jackson vs. Rowland, 6 Wend., 666; Day vs. Alverson, 9 Wend., 223; ibid, 511; *Smith vs. Lorrillard*, 10 *J. R.*, 339; Ricard vs. Williams, 7 Wheat., 59; Potter vs. Knowles, 5 Cal., 87; *Norris vs. Russell*, 5 *Cal.*, 249; Grover vs. Hawley, 5 Cal., 485; Moore vs. Goslin, 5 Cal., 266; Fitzgerald vs. Urton, 5 Cal., 380; Hutchinson vs. Perley, 4 Cal., 33; Hicks vs. Davis, 4 Cal., 67; Winans vs. Christy, 4 Cal., 70; Plume vs. Seward, 4 Cal., 95.)

It seems worthy of attentive remark, that the guarantee in Magna Charta against dispossessing a man of his lands or property, except by the law of the land, applies to estates created by lawful possession alone. In John's Charter the law is said to read that no man shall be *disseized* (*aut utlagetur*), but by the law of the land, etc. John's Charter, it is true, is not deemed the authentic evidence of "the law of Magna Charta," because there is no authentic record of it. (1 Reeves' His. Eng. Law, 214.) But the authentic record of the same charter, to be seen in the English Statutes at large (25th King Edward), is even more precise upon this point. It says (chap. 29), "*aut disseisiatur de aliquo libero tenemento suo*:" nor be dispossessed of his free tenement, or freehold estate, except by law, etc. (Stephen's De Lolme, Eng. Con. p. 53; Creasy, Eng. Con. p. 153, etc.) This freehold estate, free tenement, or *libero tenemento*, as we know, was an estate created by possession, and was at that time incapable of being legally created in any manner without the delivery of the possession. (2 Bl. 104; Intro. to Wood's Conveyancing, sup. 4, 5, and passim.) And so the law seems to have remained until written deeds were made sufficient of themselves to transfer a freehold as well as any other estate, where the possession was not held at the time in opposition to the interest sought to be conveyed. And, as your Honors remember, the common law deemed it so important to the validity of the deed of transfer, that no one should be at the time in opposing possession of the lands, that it used to require the deed to be made and delivered "upon the very spot to be transferred." (2 Bl. 294.) So much has our Common Law (which is the rule of decision in this Court) always respected the actual and peaceable possessors of lands. It is an astounding fact, and most important to our clients to be remembered, that the only cases in which these essential and fundamental principles of law have all been disregarded, and new and revolutionary dogmas announced and enforced, hitherto, seem to be the cases which have come to this Court from the county of San Francisco. Ejectment suits, coming here from any other county are determined according to the settled and known laws of the State. Ejectment suits by speculators in San Francisco have not been always so determined. It is true that the possession, and claim, and exercise of ownership (unless continued for the length of time required by law to make it so) is not *conclusive* evidence of the right of property in the soil possessed. But it is *prima facie* evidence of title *in fee*, and, according to the laws of this State it can only be overcome by contrary legal proof. (Mathews Presump. Ev. 1; 1 Starkie Ev., 544; 6 Peters R., 622, 632; 13 Peters R., 334; 2 Greenl. Ev., sec. 555.) And that contrary legal proof must be, as has been abundantly shown, competent evidence *in writing*, and, as before observed, if possession alone be continued for the requisite time fixed by law, it, of itself, amounts to the strongest proof of title known to the laws, *i. e.* absolute and conclusive proof, incapable of being overthrown, even by a patent itself. (Authorities sup. on this point; also, 1 Greenl. Ev. sec. 16.) And before that time may elapse such possession of itself *is conclusive evidence* of a right to the land, as against all the world excepting, only, the true owner. For it is most manifest, that nobody has any right to complain of another's possession of land, if the owner does not. And if he chooses to leave the citizen in possession until his right becomes absolute he certainly has the right to do so, and no other has any right to complain. And hence the law does not authorize nor permit any lawful and *bona fide* possessor of lands, to be driven off by the judicial power, or any other power, excepting only for the benefit and on the application of the true owner of the superior legal right, *i. e.* the abstract legal right of property. This seems not only manifestly just, but it is also manifestly in accordance with legal principles, and "the law of the land." Among others which could no doubt be found the following authorities seem to clearly uphold this doctrine, if authorities be necessary to uphold so plain a right. That is, the legal and "immutable right," of the claimant in peaceable possession, to be preferred over all persons, all authorities and all powers, excepting only the demand of the true owners of the *law* title, or "legal title." (McRaven v. McGuire, 9 Scmedes and Marsh., 34; Hall v. Gettings, 2 Harris and Johns., 122; Love

v. Simons' Lessees, 9 Wheat., 515; Ch. J. Boyle, in Clorton v. McKay, 1 Marsh., Ky., 251; Lane v. Raynard, 2 Serg. & R., 64; Covert v. Irwin, 3 Serg. & R., 283; Walker v. Coulter, Addison's Pa. R. 390; Lane v. Raynard, 1 Serg. & R., 65; Clarke v. Diggs, 6 Iredell, 159; Jackson v. Demont, 9 Johns. R. 60; Winn v. Cole's heirs, Walker, Miss., R., 35; Quarles v. Brown, ibid 36; Sinclair v. Jackson, in errors, 8 Cowen, 543; Buxton v. Carter, 11 Miss. Rep. 481; Carroll v. Norwood's heirs, 5 Harris & Johnson, 164; Adams Eject. 308, 309, 310, 319; and 2 Greenleaf's Ev., sections 304, 305, and 553.)

When the plaintiff in ejectment does prove his legal right to lands held by another, in opposition to his right; by proving and producing in court, within the time given by law for that purpose, a regular and unbroken chain of legal and perfect conveyances, with not a link wanting (8 Watts' Rep., 101) and reaching back, in all cases, in new countries, to "the only true original source of all private titles to lands," and without even a material scratch or erasure unaccounted for; and without a material defect in the acknowledgment or recording uncorrected; then, but not until then, "the law changes sides;" and instead of regarding the peaceable possessor as any longer entitled to countenance, commands him to forthwith overcome this proof of his guilt; and if he fail to do so *the law* (not the judges, for, of course, they have no more right to interfere than anybody else, but *the law*) will convict him of a wrong done against the legal rights of another, and will punish him by driving him from the land, with the power of the whole people, if necessary; and by making him pay to the owner his damages for its use, and will thus justly secure the true owner in the enjoyment of his right. (Livingston v. Peru Iron Co., 9 Wend. R., 511.)

But what could well occur more directly in violation of law, and of natural justice, than to so convict a citizen and undertake to drive him from his property, without any legal evidence at all, and without knowing, with certainty, whether the person complaining of him is really the true owner of the land he claims, or not?

It is abundantly manifest, that the law presumes the *bona fide* possessor innocent, and presumes he owns what he says he owns, and appears to own. And if we presume he is not the owner we directly violate the presumption which the law has established in his favor. For the law says, the contrary shall not be presumed, but must be proved. Hence, so far as the Court has presumed that San Francisco is the owner of lands, the presumption is not only without law, but it is in plain and direct violation of law. And unless we be greater than the law, it would be preposterous indeed to say that our presumptions, however ingeniously created, can overcome the presumptions which the law has created. The law is so plain and well settled, and the principle is so self-evident, that this also has been reduced to a familiar legal maxim, viz: where *the law* presumes a fact the contrary must be proved. (3 Bouv. Inst. Nos. 3,063, 3,090.) It seems as plain as the sun at noonday, that if the law presumes a man to be the owner of the library, money, and lands which he possesses and claims to own, a court or judge cannot presume that another man owns them, and issue process ordering them to be delivered to another on the judge's own presumption. And because one judge has been suffered to indulge and enforce such presumptions, cannot be authority for another to do so, while the law remains the same. Again: it also seems too plain a matter to dwell upon, that the respondent in this case stands in the position of any other plaintiff in any other suit of ejectment holding a mere sheriff's deed. If the nature of his judgment debtor permitted him to obtain such a deed at all, it is certainly against law and against common sense to permit him to introduce his mere sheriff's deed here, as any evidence of a title, until he shows us by competent legal evidence that his judgment debtor was the legal owner of the land it pretends to convey. A private deed, says Kent, conveys nothing, "where there is no evidence that he had any title who made the conveyance." (Jackson v. Hudson, 3 J. R., at p. 384. To same effect see Arnold *et al* v. Gorr *et al*, 1 Rawle, 223; Jackson v. Town, 4 Con. 599; Henderson v. Overton, 1 Yerger, 394.)

It is a general principle of law, reasoned Chief Justice Marshall, that a party who sets up a title to land, must furnish *all the evidence necessary* to support it. And if the validity of his deed depend upon some other act, that also must be proved by competent evidence. (Williams vs. Peyton, 4 Wheat. 77.) The Sheriff, of course, makes no pretence that he had any title to the land described in his deeds in these cases, nor that the judgment debtor had any. The Sheriff does not pretend to convey any thing more than the right, title and interest of the debtor, at the time of the sale, as directed in the execution, and could not if he should try, for his agency or power extends no farther. And hence he guarantees nothing except the regularity of *his own* proceedings. (2 Hilliard, R. Prop. 388, pl. 28.) His deed was only a release, a mere quit claim. And, therefore, the Court below seems not only to have acted in direct violation of law, but in plain violation of reason, in not requiring the plaintiff to show title in the judgment debtor, by competent legal evidence. To presume a title in the judgment debtor was, I repeat and resubmit, in violation of law. The legal evidence of title in the judgment debtor in this case, instead of being dispensed with and avoided, ought more than in usual cases to have been insisted on. Because, not only did the respondent's grantor buy at public sale, where the rule of *caveat emptor* strongly applies in all cases. But all transfers of this scheming title over our lands, have been made knowing we were in the peaceable and adverse possession of them! (Hunter vs. Watson, Jan. Term, 1859, this Court.) And hence this respondent's deed is not only a mere release, but the presumption of the common law is, that the deed is absolutely void, and that the purchase is one of those which is held in such detestation that it subjects the purchaser in most countries to actual punishment; under the Roman law, to the horrid punishment of "perpetual infamy." (4 Bl. 135.) And *under the common law* to the punishment of "fine and imprisonment." (Ib. see also Van Dyke vs. Van Buren and Vosburg, 1 J. R. 361, 362; Jackson vs. Ketchum, 8 J. R. 481; Knox vs. Kellock, 14 Mass. 200; Livingston vs. Prosens, 2 Hill 526; Cameron vs. Irwin, 5 Hill 272.) The 34th section of our act concerning conveyances, authorizing sales of "*interest*" in lands of others, being in derogation of the common law, and plainly (as would seem) against the quiet and good morals of the community, must be strictly construed. And though it *permits* combinations of speculators to get up law suits as to other people's property, and upholds traffic in such mere law suits, we have no fears that this Court will so far depart from law, from reason, and from justice, as to insist that such deeds must be held superior to all others, and so superior as to be deemed good without proof, valid without evidence, and capable in law to deprive a community of their property, in spite of law, and in spite of evidence.

PART VIII.

"RULE OF PROPERTY" IN FAVOR OF PETER SMITH TITLES TO UPLANDS.

It is claimed, that new and erronoeus decisions concerning land titles in San Francisco, are now a rule of property! A "rule of property" which must not now be disturbed! We do not wish this Court to tolerate the disturbance of the rules of property. Precisely what we insist upon is, that the rules of property, in San Francisco, ought not now to be disturbed. Precisely what we insist on is, that property in San Francisco should be let alone. And that the Court should not feel at liberty to disturb or destroy the rules of property in San Francisco, any more than in any other county in the State. We want all rules which are not the rule of property, to be put an end to, in order that we may begin to enjoy that new feeling of settled security never yet experienced in San Francisco, *i. e.* the feeling that our titles to property do not depend upon the decisions of the Supreme Court; but depend on laws, and the solemn contracts which the laws have made in our behalf. Because the moment they are left on this basis where *the laws* have at last placed them, they then become impregnable, and not only the Court, but the whole three departments of this government combined, could not disturb them. While on the other hand, so long as the rule of property is regulated, and the mere rule of admittedly erroneous decisions adhered to, we cannot be said to have any titles to property at all. For where any true titles to property exist, they exist just as completely beyond the power of the Court, as beyond the power of the Legislature. Whereas, titles which do not exist in fact, and in positive legal contract, but are depending only on erroneous decisions of courts, are reposing where they are all the time liable to be disturbed, impaired or totally destroyed. For every body knows, that it is often as much the duty of courts to change, modify, or reverse its erroneous decisions, as it ever can be to make them. And none can pretend that this Court has not the power to disregard erroneous decisions delivered here, whenever it deems it proper to do so. But let us look into this rule of property, which is said to be created in favor of this respondent, and which is not the rule which actually does exist in law, but which is based upon some erroneous opinions of this Court. These opinions are those said to be delivered by this Court, in what we will call the Cohas vs. Roisin decisions. Now, although it is well known that erroneous opinions of a court, are not, and ought not to be actually obligatory, still, it is a remarkable fact, and considering the pretensions here set up, it ought to be remembered, and called to the attention of the Court, that while the conclusion or judgment, in the case of Cohas vs. Roisin was concurred in, the reasoning of Mr. Justice Heydenfeldt by which that conclusion was arrived at, has never been expressly announced as the opinion of this Court. The only time in which those views were formally re-expressed was, I believe, in the case of Welch vs. Sullivan. Two of the Justices, we know did not concur in those views, though they did both concur in the judgment entered in that case. And in just the same way did two of the Justices concur in the judgment, but not in the opinion given in the case of Cohas vs. Roisin by Mr. Justice Heydenfeldt. And if I be correct in this, there is no opinion of this Court which can be referred to as necessarily combining an express and absolute adoption of the theories and reasoning of that case. And no "rule of property" which can be said to depend on those views. It can be inferred that they were adopted. And it can also be just as fairly inferred that they never have been adopted. In Leese & Vallejo vs. Clark, Mr. Chief Justice Murray, in delivering the opinion of this Court, most truthfully and accurately said: "The alienation of the public domain of Mexico, was a subject of careful consideration with that government." And that "*by the fundamental law of* 1824, *and the regulations of* 1828, * * *must be ascertained and determined the validity of every grant of land in California*," (meaning, of course, grants subsequent to Mexican independence.) This Court has never questioned the correctness of this decision as to this point. And we have already contended, and endeavored to demonstrate its accuracy as to the power to create Mexican titles in California. Indeed, until some other authority is shown, I insist that the fact is undeniable by any body, that no valid private Mexican title can exist to an inch of the soil of this State, unless made in accordance with said laws of 1824, and said regulations of 1828. And no matter whether the claim is set up by an individual or a corporation, which is the same thing as to titles in property. They are the laws which were adopted by Mexico for disposing of its public lands. *And Mexico never adopted any others.* They only, were in force in this State, from the year 1828, to the day on which this country passed to the United States. And, possibly it cannot be affirmed with equal certainty as to the grants held to the old Mission Pueblos, sold at public auctions by the Mexican authorities, under claim of having had special authority from Mexico. Still I do include every other conceivable Mexican grant or title to whomsoever made, whether a corporation or an individual.

Mr. Ch. J. Murray, in the decision just quoted from, also declared with equal emphasis, that this Court can alone look to said law of 1824, and Regulations of 1828, and *by them every grant* (to lands in California) *must be determined.* And that had this Court "*the power* to discriminate, its exercise would be more dangerous, and productive of more injustice, than the *total inability* to go beyond" the said laws and regulations. (3 Cal. R. 24, 25.) Will any one tell me, that the same judge, and a majority of the same Court denied and repudiated *these words of the law*, during the very same year, and in the very same volume of the reports of this Court? It was not so. Nor have those views to the extent quoted, ever been reversed by any decision of this Court. The same decision was actually reiterated in two subsequent decisions signed by a majority of this Court, viz., in Vanderslice & Clarkson vs. Hanks, and in the very decision of Cohas & Roisin itself. In the opinion in Vanderslice and Hanks—concurred in by J. Wells—Ch. J. Murray reiterated his former views, declaring that he had fully considered the principles declared in Leese & Vallejo vs. Clarke; and notwithstanding the sebsequent decision by this Court itself, (by J. Hydenfeldt) in opposition merely to the extent to which he carried his views, he and his associate, Mr. J. Wells, actually reversed that subsequent decision of this Court, and restored its first decision, on the ground, that even the material conditions in a grant, could not be legally presumed to have been performed. How has it been possible for us to suppose or imagine, that the same justices could turn round, in the same year, and carry the doctrine of presumptions so far, as to decide, that not merely any conditions in a grant, but *the very grant itself*, can be legally presumed, in an individual or local corporation out of possession. In his opinion in Leese & Vallejo vs. Clarke, Ch. J. Murray further said: "There is no map, no survey, no record, no evidence of judicial possession, no evidence that the grant was confirmed, no evidence that the grant was recorded in a book kept by law as a record of such grants." [3 Cal. p. 26.] And in Vanderslice vs. Hanks, reaffirming these doctrines even to the extent of reversing a decision of this Court on the strength of them, he also solemnly declared, "I am aware that the principles involved are important, and that no case has ever been passed upon by this tribunal which so distinctly affects the prosperity of this State; at the same time I am *fully satisfied* not only that the conclusions of law at which I arrived, [in Leese & Vallejo vs. Clarke] are sound, but also, that *a different rule of decision would be disastrous, iniquitous, unjust, and inequitable.*" [3 Cal. 48.] How can we believe that in six months from the time of using this language, the very two justices of this Court solemnly decided precisely the reverse of every one of the propositions they so strenuously insisted on in all their former decisions? How can we believe, that in six months these same justices did not modify nor moderate, but reversed and repudiated all the principles which they just before so solemnly declared they had "fully considered," and were "fully satisfied" that without adhering to them, such "disastrous," and "unjust," and "iniquitous" consequences would ensue. How can we believe, that after deciding that all incomplete Spanish and Mexican titles in this State, should be first affirmed or rejected by the United States, before this Court should be called on to enforce them as definitively valid, and that a bona fide and lawfully executed, written grant or patent, from the Mexican nation, and undisputed as to its genuineness, was not a sufficient legal title on which to maintain ejectment, unless accompanied by a survey, and unless the conditions in it were proved to have been complied with; and after insisting and reiterating that even such conditions cannot be presumed, but must be proved; that in six months afterwards, they not merely decided that all the requisite acts, and all the stipulated conditions *can be presumed*, without any proof, but that the very *grant itself can also be presumed*, *without any proof of its existence, and without its having ever been seen?* If they did it, it is certain that they both expressly and publicly, and from this bench, denied that they did it; and *justice to us*, as well as to them, seems to demand that that *denial* should not be forgotten.

Ch. J. Murray published a separate opinion in the case of Cohas vs. Roisin, with which separate opinion, Mr. J. Wells concurred, making it the opinion of a majority of the Court. In that opinion they say: "It is contended that this decision [of Cohas & Roisin] trenches upon the principles *laid down by this Court*, in the cases of Leese & Vallejo vs. Clarke, and Vanderslice &

Clarkson vs. Hanks. *We* [i.e. the majority of this Court] do not think so. *If we did, we would not decide anything to shake the authority of those decisions which we believe to be correct.*" This other opinion by this Court is not published in the Reports, but it is recorded in the office of the Clerk of this Court, in connection with the opinion which is published. And in the syllabus of the case, [in 3d Cal. Rep.], matters are referred to as decided, which do not appear in the opinion published, but only in the opinion omitted from the blundering and improper report. But the most essential part of this explanatory opinion of this Court, remains to be stated. They did not pretend to agree with the doctrines and speculations given in the opinion of Mr. J. Heydenfeldt, in that case. They said, and said carefully as it would seem, that they concurred with him in the *judgment*, or in their own words, "in the *conclusion* to which he has arrived." And the ground on which they place their opinion of a title in San Francisco, is directly in the teeth of the presumptions which are found in the opinion published in the Reports. They, or at least the Ch. J. concurred upon the ground most prominently stated, that an actual grant had been made to San Francisco. A *lawyer* would, perhaps, hardly suffer himself to knowingly adopt any other ground on which to place the conclusion, that such a corporation owned lands. In the said opinion by *the majority* of this Court, the Ch. J. said: "*I am satisfied that, long before the grant upon which this controversy arises was executed, the pueblo of San Francisco was organized, and a grant of Pueblo or municipal lands made to it by the Governor of California, and confirmed by the Territorial Legislature.*" [*!*]

It may also be doubted, whether Mr. J. Heydenfeldt intended to repeal the "settled and fundamental doctrine" of the common law, that courts of justice cannot notice private titles to lands, [in possession of others] unless they be duly verified by writing, produced and shown to the Court. Certain it is that six months before his decision in Cohas vs. Roisin, he decided differently in a case in which a title in the anciently incorporated *city of San Jose* was set up against the plaintiff's right. That town had been expressly incorporated by the king of Spain. "Its lands," speaking in the sense in which you would speak of the lands of a county or a city, meaning the lands within it, were proved to have been actually surveyed, and marked out upon the ground; and yet when the title of that ancient town was claimed to exist, Mr. J. Heydenfeldt decided it did not, *because* "no title was *exhibited* establishing the fact." (3 Cal. p. 45.) Are there not more decisions of this Court to the same effect, than there are decisions to a contrary effect? And which class of these decisions constitute the best "*stare decisis*," the best "rule of property?" Have not the decisions of this Court, which we will all admit to be correct, created a better rule of "*stare decisis*" than any or all its admittedly erroneous decisions can have created? And besides, we are to keep in view the constitutional prohibition against applying any kind of law against us from San Francisco, which would not be applied against others from other parts of the State. We have not come here to have San Francisco laws applied to us. We have come here to have the laws of the State of California applied to these cases; and we insist that the honor of the State and the honor of this Court is solemnly pledged to administer justice to these parties now here, *according to the laws of the State of California*, regardless of whatever has been done heretofore, incompatible with the laws of the State.

Conceding, for the present, that the Court had power to change or to suspend the "settled and fundamental doctrine" of the laws of the State of California, requiring that no court shall notice *any* private title to any lands in the bona fide possession of others, unless it is proved by a legal chain of written conveyances; still it seems manifest that a majority of this court did not intend to make any such decision. And there is another maxim in our laws, concerning erroneous decisions of judges, which does not consign them to dishonor, nor require any animadversion upon their conduct; but simply declares that the commission of errors are not to be deemed wilful; *nor are they to be regarded as having ever been actually consented to.* "He who errs," says the maxim, "*does not consent.*"

2. The Statute Rule of Evidence.

But if the power shall be asserted to change "the settled and fundamental doctrine of the common law," to which I have referred, by repeated decisions in violation of it; still that power will hardly be claimed to extend so far as to repeal the constitutional statutes of the State by the same process. Every statute law is the supreme law, unless restricted by the Constitution. [1 Kent, 494.] And our statute laws fully recognize and affirm the doctrine contended for, and prohibit the violation of "the 'settled and fundamental principles' of the common law," as to proof of private title to lands of others. Our act concerning conveyances permits no actual transfer of any estate or interest in lands, except by deed. [Laws 1850, p. 249, etc.]

And by another "supreme law" of this State, because equally constitutional, our State has, I submit, expressly prohibited the courts of the United States, and the courts of this State, as well as all other subordinate powers and persons, from "declaring" or "creating" any title to any portion of the soil of this State, unless it be done "by deed or conveyance in writing" made by the owner, or "by act or operation of *law*." [Statute against frauds, Laws 1850, p. 267, sec. 6.] *This excludes every species of trust estates.* [4 Kent, 316]. A title created "by operation of law," I submit, means what it says, and not what it does not say; that is, it means "by operation of *law*," and does not mean nor include, by operation of judicial opinions or decisions. Decisions may be, and may not be, law. If the statute had meant to include them, or make any exception on account of them, it would, of course, have been so expressed. The phrase "by operation of law," has of course, only reference to the legal mode of classifying the adopted and established means by which titles are legally acquired. The old mode of classification of the means of acquiring title to lands was: all titles are acquired by descent or by purchase; but the present classification is: all titles are acquired "by operation of law," or by purchase. [*v.* 4 Kent Com. 391.] Our statute creates no new mode; on the contrary, it prohibits any new mode of creating or acquiring titles to lands.

There seems to be no authority in law, to take notice of any mere declarations or assertions, or even oaths of any man, or of any officer, or of any court, as of itself, legal evidence of a private title to lands, in the adverse possession of others. I have endeavored to prove that the "settled and fundamental principle" of the common law on this subject, prohibits it; and, I submit, our statute laws prohibit it. The only power on earth, which either our laws or our reason, or our security, can recognize as capable of "creating, granting, assigning, or surrendering," "any estate or interest in land," to any person not in possession, is the power of the owner, and "the act or operation of law;" and all titles "by act or operation of law," *rest on the basis of the owner's assent.* They are titles, as we know, created by marriage, by descent, by operation of the statute of limitation, the statutes regulating judicial sales, etc. But the title here in question is claimed to be regularly and legally derived from the owner, merely by opinions of this court!

The consent of the true owner must be had to pass the title; and the consent of all the courts or individuals in Christendom ought not to be sufficient without it. And *the law* will not listen to any evidence that the owner has parted with his title, except the act or deed of the owner himself. Decisions of courts cannot pass it. The owner must pass it, and must pass it by such solemn acts as the laws wisely require; so that afterwards, whether absent or dead, or become a mortal foe, his transfer can always be shown, and can never be disturbed. Titles asserted over lands in the peaceable possession of others, are solemn claims, and considering the magnitude, extent, and duration of the interests to be affected, they should require solemn testimony to uphold them. They affect the homes, and the stable plans of society, which should be secured against revenge, and be placed beyond the power of envy, cupidity, and perjury, and also beyond the power of judicial enmity, prejudice, and favoritism. And our laws, and our laws only, have so secured them. And if this Court will suffer the laws, and not erroneous decisions, to be administered in the county of San Francisco, the titles to our lands, which have been kept in confusion for ten years, by trying other expedients, will be quieted and settled in one day. Even the State itself is not allowed to make a grant of its own lands, except by solemn deed. "All *grants*," says our constitution, "shall be in the name and by the authority of the people of the State of California, sealed with the great seal of state, signed by the Governor, and countersigned by the Secretary of State." [Art. 5, Sec. 15]. If the State itself cannot make a grant to a person or corporation without all this solemnity, how could this single Department do so, by merely declaring that a grant exists, and afterwards finding a virtue or an excuse for adhering to such an assertion. And as the State itself is not the original proprietor of all the lands within it, and hence even its own grant would not, of itself alone, be conclusive on this Court, unless or except as to lands below high water-mark; how could this Court feel that a grant or title is conclusive upon it, which was merely made by the opinions of its predecessors in office, without anything appearing to show sufficient authority for such opinions; or to show that the owner has ever consented to it, or even been consulted on the subject.

Indeed, we know well enough, that if an actual and valid grant in writing, had been duly proved and introduced in evidence, in the case of Cohas and Roisin, and in every ejectment suit tried since that decision, it would not help this case, it would amount to no legal evidence, and could not be legally taken notice of in this case, because every such case must be decided by its own evidence, not the evidence in other cases.

PART IX:

THE QUESTION WHETHER SAN FRANCISCO HAS A GRANT OR A DEED FOR LANDS, IS, IN THE FIRST INSTANCE, A QUESTION OF FACT, NOT OF LAW. AND THE REASONS GIVEN FOR JUDICIAL JUDGMENTS DO NOT, OF THEMSELVES, PROVE FACTS. AND IF ANY RULE OF STARE DECISIS CAN BE APPLIED AT ALL, IT CANNOT BE AGAINST THESE APPELLANTS, WHO DO NOT HOLD UNDER ANY TITLE SO CREATED.

Whether any private person or corporation has a title to lands in the possession of another seems to be a question of fact, and not a question of law. The construction and effect of a grant, or of a statute title when produced, may raise questions of law. According to the settled and fundamental principles of the common law, and of the statute law, and the laws of all former governments having dominion here, the grant or statute title, if it exist, must have been in writing. But the question whether any such writing has been made or not, cannot be a question of law, any more than the question, whether a promissory note, or any other contract also required to be in writing, has been made or not? A conveyance of land is a contract in writing, executed and binding on the grantee. (6 Cranch. 97.) How can this Court find that such a contract was made and executed between any parties whomsoever, without ever having seen the writing, and without ever having seen or heard of anybody who has seen it, and without its being shown in the record? Nothing can be legal evidence of the fact that a conveyance was made by some law, or by some deed, except of the law or the deed, unless they have been lost; and if lost, not some title, but the contents of the law or the deed, is certainly all that could be safely listened to; and, therefore, *the law* declares it is the only evidence which shall be received to prove such facts, and the only evidence which courts of justice shall take notice of. (Pr. Act, sec. 447.) There is no pretense that any title paper in this case has been lost. Therefore they must produce their title. They must show it to this Court, and to us. We deny that they have any. And if they have any they can produce it, and they must produce it, or else it must be conceded that all the most familiar principles of law for the security of property, and against the commission of frauds are meaningless. But in any view, this point seems undenied and indisputable; that the first question in these suits of ejectment is a question of fact, viz: has the plaintiff or his judgment debtor a title to the lands sued for? Not what the title is, nor how it comes; but the question has the city any title at all from any body, or in any manner; necessarily raises a question of fact. Not what a deed conveys, nor what a law conveys; but is there any deed or any law conveying, or purporting to convey anything, is a question of fact. Before a court can move it must have some fact presented and proved or agreed to. For it is also a plain truism, and hence a legal maxim, that "*ex facto, jus oritur.*" Upon proof of the fact that this plaintiff owns our land, this Court must give him a legal process for our land; and on proof in another case that he owns our ship, this Court must also give him due process for our ship. This is not done in virtue of any power inherent in, or capable of being originated by the Courts, but because the laws have so previously provided and fore-ordained. But can the Court grant the process without the fact being proved that the plaintiff actually had a title to our land, or a title to our ship? No; because the law prescribes the manner in which final process may be granted, *i. e.* on *legal proof* of ownership; and if the process be granted without such proof, and merely on the strength of something said or decided in some cases between other persons, it seems manifest it will not be the process which the law contemplates. The Court may say there is a law which gives San Francisco all the lands about it; but that is plainly a statement of fact which no man is bound to believe, unless the law is shown. For, although courts can take judicial notice of the general laws of a country, they cannot make judicial notice extend further than actual notice, and make men see judicially what is not otherwise discoverable at all. For that would enable Courts to see things which might keep men's property continually subject to its discoveries. Courts do not seem invested with any such authority; but seem bound, in common with the rest of mankind, to be governed by evidence. And they seem no more authorized to say that does exist which does not exist, under any pretext, or for any purpose, than has any other department of the government, or any citizen under it. Courts of Justice, I most respectfully submit, have nothing whatever to do with the acts by which titles are made, or transferred, or destroyed. Those are acts upon which courts of justice can pass, but in which they cannot participate. The acts must be performed elsewhere, and the fact as to what has been done, must be proved and shown before the judicial power can attempt to prescribe consequences. But if this court has the power to create titles, or to declare titles by its own decisions, then it must continue to do so in each case, for no title can be made for one judicial case which can answer for all other judicial cases of the same kind; because courts of law, as well as jurors, (most wisely) are sworn to try and determine every case *by itself*, and according to the evidence produced in the particular case presented. The fact of the creation of a title to land is as much a matter of evidence, I repeat, as the fact of the creation of a promissory note, and the judgment or decision of this Court on one title in one case, can no more be noticed *as evidence of the fact that there is a title* in another case, than a judgment, (or forty judgments,) that there was a promissory note given in one case, can be referred to, or noticed, to establish the fact that there was a promissory note given in another case, or in all other cases where the same debtor is involved. The law seems to be well settled, that not even *judgments*, much less mere decisions, can be afterwards referred to for the purpose of showing a title in suits between new parties. Titles in every case of ejectment must be proved with the same particularity, and by the same degree of legal evidence *as though no other case had ever before been submitted.* A reliable authority

(Adams on Eject.) says the true rule would seem to be, that "a judgment in ejectment is not, in any case, admissable in evidence in a subsequent ejectment;" but, says the learned author, "where the *parties and premises* are the *same* in both actions," the judgment may be introduced "as against the party against whom it was before recovered." (Adam's Eject, 334.) But, he adds, such evidence even in such cases "must be slight, and the courts will not extend the principle." (Ibid.) We are all aware it is not the words or opinions of judges, but the judgments they render which constitute precedents and sometimes, after many years of universal acquisence, create the rule of *stare decisis.* But a judgment in a criminal action, that the man tried shall be executed, cannot be taken notice of nor be made to effect the minds of the court, as to the guilt or innocence of all men who shall afterwards be tried for the same offense. The manner in which a *question of law* is decided in one case, or forty cases, may be continued at the discretion of the court, *provided the law has not been violated*, and will not have to be violated every time such decision is repeated. But the guilt or innocence of men charged with crime is not a question of law; it is a question of fact, which can only be determined by the evidence contained in the record, and if the record contains no evidence of guilt, amounting to legal proof, the court cannot convict, no matter what any other court may have done. We shall see that a *suit of ejectment is governed by the same rule*; and that if the former court had convicted a hundred men of (land) robbery without proof, their decision in such cases would not form precedents to continue and repeat such acts. And to convict men in a hundred cases of illegally taking and withholding lands without legal proof of title in the record of each case, would seem to form no precedents to justify a continuance of such acts. And in the entire range of jurisprudence, I defy the learned counsel for the respondents to find any case justifying or excusing, much less approving and encouraging such acts, on the ground of "a rule of property" or of "*stare decisis*," or on any other ground. I submit, no principle of law is better settled than that each ejectment suit must be decided according to the proof of title contained in its own record; and no other trial nor decision can be referred to or noticed, as capable of *supplying evidence*, or of dispensing with it. "It is a well settled rule, says a reliable authority, that the records in former cases of ejectment cannot be introduced as any evidence against new parties, and concerning new premises in new suits of ejectment." A decision of a court is a record in a former trial; therefore it cannot be noticed nor thought of as supplying any evidence or any want of evidence which the law has prescribed, and exacts for each and every case. (Jackson *v.* Vedder, 3 J. R. 10; Lawrence *v.* Hunt, 10 Wend, 80; Jackson *v.* Wood, 3 Wend, 27, 8 Wend, 9.) On points of law, of course, former decisions may be appropriately referred to, and if not now, when sought to be applied, in violation of any existing law, or of any private right, such mere decisions or opinions can be respected and adhered to as evidence of what the law is. But it will hardly be pretended that the original and primary question, whether the respondent has a legal title to our lands or not, is a question of law at all. I insist it is not a question of law, but a question of fact, whether he has a title for our lands or not; and it has been expressly decided, that "*in deraigning a title*" to land, *former decisions of courts cannot be taken notice of.* (Walsh *v.* Ostrander, 22 Wend., 178; Adams' Eject. 334. See also Leland *v.* Tousey et. al., 6 Hill, 328.) Therefore if respondent must deraign his title through the decisions of this Court, those links in his title must be thrown out, and his title must fall. It is a matter of the utmost importance to be remembered in these cases, that the Cohas *v.* Roisin decision *can* stand, without forming any precedents to justify or excuse the support of sham titles like this now before the Court. In that case the question before the Court, or rather the question decided by the Court, was, whether an American Alcalde *could make an original grant of land or not. It was not decided* that a grant could, in any case, be dispensed with, but whether an American Alcalde was authorized to make the grant which was produced and shown to the Court, was the question decided. The grant so produced and shown to the Court, was an original government grant. It was precisely such a grant, that if made by a Mexican officer of the same grade and of the same place, would have been legally made and valid. The question before this Court was, whether an *American*, holding the same office during the continuance of a war between the two countries, and after the peace, was authorized to make the same kind of grants. What was the judgment of this Court on the question? The judgment of this Court was, that the grant made by an American was valid. Now suppose the Court had said and had decided forty times, that all such Alcalde grants were valid, because the *Partido* of San Francisco owned the "lands within her boundaries," would it now be a "rule of property;" would it now be "*stare decisis*" that that *Partido* owned the lands within it? Why not? If those decisions are "a rule of property" and "*stare decisis*" against ten thousand acres, why not against thirty millions of acres, if the word *Partido* had only been used in the decision instead of *Pueblo?* Suppose this Court had decided that American Alcalde grants were valid, because the lands belonged to the Territorial Government of California, and the Alcalde was a local officer of that government, (which was the fact,) and therefore authorized by law to make the grant, would it be "*stare decisis*" and "a rule of property" that said Territorial Government owned the lands? Suppose the Court decided that such Alcalde grants were valid, because the town of San Francisco owned all the lands about it, wherever such Alcaldes had made grants; would it be "*stare decisis*" and a "rule of property" that said town owned the lands? Is the reason on which a decision is based capable, by any process, of becoming a title to land? Who ever heard of such a thing before as the reasoning of the judges becoming a rule of property; and so sweeping a rule as to deprive five thousand citizens of their rights and titles, and possessions of lands? Where did any of us ever read or hear of such a thing as a "rule of property," established by a court, becoming an independent title over property, capable of destroying other rights and titles? When a title is shown to property, and that title, the existence of which is not in dispute, receives a settled judicial construction, and on that construction the property has been divided, or inherited, or sold, or otherwise disposed of, such judicial construction and decision on a title proved, becomes a rule of property, and, of course, ought never to be disturbed, unless the decisions are forbidden by law, or violate the settled rules of evidence, or are sought to be turned against new parties, who do not claim under the title which has been so construed. If we were here holding title in opposition to an Alcalde grant we might be told, with some show of reason, that this Court has repeatedly decided that such officers were authorized by law to make grants; and having construed such grants to be valid, although the law did not authorize such decisions, yet having been made on question of law alone, and having been long continued, and *bona fide* rights of property grown up under them, such decisions and constructions of the law, so far as they do not affect the rights of property, must now be adhered to. Because they have become "a rule of property," and because such a construction of *such grants* has become "*stare decisis*," and consequently that all such titles will be held valid when no prior legal right or grant is shown to have been made. But we are not here holding in opposition to any Alcalde grant whatever. We are not here claiming title from the same source, nor from the same authorities. All the decisions which have been made, and all which can be made concerning Alcalde grants, do not concern us, and do not necessarily, nor in truth, have anything whatever to do with our titles. The lands we claim have never been granted by any Alcalde, and, of course, never can be hereafter. We have produced and proven the authority by which Alcaldes made original grants of land in San Francisco; and the fact is undeniable that if the *town had owned* the lands "by the laws of Mexico," the Alcalde under the Mexican law could not have granted them at all. (1 Febrero, page 294 note; Siete Partidas, law 1, title 2.) And the Governor of the Territory, of course, could not have done so, (and we have seen he did every year, down to May, 1846,) because we all know the only authority the Governor possessed to grant any lands was the Colonization Laws of 1824, and Regulations of 1828. And we have seen that the laws of Mexico of 1833 and 1834, required the lands in our *pueblos* to be *colonized*; and after those laws, but not before, grants of lots were made at Yerba Buena, and at the Mission or Pueblo of San Francisco. (See Wheeler's list of grants in San Francisco. None will be found of an earlier date, and none now exists there of an earlier date.) But are the mere reasonings of this Court binding on us? If they are not binding, when in themselves rational and true, are they binding when in themselves irrational and untrue? Moreover, it has been shown that these reasons of the Court were, that San Francisco had derived a title to the lands under the laws of Mexico; and that, what this Court then supposed and asserted to be a fact, has since been proved, and duly and judicially decided, by the United States Commissioners, to be a mistake of fact. And that the fact is, said town had no title from Mexico. Is an assertion on a question of fact requiring proof, to be continued and repeated after it is proved to be untrue? We shall see that this Court has no jurisdiction to determine matters of fact, requiring any evidence to be here introduced to prove their existence. Whether Alcaldes were authorized by lawful authority to make grants, is a question of law. Whether Alcaldes did make grants, is a question of fact, to be proved by the best evidence; that is, by producing the grants. That proof cannot be produced in this Court. If in any suit depending on such grant, it was not introduced in evidence before the case came here, it could not be introduced here. Suppose this Court had decided forty times that such grants need not be introduced nor proved in a Court below in any case depending on them, would that make such decisions *stare decisis?* Can the Court conceive of any case whatever where it will be right and lawful to insist there is a private grant, and insist on the right to drive men from their property on the strength of it, although satisfied and knowing perfectly well there is no such grant at all? Whether the city of

Sacramento owns ten thousand acres of land or not, cannot be determined by this Court; because, if true, it must be proved by legal evidence in the manner required by law. But suppose this Court had decided that Sacramento was an incorporated town thirty years ago; that by the act of incorporation it was authorized to hold and own any quantity of lands, and that under and in virtue of the laws of Mexico, it does own all "the lands within her boundaries." Would such a decision be binding on this Court, and on the property owners of Sacramento? Could this Court undertake judicially to eject every citizen of Sacramento from his property in virtue of a title so created by this Court, and justify itself on the ground that men had been found to invest money on the strength of such a title, and consequently it had become a "rule of property," and "*stare decisis?*"

Would not every such decision, based on no actual title, be simply extra-judicial and void? Would it not be a decision against property, as well as in favor of the property of those who had invested money on the strength of it? If it would be a rule of property for speculators out of possession, would it not be a rule against property for *bone fide* holders in possession?

Would it not be just as rational and as equitable to hold that the Limantour title, and the Bolton title, are a "rule of property" in San Francisco, and are *stare decisis*, because the United States Court of Land Commissioners decided they were both valid titles, and because under such decisions men invested money in them? The Cohas and Roisin decisions were not originally made against the city of San Francisco, on the ground of a rule of property, nor on account of *stare decisis*. And they were not repeated on that ground, except by Judge Terry in the case of Welsh vs. Sullivan.

We most respectfully submit, and most earnestly insist, that the doctrine of *stare decisis* has nothing whatever to do with the fact, whether the judgment debtor in this case owns lands or not. We insist that *stare decisis* cannot create titles where titles never existed, nor be made to destroy rights and titles which do exist; and that a rule of property cannot be made to destroy the property of those who had nothing to do with establishing the rule, and who do not hold under the rule, not even in opposition to the actual rule which was established; that new rules, like these, cannot be made to suspend the rules which the laws prescribe; nor to disturb the rules fixed by "the settled and fundamental doctrines" of legal evidence; and, moreover, that whatever "rules of property" or *stare decisis* may exist, can have nothing whatever to do with these cases; and that they can no more excuse the continuance of such decisions than they could justify their origin.

Again: But perhaps it will be claimed, that whether San Francisco owned lands or not, as held in the Cohas and Roisin decisions, was really a question of law, because there were Mexican laws regulating the rights of towns to lands. And these Mexican laws the Court could take judicial notice of.

It is claimed, that by some general laws appertaining to Mexican towns, they became the owners of the lands in their boundaries. I submit, that although foreign laws may be judicially noticed, yet even if there were foreign laws giving lands to towns in this country, this Court cannot undertake to determine judicially, and with no evidence of the facts, whether any particular town or towns complied with the laws, or had lands ceded to them under such laws. No system of laws can be rationally conceived of, which leaves nothing to be proved, to actually pass the national title to lands to an individual or subordinate corporation. Can the Court judicially determine, *without proof*, (and without the facts appearing in any law) where towns were incorporated in California, and their corporate names, and where the lands are which were conveyed to them? And also that they are conveyed in fee? For example, the archives of the Mexican Government over this country, prove that there were in the present county of San Francisco, three settlements, viz: the Presidio (Garrison) of San Francisco; the Pueblo of San Francisco de Asis, also called the Pueblo of San Francisco, and the Pueblo of Dolores, and the Mission of Dolores; and Yerba Buena, sometimes called the Pueblo of Yerba Buena.

Gomacindo Flores, the first Administrator of the ex-Mission of San Francisco, and who is mentioned as such in "Exhib. A" in the record of this case, has recently testified in the trial of Leese vs. Clark et al. in Fourth District Court, that there was only one Mexican pueblo in San Francisco county. Now, it is claimed that this Court can take judicial notice, that that pueblo was an incorporated town. Is the existence of the act of incorporation a question of law? And is its corporate name a question of law? The very reason of things compels a particular name to be given to every corporation, no matter under what government or system of laws it is created. The name is the most absolute requirement which can be thought of, in connection with a corporation. It is, says Blackstone, "the very being of its constitution," and "the knot of its combination, without which it could perform no act." (1 Bl. 475.) Can this Court undertake, or could it at any time have undertaken, by exercising judicial notice, to even tell, with certainty, what the *corporate* name of San Francisco was? Again: Under the decree of the Departmental Assembly, of May 28th, 1845, for selling at public auction, to the highest bidder, all the pueblo lands of California, "from San Diego to Sonoma," there are four places expressly named as then being pueblos. (See "Art. 2," Miss Ex. p. 39.) These places are "The Carmelo, San Juan Bautista, San Juan Capistrano, and San Francisco Solano." Now, these places, I say, *were expressly declared to be pueblos, on the 28th of May*, 1845, in this high and most important official decree. Can this Court or could it ever, take judicial notice that those places were actually "municipal corporations, and invested with title to all the lands within their boundaries?" And take judicial notice that their boundaries were anywhere about them where an officer in them had made grants? Why not? If it can do it for San Francisco, it must do it for the other towns, then as populous.

Now I most respectfully submit, that the rule allowing courts to take judicial notice of foreign laws does not admit of any loose, unbounded, or obscure application. And that in no instance can the court, *by judicial notice*, establish *a title to land* in any Mexican corporation which may have existed in California. What is the true meaning and limit of the rule, that courts may take judicial notice of foreign laws? Mexican laws, I submit, are merely *facts*, of which our courts can take judicial notice, just as of other public occurrences and public *facts* well known to have existed.

A work which is itself authority in all English and American Courts, says: "The established doctrine now is (1841) that no court takes judicial notice of the laws of a foreign country, but they must be proved as *facts*." (Story Conflict of Laws, sec. 637, where fifteen authorities are cited in support of this avowal.) Greenleaf also expressly declares this to be *the settled law*, in his work on Evidence, sec. 486, edition of 1852; and on the authorities cited by Story. Neither our courts nor our people can be presumed to know the laws of any foreign country, under which they have never been governed. "Foreign laws (said Chief Justice Marshall) *are well understood to be facts*, which must, *like other facts*, be proved to exist before they can be received in a court of justice. The principle (he continues) that the best testimony shall be required which the nature of the thing (to be proved) admits of, *applies to foreign laws as it does to all other facts*." And the evidence required to prove the existence of a foreign law is "such high authority that the law respects it not less than the oath of an individual." "In this as in all other cases (he continues) no testimony will be required which is not attainable." But it is not to be presumed that any civilized nation will refuse to give such copies duly authenticated, which are usual and necessary for administering justice in other countries." (See Church vs. Hubbart, 2 Cranch, 187, and 1 Greenlf. Ev., sec. 487.) In that case the U. S. Supreme Court refused to receive a law of Portugal, prohibiting vessels from entering certain Portuguese ports, as genuine, although duly certified to be so by the American Consul at Lisbon. Some men would say that was unnecessary particularity. But such men, it may be presumed, have but feeble conceptions of the certainties and securities which the laws are really designed to afford, when administered with the purity and precision, of which they themselves usually consist. In Talbot vs. Seeman, 1 Cranch, 1, Ch. J. Marshall, said: "That the laws of a foreign nation, designed only *for the direction of its own affairs*, *are not to be noticed by the courts* of other countries *unless proved as facts;* and also that this Court with respect to facts is limited to the statement made in the Court below, *cannot be questioned*." Now this doctrine has not been overruled. But it is to be observed, that this doctrine is not held to prevent a court from proceeding *on its own knowledge* of foreign laws, if it chooses to do so. But *its decisions must be reversed if it turns out* that it was mistaken in those laws. It was so decided in The State vs. Rood, 12 Vermont R. 396. But no authority seems necessary to prove so plain a proposition. If this Court should decide that by the laws of this State, Sacramento owns 10,000 acres, the decision would have to be disregarded when it should be found no such law had ever existed. So also it has been decided, and was so declared by Chief Justice Marshall himself, in the same case of Talbot vs. Seeman, that the public laws of a foreign nation made and promulgated with reference to the rights of other nations, may be acted on from judicial notice. And on the same principle our courts take judicial notice of the laws which have been in force over American territory, and which have become foreign in consequence of American acquisition. But these rules admitting judicial notice of foreign laws, when given the utmost latitude, do not seem to *justify nor permit judicial notice of any private contracts made and concluded with private individuals or local corporations*, while these laws were in force over the soil. *All private* contracts pre-existing *must be proved*. And if the contracts were created by laws or by deeds, can make no difference, in either case they must be proved. And if they are contracts respecting title to lands, no evidence of their having been made can be received except the written evidence by which alone they could be made, or can exist. If there be any foreign law or laws, which created a contract whereby some corporation in the county of San Francisco became vested with the legal title to lands, that law or those laws must be produced, and be proved to have been complied with; for the existence of any such contract is the very point in issue in this suit, affirmed on one side and denied on the other. No private title to lands can exist *except by a contract executed.* And to sue another on a contract of title to lands in fee, without making out the title by complete legal proof, certainly ought not to entitle a plaintiff to recover on a mere assertion of the Court, that there was such a contract.

According to the laws of evidence governing all suits of ejectment brought by citizens of this State in the courts of this State, persons, natural or incorporated, claiming a private title to lands under a former law or under a former patent or concession, must produce the law, or produce the patent, under which they claim. To assert, or give an opinion, that such titles exist in virtue of foreign laws generally, or some foreign system of laws, does not meet the requirements of the law of evidence of this State, (nor as I suppose of any civilized State,) in suits of ejectment; because the law of evidence requires precision and certainty, and its very object is to insure the destruction of all uncertainties connected with titles. And to insure certainty, it is manifestly as necessary to demand the proof when a title is set up under a foreign law, or statute, or system of laws, as though set up under a foreign patent or deed. No matter what the claim is based on, the proof must be produced. And its submission to actual inspection, is of course, and in every particular, important and wholly indispensable. Nor is it possible there can be any hardship in this exaction; for it is precisely the same thing which we require concerning titles derived from or created under our own governments; and, so far as we are informed, exactly what would be required in any suit of this character in Mexico, or in any part of the (so called) Christian world.

The question of the existence of a *private title* to lands, under former laws, then, is simply a question of whether or no, a contract was made and concluded between two or more parties when such laws prevailed. And when the Court takes judicial notice of the existence of foreign laws, to the extent of finding by judicial notice alone, all the facts necessary to make, conclude and execute an individual contract, and to determine what that contract was, and without a scintilla of evidence to prove any contract at all; then we insist, it necessarily undertakes to pass upon questions of fact, besides and beyond those which are questions of law. Indeed, it is manifest, if any contract of conveyance was ever concluded between the Mexican nation and some corporation about or in San Francisco, for lands, it must have been under or in virtue of a patent, or a statute law. It could not have been done under books and treaties about Spanish law, even if such could be found to uphold any such notion; because every national proprietor has, of course, the right to prescribe its own mode and plan of disposing of its public lands, and Mexico prescribed a different mode. And no lawyer in California can be supposed ignorant of the fact, that the only mode of passing the title of Mexico to lands, was, a grant or concession in writing from Mexico. And where this is manifest, and the existence of any such transfer is denied, I insist no decision has ever been known, nor can any be found, to justify or excuse any notice of the transfer, until it is *proved* by legal evidence. The production and proof of such transfer, is required by all Courts where the title is genuine; and I do not know, why titles resting upon nothing but fancy and sham, should ever be preferred by Courts, over those which are genuine. (See Robinson v. Clifford, 2 Washington Court, C. R. 1, that *statutes* must always be shown as much as a patent; also to same effect as to a British statute, Kenny v. Clarkson, 1 J. R. at p. 394. And our law regulating proceedings in our Courts expressly requires the production of authentic *copies* of the statutes of any foreign government, relied on in any judicial proceeding, and does not take any authority as evidence of what such statutes contain, except copies of the statutes themselves. Pr. Act., sec. 453.)

PART X.

We submit also that the respondents have no title, because they show no title, nor legal evidence of a title, which is recorded as required by the laws of this State. No title sufficient to maintain this action, and created since April, A. D. 1850, can possibly exist, except by some "instrument in writing, by which any real estate, or interest in real estate, is (*i. e. can be*) created, aliened, mortgaged, or assigned." And every such instrument must be recorded. And if *any* title to land is, or has been made or created by decisions, *the decisions creating it ought to have been recorded in the Recorder's office.* The law says every act since its passage, amounting to any title or encumbrance on real estate, excepting only "wills, leases for one year or under, executory contracts for the sale or purchase of lands and powers of attorney," *shall be recorded.* And if "not recorded as provided in this law, it *shall be void*, as against *any* subsequent purchaser in good faith, and for a valuable consideration *of the same real estate, or any portion of it, where his own conveyance* shall be recorded first." (Laws 1850, p. 252, sec. 26 and 36.)

This, I admit, is only an argument *ad absurdum*, to show the injustice of encouraging, or advising property owners in San Francisco to rely on defeating the recorded Bolton & Barron grant, with *no grant* at all. And not even with any title at all, which a single soul of them has ever seen for himself, or which could even be recorded in the Recorder's office, or which any human being can make a copy of, or show to any other human being. But with these mere vague notions, which are the very things which the laws of every enlightened country take great pains to render impossible concerning titles to lands, and which, if they were permitted, would render titles to property uncertain, and incapable of being understood by every body; I say, on these vain notions men in San Francisco have been actually advised to rely, with confidence, on defeating a recorded Mexican grant, which can only be defeated by resorting to the means afforded by the laws. And not by relying on vague notions, which appertain only to the rights which Mexicans enjoy under their systems of local government, but have nothing to do with the title to land at all. Yet, so absolutely deluded are my fellow-townsmen, that they do not yet plainly see and understand, that titles to lands are things *which can always be seen, and produced, just as readily as a* promisory note, or any other *contract* which must, *ex necessitate*, be always put in writing. And that no such thing is within the range of legal possibility, as the existence of the *law's title* to land, *in any body*, or *in any country*, excepting where the law or the writing can be produced, by which alone it *could* have existed. The idea that titles to lands under the laws of Mexico were, prior to 1846, or are now, any more vague, unknown, or uncertain, than they are *under our own laws*, is wholly gratuitous. Such notions ought to be sufficiently disproved by what we see of actual Mexican titles, every day before our eyes. And the idea that any corporations, except supreme national governments, ever do hold or can acquire the national title to lands, *unless it is passed to them by writing*, we have shown by authority to have no foundation, and also to be a thing actually impossible, from the nature of titles, and of national proprietors. Titles to lands are things certain. And where every body cannot see that a title exists, (without any necessity of reading Spanish,) every body can, of course, be entirely certain that it does not exist. Because there is no law in force in this State, except our own laws, and no title to lands exists in this State, *except in pursuance of our own laws*, and unless it can be proved in our own courts, just as every title which does exist can be proved, it is no title at all.

We have now done, what the former decisions of a court of justice probably never before required, in a suit of ejectment. We have proved by historical, legislative, and official transactions, of the former governments of this country, that a plaintiff in ejectment, who has not shown nor proved a legal title in accordance with the law of evidence of this State, has no title. We have not rested, as we might have done, with perfect security, on our denial of the plaintiff's title. and his failure to prove any. But, owing to former declarations of Justices of this Court, we have gone further, and have proved the truth of our denial. By the evidence before alluded to, by the unanimous decision of the United States Board of Land Commissioners, and by the decision of this Court, in the case of Redman vs. Nobile, decided in 1856, we have such a weight of authority, all harmonious and in one direction, as to any national transfer of lands to any corporation in the county of San Francisco, prior to 1846, that no man, "though a fool, need err therein." I shall hereafter submit other reasons why no title in this judgment debtor can be admitted. But at present, I most respectfully submit this proposition as beyond the power of successful contradiction or rational controversy, viz.: That in the county of San Francisco, the same as in all the other counties of California, all the lands not granted by actual transfer prior to July 7th, 1846, passed by treaty with Mexico, to the United States.

Perhaps we might here properly and confidently submit our case. But we deem it necessary to go still further. There is too much at stake in these cases to justify leaving even a pretense behind, for longer continuing the reproach of such injustice, and the boast of such speculators, that "they have the Supreme Court in their favor."

PART XI.

HAS THE CORPORATION OF SAN FRANCISCO A GRANT FROM THE UNITED STATES?

Failing to show any title from Spain or from Mexico, the next thing we shall hear will be that the United States has made a grant of lands to the corporation of San Francisco, and that this grant has been confirmed by the United States Board of Land Commissioners, or, perhaps, *by decisions of this Court!* It has been shown that these speculators cannot claim the benefit of a grant, unless they produce it, as all other speculators are required to do. Where then is their grant? The learned counsel who tried this case in the court below introduced a mass of irrelevant documents to show that *Mexico* made one. The learned judge, Shattuck, before whom this case was tried, decided that *this Court has made one by its decisions, and so charged the jury!* (See the charge.) And now we come to "the decree of confirmation" shown in this record, to prove that the *United States* has made one! Did any member of this Court ever before hear of a plaintiff in ejectment so lost as to where his title originated? It has been already sufficiently demonstrated that he has no title from Mexico. It has been also shown and will be still further insisted hereafter, that he cannot look to this Court to assist him to a title. And, now, I submit, this last pretense, that the United States has helped him to a title, is the most absurd claim of all. Because, to claim a title, incapable of being shown in evidence, by virtue of some laws made by Spain, or by Mexico, or by *stare decisis*, is tracing the title to obscure sources, where the common mind of the country cannot penetrate with clear ideas, nor deny and confute assertions of title, however preposterous, from any positive present knowledge of their own on the subject. But when a title is set up from the United States the whole country understands the subject. And, therefore, it seems the most absurd of all sources to which to trace a title incapable of complete and definitive proof. It is like claiming a title from the Legislature of California, where everybody can easily understand, from reading the law and the debates in the Legislature, whether it is, or was at all intended to be, a confirmation or transfer of title to lands. But let us examine this claim. This respondent claims that the United States has granted or confirmed a title of from ten thousand to one hundred and fifty thousand acres of the choicest lands in California to the local governments of this State, established over the places where Mexicans used to live. Whilst the American and Mexican inhabitants who have resided in those old settlements from ten to sixty years have been utterly neglected, and had all their legal and equitable possessions ruthlessly clouded and incumbered by the United States, and, in a manner so reckless and heedless that their entire possessions, where their Spanish or Mexican titles are not perfect, are now subject to the demands of these speculators in sheriffs' sales; and such others as may continue the same schemes against other towns. This claim of title seems to prove too much. It seems to raise a reasonable presumption at the start, that the United States has not engaged in any legislation so utterly useless and iniquitous. It seems more reasonable to suppose that there must be also some misapprehension as to the United States ever having made or confirmed any such sweeping claims. And we may certainly presume that the most positive and irresistible evidence will be demanded to prove the actual and perfect existence of such a title, before this Court will attempt, for one moment, to uphold it. Nobody pretends that the United States has granted or confirmed any lands to the corporation of San Francisco. The debates and proceedings of the United States Senate show that such a proposition was expressly voted down, by a majority of more than three to one against it. No grant, then, has been made and confirmed *to San Francisco*. That will not be disputed. But the claim is that by the 14th section of the act of Congress of March 3d, 1851, the United States granted or confirmed a title, to all the cities, towns, and villages in California; and San Francisco, being one of them, therefore has a grant. We see then, at the start, and positively, that no grant has been made by the United States to San Francisco, the judgment debtor in these cases. We see that all which can be claimed is, that the Congress of the United States, in passing a law to ascertain what private titles existed here, "derived from the Spanish or Mexican government," used such language in the 14th section of said law as amounts to a grant to "all the cities, towns, and villages" existing in California on the 7th of July, 1846. Now if the language used really is a grant, we must all, in common candor, admit that it is the most singularly worded, the most vague and the most unguarded and reckless grant ever before made by an intelligent government. The provision of law which is said to create or confirm this title is as follows, viz.: *The provisions of this act shall not extend to any* town lot, farm lot, or pasture lot, *held under a grant* from any corporation or town *to which lands may have been granted* (for the establishment of a town) by the Spanish or Mexican government, or the lawful authorities thereof: *Nor* (shall the provisions of this act extend) *to any* city, or town, or village *lot*, which city, town, or village existed on the 7th of July, 1846; but the claim for *the same* (*i. e. the lots*) shall be presented by the corporation; or, where the land on which the said city, town, or village (is situated) was originally granted to an individual, the claim (for *lots*) shall be presented by or in the name of such individual; *and the fact of the existence* of the said city, town, or village, on the said 7th of July, 1846, being duly proved, shall be *prima facie* evidence of a grant to *such* corporation or individual, *under whom the lot holders* claim. (See sec. 14 of said act of Congress of March 3d, 1851.)

Now this law of Congress does not say it grants lands; then what right have we to say it does? It does not say it confirms any former title to any lands; then what right have we to say it does? It does not fix the boundaries, nor allude to any boundaries to any lands. Nor does it specify any counties, any districts, any locations by which the boundaries can be known, or can be ascertained, from any description, or from any allusion to a description, to be found in the grant. Nor does it define any quantity, nor does it contain any language by which it is in human power to fix any definite boundaries, or any definite quantity of lands, from anything to be found in the said provisions. Nor does it specify any names, or give any descriptions by which it can be known, with certainty and with no liability to err, even the grantees intended to be the recipients of the grant. Conceding it to be a grant, it seems to be precisely as vague and uncertain as would be the bare words "we grant," without specifying to whom, or how much, or where. Or the words "we grant to every American, existing in the State of California on the 7th of July, 1846." Grant what? Grant when? Grant how much? Grant within what boundaries? Grant to what kind of Americans? It would be a grant made to the dead, as well as to the living. And certainly it would be a grant as completely uncertain in its terms, and as ambiguous on its face, as it is in the power of the mind to admit of being seriously made or attempted, by any intelligent human being, much less by the Congress of the United States. But equally so, seems to be a grant to all the cities, towns and villages in California, existing July 7th, 1846. It is plainly ambiguous on its face, if applied to any thing but lots. And the law is familiar that "where the ambiguity is patent, is apparent *on the face of the deed*, without reference to any extrinsic proof, it cannot be explained by parol evidence, and avoids the deed." [2 Hilliard R. Prop. p. 329, pl. 38, *and ten decided cases, there cited, note* 4.] Our common sense seems to teach us, that where there are *no* boundaries mentioned *in the grant*, or law; and where there is *no quantity* mentioned, nor means given to ascertain the quantity or the boundaries from any thing in the grant, or law; we surely cannot be allowed to supply both the boundaries and the quantity by parol testimony. Because, that would be nothing less than making a title over *particular* lands by parol proof. Where no particular lands are granted, or confirmed, it is a corrollary, that, no particular lands are granted, or confirmed. And where no particular lands have been granted, or confirmed by a law, it is a corrollary, that no particular lands can be claimed to have been granted or confirmed, by a law. No material omissions in a deed, [said the Supreme Court of N. Carolina,] can be supplied upon conjecture. [Dismukes vs. Wright, 4 Dev. and Bat. 206.] The Court is not bound [said Queen's Bench] to find out a meaning, where the *language used* admits of no certainty. [Doe vs. Carew, 2 Ad. and El. N. S., 321.]

"To render a deed valid," said this Court, "the rule is, that there must be two things, parties, and a subject matter. As land rests in grant, these essentials must be shown *by the grant*, viz.: the grantor, *the thing* granted, and the person to whom the grant was made. *The thing granted cannot rest in parol, but must be shown* (in the grant) with that distinctness of description that will enable it to be identified. The law requires that the conveyance of land shall be in writing, but it is not guilty of the solecism of permitting that the land to which the title passed may rest in parol, or need not be in writing. The general rule upon this subject is, that every conveyance must, either on its face or by words of reference, give to the subject intended to be conveyed, such a description as to identify it; if land, it must be shown (in the grant) so as to afford the means of locating it. Nell v. Hughes, 10 Gill and Johnson. Again it is said if the description in a deed be so imperfect that it cannot be understood (from the deed itself) what land is intended to be conveyed, the deed is void. 5 Ohio, 454; Worthington v. Hyler, 4 Mass. 205; Jackson vs. De Lancey, 13 J. R.; United States vs. Forbes, and Burch vs. the United States, 15 Peters; Jackson vs. Rosevelt, 13 J. R.; and Kee vs. Robison, 5 Iredell Equity, 373;" all cited by this Court to sustain its views just read.

And adopting and quoting the language of Lord Bacon, this Court continued: "Ambiguitas patens, (ambiguity apparent on the face of the instrument or deed,) is *never holpen by averment*, and the reason is, because the law will never couple and mingle *matter of specialty*, which is the higher amount, with *matter of averment* which is of inferior amount in law; for that were to make all deeds hollow and subject to averment, and *so in effect, to pass that without deed which the law appointeth shall not pass but by deed*," etc. (Mesick v. Sunderland, 6 Cal. at p. 312.) These laws and settled principles for construing all deeds and grants of lands, this Court held to be conclusive against a description in a deed in these words: "the following described property situate, lying and being *in the city of Sacramento* and State of California, consisting of two thousand two hundred [2,200] town lots, be the same more or less, said lots being bounded according to the original plat or plan of said city." No clear head could fail to see, that this description neither specifically mentions nor describes, so as to be specifically pointed out, precisely the lots intended to be conveyed. And the Court was therefore forced to say that that defect was incurable, or "would be perfectly conclusive of the whole case," if it rested only on the sufficiency of the deed as a legal and absolute conveyance.

If a grant be so uncertain and vague altogether, that *its own language* is not capable of being made *certain, as to the particular lands it conveys* (*or confirms,*) *the grant is void.* (Powell's Wood on Conveyancing, vol. 5 p. 53;) Comyn's Dig. "Grant," (E 14) (G 6,) 5 Barn. and Cr. 583 S. C.; 12 Eng., Com. L. R. 327; 1 Russ and Mylne, Ch. R. 116; Worthington vs. Hylyer 4 Mass., R. 196; Jackson vs. Ransom, 18 J. R. 107; Duncan vs. Beard, 2 Nott & McCord, (S. C.) 400; Law vs. Hempstead, 10 Con. 23; Wright vs. Pond, ibid. 255; Doe vs. Porter, 3 Pike (English Ch.) R. 18, in Atkyn's R;) Windsmore vs. Hobert, Hobart R. 313; Mesick vs. Sunderland, 6 Cal. 311, 312; Jackson vs. Clark, 7 J. R. 217.)

Again: It seems just as important to know with certainty who the grantees are, as to know with certainty the particular lands granted or confirmed to them. (5 Powell's Wood's Con. sup. p. 18.) It has been said as an axiom, that "certainty is the mother of repose, and therefore the law aims at certainty." It has been declared that "when the description is not that of one individual object, but designates only the kind," the particular thing meant is not certain. (La. Code, Art. 3522, No. 8.) The grantees or confirmees, (imagined) in the 14th section, are merely classes or kinds of grantees. They are, first, "any" *i. e.* all "cities;" second, "any," *i. e.* all "towns;" and third, "any," *i. e.* all "villages"—which were in existence in California, July 7th, 1846. We concede that villages, existing thirteen years ago, are precisely as much grantees as any towns or cities, existing thirteen years ago. San Francisco at that time, as has already been shown, was not a city. It was a mere little adobe settlement, with not three hundred human beings either at the pueblo, (now called the Mission,) or at Yerba Buena, (now the heart of the city.) But I concede that it was, at the time specified, a village, and therefore that it is one of the class specified in the supposed grant, or act, or confirmation. But we have already seen, from the authentic history of our own State, that there were at least twenty-four other "cities, towns or villages," here, at the time specified. And in order that this fact shall not be questioned, I will presently specify their names. But before doing so, we must settle clearly, the meaning of the words "cities, towns, or villages." They being the grantees named, of course the first thing to be done, is to ascertain who or what they are. A city we will concede is a town incorporated by that name. [Comyns' Dig. "Burrough" B]. We will also all admit that a "town" is an indefinite term, applied indifferently to incorporated and unincorporated places, and includes both or either. By the Mexican law of January 4th, 1823, which was officially before the Senate when this 14th section was adopted, it was enacted that "The union of many families at one place, should be a city, town, or village." (Sec. 12.) In our language, "any small assemblage of houses in the country, is a village." (Web. Dic., Burrill's Law Dic.) By the common law, a town or village is a place which has or has had, a church, and celebration of divine service, sacraments and burials. (Co. Lit. 115 b.) Therefore under either the legal or the ordinary meaning, and either the Mexican or the American meaning, the words "any city, town or village, existing on the 7th of July, 1846," actually and truly includes twenty-four different grantees. They are as follows: San Francisco Solano, or Sonoma; San Rafael, county seat of Marin county; San Francisco or Dolores, including Yerba Buena; Santa Clara, Ex Mission San Jose; San Jose City; San Juan Bautista or "Pueblo of San Juan de Castro;" Santa Cruz; Carmelo; Monterey; Soledad; San Miguel; San Antonio; San Luis Obispo; Santa Ynez; La Purisima; Santa Barbara; San Buenaventura; San Fernando; Los Angeles; San Gabriel; San Juan Capistrano; San Luis Rey, and San Diego.

Now if the said 14th section be a grant or a legislative confirmation of title to these former "cities, towns or villages," the title was vested by said law, and can never be recalled. And if it has granted or confirmed lands to one, it has done so to all. Because "the fact of the existence" of each and all, or, I am certain, of at least twenty of them, on the 7th of July, 1846, can be "duly proved" just as readily as the existence of the pueblo or village of San Francisco has been proved on that day. Many of them are places which were of far greater importance than San Francisco in 1846; and it would be a contradiction of the law to hold that it applies to any less than all the villages existing in California at *that date.*

Again: We are to remember that these twenty-four "cities, towns and villages" existing here in 1846, actually included within their recognized limits all the lands in this State. If the 14th section has granted or confirmed a title to them of all the lands then within their respective jurisdictional limits, then the entire State is conceded to them as completely as though such a release were now made to the counties now existing. If the lands granted or confirmed to them be to the extent of four leagues, as has been supposed by some persons, then the United States Land Commissioners are at fault; for they have not acted upon nor discovered the existence of any such law as to any town in California. And so likewise the United States District Court for the Northern District, which has lately sanctioned the entry of a decree in that Court for *at least forty leagues* of lands to the corporation of San Jose. Indeed the United States Land Commissioners and District Courts have confirmed, under this 14th section, to the town corporations of California, at least from four to five hundred thousand acres of the choicest lands in this State. And if this Court should hold them to be confirmations to the corporations of the lands described in the decrees, (instead of confirmations merely to the extent of lots held by "lot holders" in such towns,) then at least ten thousand property owners have been ruthlessly incumbered; and all the possessors and holders of lands in the oldest settled portions of the State have been treated with contempt and cruelty; and merely in order that their lands and possessions may be given to corporations, or towns, existing here thirteen years ago! And if the decrees which actually have been entered are to be tolerated in this Court as valid titles in the corporations, to the extent of the boundaries given in the decrees, then the same direct outrage will be committed against property, only less extensively, as though one tenth of the State were given at once to these corporations, utterly regardless of the rights of individuals.

Again: if this section be a grant or a confirmation of any former right to the political town governments, where are the lands which it grants or confirms? The law does not say it is the lands in their boundaries, or in their jurisdictions, or to the extent of four leagues, or of one league, or of one inch. The only power which could fix the boundaries, where none are given in the act, is the power which passed the act. This is expressly decided in the recent and very able decision of this court, in the case of Biddle Boggs vs. Merced Mining Company. Has the United States government yet specified or fixed, or even referred to any boundaries, to which this fourteenth section shall operate as a grant or a confirmation of a pre-existing right? It has not. What right then had the Land Commissioners, or the District Court of the Northern District to do it? None whatever. Why, then, have they gravely listened to evidence to prove the boundaries of these old towns, as they existed under the Mexican government? Is there anything said or even intimated in the law, about granting or confirming to such towns the lands in their boundaries? There is not. What then has the question of boundaries to Mexican towns to do with the fourteenth section? Nothing whatsoever. Is it pretended that *any boundaries* are referred to in the 14th section, in connection with any *prima facie* grant? By reading the section, it will be seen that nothing whatever is said about any boundaries at all. Is it pretended that the boundaries of the Mexican towns here must be proved from necessity, because no boundaries are given in the law? I ask what is the necessity? Is it the necessity of sustaining these Peter Smith speculators? I know of no other human beings to be benefited by the proceeding. What then makes the necessity of proving such boundaries? There is certainly no justice, nor law, nor ordinary common sense in the proceeding. If the law does not describe nor refer to any boundaries, as included in a grant or legislative confirmation, who, in his ordinary senses, can suppose the grantees themselves are to fix the boundaries of the lands they are to have? I insist and reiterate, if no particular lands are mentioned nor indicated *in the law*, none can be fixed out of the law. And since the law shows on its face, that no particular lands are granted or confirmed, to any corporation anywhere, what sense is there in supposing that some lands are granted or confirmed to corporations somewhere? When the law says in plain terms that as to *lots* in towns in this country, existing in 1846, the lot-holders shall not prosecute the claims, but the corporate authorities shall do it for them, in order that they may all be included in the suit; what convenient excuse is that for claiming that the corporate authorities themselves are to be given a title to vast *tracts* of lands. And that "the lot-holders" claiming *lots* under titles "derived from the Spanish or Mexican government," are to be treated by their corporate authorities, not only with contempt and indifference, but a title is sought to be obtained from the United States, to the town corporations of from four to forty leagues, in virtue of no shadow of right, except to present a claim for "lots," for the benefit of "lot-holders."

Of what conceivable advantage is it to tolerate such pretensions on the part of our local town corporations? Their inhabitants require lands, but their corporations do not. Bring these same things home. Suppose a patent from the United States could now be obtained under an Act of Congress, to the corporation of Sacramento, for all the lands from ten to thirty miles around it; could a greater outrage be perpetrated than to overshadow this whole county with such a new title in the corporation of Sacramento? Few men could, perhaps, be found to deny, that such a thing would be an unjustifiable outrage, committed against the rights of the present possessors and owners of the lands; and that it would only be well calculated to operate as a sweeping curse against the prosperity and growth of this city.

Now, suppose there had been a settlement here for the past fifty years: would that fact be calculated to render the act any less scandalous, iniquitous, and sweepingly injurious? All will readily see and admit the injustice of creating such a title in favor of an individual. It is manifest that it would be no more just to create one in favor of a corporation; and, on the whole, it might prove to be even less beneficial than to make one to an individual. Now suppose, in anticipation of the creation of such a new title over this city and county, speculators had already commenced, and procured and duly recorded Sheriff's deeds over nearly every inch of the lands, would that render the creation of the new title any more desirable or respectable? It is a legal maxim, that "what is plain, needs no proof," and it is plain that if it would be monstrous to attempt such a thing against the city and county of Sacramento, it is equally monstrous to attempt the same thing against the city and county of San Francisco. Do not let it be thought that the property holders in Sacramento have been any longer in possession of their lands or their titles, or that their rights or titles to their lands are in any respect, more legal or equitable, for we have already seen that such cannot be the fact. And do not let it be thought that the injury and injustice would be any more sweeping and extensive in the case supposed, than would actually be attempted, by sustaining these Sheriff's titles on the strength of these "decrees of confirmation," or of any past decisions of this Court. Reference has already been made to the vast extent of those sweeping and heedless decrees. They have not only been made against the private property of whole communities, but also against, probably, not less than a million dollars' worth of the public property of the United States. In this estimate of value I mean what the United States would have to pay to reacquire the legal title to lands now in its indispensable use, provided these "decrees of confirmation" were to be deemed actually legal and obligatory. In Monterey, I beg to repeat, they have "confirmed" the United States Garrison, and the Point Pinos Light

House buildings, both of considerable value, to that corporation. And in San Francisco, the large building on the Rincon, known as the United States Marine Hospital. And the military reservation, and garrison, barracks, officers' houses, and all the lands around and up to the very walls of Fort Point itself, have all been "confirmed," [by means of the reckless or uninformed conduct of Mr. Attorney General Cushing,] to the new corporation of San Francisco. And we have already seen, that all said lands have been in constant military use by three successive national governments, during every day for the last eighty-three years. And not only this, but these Peter Smith speculators are actually now here in this court, with an agreed case, in which the defendant, by Frank Pixley, Esq., his attorney, admits that San Francisco owns the lands, and this very attorney has a Sheriff's deed now on record in his own name, covering all the lands, houses and barracks, just mentioned, and absolutely including *the entire fortifications of Fort Point itself!* And here is a certified copy of the deed, recorded in book 86, p. 188, Dec. 13th, 1858, and the affidavit of a surveyor attached, that it includes "the entire of Fort Point." (Hands the deed to respondent's counsel.)

Mr. J. Baldwin: How do you get that into this case?

Your honor, as to the deed, I have dragged it in, as a thing which ought to be known to the Court. But the case to which I have referred, of Wheeler vs. Hampson, is submitted in connection with this case I am now arguing. A pretty business is that case of Wheeler and Hampson!!

It would seem that no man of ordinary intelligence and good sense, can either suppose or desire, that the patents of the United States will be, or ought to be, issued to the corporations for the lands which have been so "confirmed" to them. According to the laws, and the uniform practice of all our American governments, about *the most worthless purposes* to which large landed estates can be given, is to give them to corporations established for the local government of cities, towns, or villages. And we will look abroad in vain to find any such system practiced, or tolerated, by any enlightened government. Let us look further into this subject. I confidently submit that this Court should take notice of the law under which these "confirmations" have been made. And I insist that the law cannot be taken notice of, without seeing that they confer no authority to confirm titles derived from the United States, and every person acquainted with the subject knows that the confirmations are based on such a title, and no other.

PART XII.

THE LOCAL GOVERNMENTS OF CALIFORNIA HAVE NO CAPACITY TO TAKE OR HOLD SUCH VAST TRACTS OF LANDS AS HAVE BEEN "CONFIRMED" TO THEM.

Only a few of the "cities, towns and *villages*," of California, existing in 1846, have been incorporated. "It is a *well settled rule* of the common law, that a community not incorporated, cannot purchase and take lands." (*Per Curiam*, in Jackson vs. Cory, 8 John. R. 387.) A community not incorporated cannot purchase. (Comyn's Dig. Capacity [B 1.]) A grant to such a community would be void. (Hornbeck vs. Westbrook, 9 John. R. 73; Hornbeck vs. Sleight, 12 do. 200.) Of course the United States cannot directly, nor indirectly create any corporations in this State, nor authorize them to hold lands. This State alone has the right to say when, where, and how far its municipal corporations shall engage in land speculations, or be suffered to hold lands.

Lands held by municipal corporations, beyond what their necessities require, says a high authority, "are removed from commerce." They are exempt (usually) from taxation, and are dead to the public. (See De Armies vs. N. O., 5 Miller's La. R.) Our true statesmen, I think, without any exceptions, have always deemed it against public policy, and against the interests of our citizens, to make municipal corporations the owners of large tracts of lands. And the Congress of the United States has never in any instance whatsoever, or wheresoever, endowed town corporations with large tracts of lands, by actual and unqualified grants in fee. I have examined the acts of Congress in vain, to find a single instance of such folly on the part of the United States Government. Laws have frequently been passed, authorizing towns to sell lands, or making them trustees for *the disposition* of lands, for the benefit of *citizens* who have erected villages, or cities, upon them, or for the support of schools, or some other *pvblic* or eleemosynary purposes. But I know of no instance, nor do I believe any exists, nor should it be believed until it is shown, where Congress has granted large tracts of lands in fee unqualified, to municipal corporations for purposes of speculation, or private ownership. And if it should be done, and the towns were deemed capable of holding such tracts of lands, as private owners, it would be the imperious duty of the State Legislature to require such corporations to immediately dispose of such lands, or otherwise to immediately repeal their charters, and cause the land to revert. Because, it must be evident to every intelligent person, that hardly any injury could be inflicted upon our inhabitants, and consequently upon our State, more mischievous and unjust, than to refuse to give good titles to those who have, and will improve the lands, for the mischievous and silly purpose of giving the lands in fee to mere local political governments, about the most useless, and the most unreliable owners imaginable. In all the United States, do we know of any city being the owner, and proprietor of the lands about it? Have any of us ever lived in any city, where the corporation, (and not the citizens,) owned all the lands; and was the great land proprietor, and land speculator of the place? Do we know of any intelligent, or even semi-civilized nation, engaged in endowing its local political corporations, instituted for mere purposes of local civil government, with the ownership of the title and proprietary care, and corrupting management of immense landed estates? We, perhaps, all agree that it would be miserable policy to allow our local governments to continue in the ownership of vast tracts of lands. Why, then, should they be given lands at all, if they cannot or ought not to continue to hold them? All our people can get their titles direct from the State, or the United States, why then should we desire to see our local corporations vested with title to lands intended for our inhabitants? There seems to be no good object to be gained by it. And the very fact of its being useless and injurious, is the reason why Spain, Mexico, the United States, England, and probably all civilized governments, do not encourage, nor permit their local governments to own large tracts of lands as private proprietors.

We are all aware, that only a few of the imagined grantees of the said 14th section, were incorporated when the act was passed. And to say Congress confirmed their title to their pueblo commons, or made them a grant, is to convict an intelligent national Legislature, of making sweeping provisions for the benefit of towns and villages, incapable of receiving its bounty! And in any view of the case, this disposes of the 14th section, being any concession to corporations, by showing that certainly a majority of all the places *it expressly enumerates, are not corporations at all.* But let us go further, and see if it can be a grant, or legislative confirmation, to those which are corporations. Grants, or conveyances, or transfers of title to lands, in *fee absolute*, to a city, is a conveyance in mortmain. [Comyns' Dig. Capacity (B 2,) 2 Bl. Com. 268, 269.] The King, however, "by granting a license of mortmain," "could enable any corporation to purchase and hold lands, or tenements *in perpetuity*." (2 Bl. Com. 272; Comyns' Dig. Ib. Sup., B. 3.) "But a corporation sole or aggregate cannot purchase, or take lands or tenements without license to take in mortmain," *i. e. in perpetuity.* (Comyns' Dig. Franchise (F. 17.) Now *our State Constitution expressly prohibits all perpetuities of this sort.* It says: "*No* perpetuities shall be allowed (in this State) except for eleemosynary purposes. (Art. 11, sec. 16.) Owning lands by a local corporation, as a private proprietor, is not for eleemosynary purposes. Now is such ownership of lands in any sense a perpetuity? If it is, it is expressly prohibited. We have just seen that Blackstone call such ownership, the permissive right to hold lands "in perpetuity." It is manifest, after the least reflection, that this constitutional prohibition does not extend to public property held for public purposes. For the very sense and meaning of "perpetuity" in law, confines it to property held as private property. We have already seen that land held by cities is "out of commerce," and the city can hold it as long as the city lasts or indefinitely.

Now a perpetuity is "Any limitation *tending* to take the land out of commerce for a longer period than a life or lives in being, and twenty-one years and nine months afterwards." (2 Hilld. Real Prop. 586; 4 Kent, 267; Bouv. Dic.) "All restraints which exceed that period are void." (2 Hilld. Real Prop. sup.) To hold lands out of commerce for a longer period, or to place any limitation or restraint on them "tending" to do so, is against public policy. The "English Common Law abhors it." [4 Kent, 264.] "Estates may be rendered unalienable by act of Parliament." [Hilliard, sup.] But the power of our Parliament in this respect, is limited by the Constitution. And it cannot authorize estates, *i. e.* property held for private purposes, to be so situated as to be rendered unalienable, or to be out of commerce for a longer period than just stated. Now by creating corporations and prohibiting them from selling any lands conveyed to them, there would be a "limitation tending to take them out of commerce" for a longer period, would there not?

True, our corporations are the creatures of the Legislature, and may be compelled to sell, etc. But that goes to the remedy. What I submit, is this, for example: The present city and county of San Francisco is prohibited by law from selling any lands belonging to it. "Now I submit, if A., or U. S., grants a farm or a tract of land in private property to the present corporation, it is placed where there is a limitation on it tending to keep it out of commerce forever, or indefinitely; and that is a perpetuity, [Burrill's Law Dic.], and prohibited. Therefore what lands are so held, must be deemed held for *public purposes*, and not as a private owner, nor subject to seizure and sale on execution as the property of a private owner, for if held as a private estate it is a perpetuity, and not permitted. Indeed, we shall see that it is the settled tendency of the legislation of this State, not to allow our corporations to hold lands "for purposes foreign to their institution." [2 Kent, 283] Now, I most respectfully submit, if a municipal corporation organized for "municipal purposes" only, be allowed to hold estates as a *private owner*, it would be *authorizing* such estates to be held forever, or indefinitely, out of commerce; which is prohibited by sec. 16 of article 11 of the Constitution.

Nor is such a prohibition unreasonable or unwise? It is the same thing to all intents and purposes as holding lands in dead hands or mortmain. And such kind of useless and mischief-making ownerships, seem to be firmly resisted and prohibited by all enlightened countries. Spain, like England, seems to have passed many laws on the subject. And long before any town or local civil government was established in San Francisco, it was the settled law of Spain, that no lands should be held by any corporations, religious or political, in mortmain. (Nueva Recop. title 17, book 10, note 5; Royal Order Ferdinand VI., August 20th, 1757; Law Spanish Cortez, January 4th, 1813, art. 18; and especially, the same, of Sept. 27th, 1820; *vide* also art. 13 Mexican Colonization Laws of 1824; see also the very learned brief of H. Hawes, filed with this Court, in case of Nobile vs. Redman, 1856, to which I am mainly indebted for the Spanish authorities here cited.) These laws are, of themselves, sufficient to disprove the unfounded, unproved, and yet persistent notion (amongst persons only who are ignorant of the subject) that the local governments in California, owned the lands about them.

So also by the civil law, "a corporation was incapable of taking lands except by special privilege from the Emperor," (1 Bl. Com. 479, note [y]; Ang. and A. or Corpo. sections 49 and 150.) The State of Louisiana is not a common law State; and there estates in mortmain are expressly prohibited by law. [Civ. Code, Art. 1507.] And now, I submit, the Common Law of England, which is the rule of decision in this Court, is opposed to the existence of such estates.

The first express prohibition against corporations owning farms or tracts of land, seems to be that of chapter 36, of Magna Charta, made the ninth year of Henry III. [A. D. 1225.] It is as follows: "If any from henceforth give his land to any religious house, and thereupon be convict, the gift shall be utterly void, and the land shall accrue to the lord of the fee." But what difference is there, as far as the public is concerned, between allowing religious or political corporations, to own the lands of a country beyond what is actually required for the legitimate and actual use of such corporations, in and about their own legitimate purposes? It would manifestly be just as bad to encourage such ownership in political as in religious corporations. And so it was found in England very soon. And in less than sixty years after religious corporations were prohibited, all others were prohibited also. And the statute of 9 Edw. I. [A. D. 1279] declared "no person *whatsoever*, religious or *other*, should presume" to buy or sell, or in any manner acquire or hold any lands "so as such lands should come into mortmain." [2 Rev. His. Eng. L. 154.] Six years later, in the same reign, another law was passed, prohibiting priestly devices for evading the former act. [Ib. 155, 156.] But in the year 1392, the law of 15 Ric. II., ch. 5, was passed, expressly prohibiting *cities*, as well as other corporations, from owning any landed estates.

"Moreover, because Mayors," etc., "*of cities*," etc., "*were as perpetual as religious institutions*, it was declared that any purchase by *them*, or to *their* use," should be within the statute of mortmain. [Ib. Sup. vol. 3, p. 169.] So the statute of 23 Henry VIII. [A. D. 1532] made void all transfers of land for *the use* of corporations. [Comyns' Dig. "Capacity" B. 2.] The learned Justice Comyns refers to many other statutes to the same effect, and of even older date, and says these statutes apply to every corporation sole or aggregate. And cites Co. Lit. 2 b; 2 Inst. 75. [Dig. Ib. Sup.] Blackstone nowhere says that mortmain has ever been tolerated or encouraged by the common law. He says, in vol. 1, p. 479, that it was regularly true at common law, that corporations (like natural persons) could purchase lands. But that is the announcement of a general principle. In vol. 2, p. 268, he says: "By the common law any man might dispose of his lands to any other private man, especially after the feodal restraints against alienation were worn away. Yet in consequence of these (restraints) *it was always*, and is still, *necessary for corporations to have a license* to enable them to purchase lands." "And *such licenses* (he continues) of mortmain seem to have been necessary among the Saxons, above sixty years before the Norman conquest;" (which would be before about A. D. 1000.) He also says, in referring to the evils of permitting corporations to hold estates, "that the circulation of landed property from man to man began to stagnate," etc., "and therefore in order to prevent this, it was ordered by the *second* of King Henry III., great charter [A. D. 1217], and afterwards by that printed in our common statute book (the 9th Henry III. before mentioned), that all such attempts (to convey estates to corporations) should be void." And that though this applied to religious corporations, the statute of 7 Edw. I. (before mentioned) "seemed to be a sufficient security against *all* alienations in mortmain." [B. 2 p. 270.]

He also says that "actual alienations in mortmain" are "pernicious in a well governed state." [p. 272.] And that grants for *uses* to corporations, were as void as direct grants, [Ibid.] In Giblet vs. Hobson, 3 Mylne and Keene, 517, Lord Chancellor Brougham seems to hold that the law was always opposed to mortmain because it created tenants who never died, and thereby interfered with the rights of the lord of the fee; and also because *it removed lands from commerce.* But it was decided in a chancery case in England, [Attorney-General vs. Stewart, 2 Merivale 161] that these laws were wholly political and local, and did "not extend to the alienation of land in the West India Colonies." And it was decided in another chancery case in England, [Mackintosh vs. Townsend, 16 Ves. 338] that they do not apply to Scotland. And, no doubt it could be decided, with equal truth, that they do not apply among any other people, where they have never been adopted by competent authority, and claimed as part of the laws of the country. And, I submit, no court would decide they are not in force in a state or country where they have been adopted, as a part of the common law of the country. Our statute has expressly and in the broadest terms enacted: "The common law of England, so far as it is not repugnant to or inconsistent with, the Constitution of the United States, or the Constitution or laws of this State, shall be the rule of decision (*i. e.* shall be *law*) in all the Courts of this State." Now are the laws against mortmain (which "always" rendered it "necessary for corporations" to have express permission to own landed estates before they can hold them) repugnant to the Constitution of the United States, or any constitutional law of the United States? Are they repugnant to any law of this State? On the contrary, do they not actually harmonize with the express prohibition of our Constitution against ALL conceivable kinds of perpetuities, excepting only those which are for eleemosynary purposes? Now in England, the purpose for which such estates are created are not the subject of exception. [2 Bl. 4, 74, and note 5.] Does not the very fact of an exception being made, indicate that the same evil is intended to be prohibited, with the single exception mentioned?

Again: It is said by great authority that it is the established doctrine with "our common law courts" that English statutes, as well as other laws, not inconsistent with our condition or our laws, and in force prior to the emigration of our ancestors, "constitute a part of the common law of this country." (1 Kent 473, *q. v.* and numerous other authorities, note *a.*; *V.* also 1 Kent, 604.) The English common law theory, as we know, with regard to all the old statute laws, was that they were only declaratory of what was previously the common law. [1 Bl., 86.] It is certain these statutes of mortmain were passed "before the emigration of our ancestors," for, as has been shown, they were passed before the existence of this continent was known to Europe. The Supreme Court of Pennsylvania, expressly decided and maintained that said statutes of mortmain constituted a part of the English common law of that State, so far as to prohibit grants to corporations without a statutory license. Many years ago, all the learned judges of the Supreme Court of Pennsylvania, (five in number,) were specially requested by the Legislature of that State, to ascertain and inform the State, among other laws, what, if any, English statutes were in force in that State. In December, 1808, they made their report, which is the Appendix to 3 Binney's Reports. The report seems to have been made with the greatest care, and the subject certainly required it. They declare *unanimously*, and in the absence of any thing found in the Constitution or the statute laws of Pennsylvania, that the statutes of 7 Ed. I, of 13 Ed. I, of 15 Rich. II, and of 23 Hen. VIII, all which prohibit alienation to corporations without previous license, " are in part applicable and in force in this country;" that " they are so far in force that all conveyances, either by deed or will, of lands, tenements, hereditaments, made to a body corporate, or for the use of a body corporate, are void, unless sanctioned by charter or act of Assembly." And, in 1832, notwithstanding the authorities mentioned in Kent, [vol. 2, page 283, etc.,] and, although no legislation appears to have been had to especially adopt said English statutes, they were decided by the Supreme Court of that State to be law in this country, and to require a license on the part of corporations before they can be allowed to hold or own landed estates. [Methodist Church *v.* Remington, 1 Watt's R. 220.] Statutes of *later date* have been generally held and decided to be a part of our common law on the " established doctrine " just referred to in Kent; and the evils which the mortmain statutes prevented, are apparently quite as serious, and quite as applicable to our condition, and quite as free from being repugnant to any provisions in our written laws; and while this Court would be expected to adopt the one, in the absence of State legislation, on the strength of the " established doctrine," I cannot comprehend a sufficient cause why it may not adopt the other to which the same "doctrine" is also applicable. The statutes of 28 Edw. I, (A. D. 1300,) against the scandalous practice of champerty, or buying titles over lands in peacable possession of others, have " become incorporated into the common law," (4 Kent, 489-90.); and the English statutes of 13 Eliz., and 27 Eliz. (A. D. 1585, almost 200 years after the statutes of mortmain,) which were passed to prevent fraud by setting up a title to land with no written proof of the title, are to be considered, says Kent, as part of the common law which accompanied the emigration of our ancestors." (4 Kent, 510.) By the same principle, on the same authority, and for the same reasons of public justice, I submit the Supreme Court of Pennsylvania was right; and the statutes against the accumulation of vast amounts of dead property in corporations should constitute a part of our common law, as well as other and more recent English statutes, unless it were true that they were only political laws concerning rights of towns and cities, and formed no part of the laws concerning the rights of persons. The impolicy, I have said, of allowing cities to hold vast tracts of land, we will all admit. True, it cannot and ought not to make any difference with this Court, whether it is politic or impolitic, for courts of law are not the bodies organized by Government to originate or determine matters of public policy; but the impolicy of the law permitting such a thing, being clear and certain, raises a presumption that the law does not permit it, because the rule is, that the law does not permit that to be done, which clearly and certainly ought not to be done; and the common law does certainly seem to prohibit it, and to require a special license from the King in order to allow any corporation to hold lands; and the ancient statutes against it are, I submit, to be legally construed as declaratory of the common law. But I will not, for one moment, contend that this Court is under obligations to so decide, because the law on this point is not uniformly held in the same way; but our Courts, falling into the English decisions before referred to, seem to have generally adopted a different view; but, perhaps, not in any case where the Constitution and the act adopting the common law were the same as ours.

2. IT IS PROHIBITED BY OUR STATUTES.

But, nevertheless, if this Court shall conclude the law to be, that "the common law of England" does not require a license to enable corporations to hold large tracts of land as private owners, and shall decide that the ancient English statutes, passed to insure the prevention of such abuses, constitute no part of the common law of this State; and shall further conclude that our constitutional prohibition against every conceivable species of perpetuity, excepting only those for eleemosynary purposes, has no application to that kind of perpetuity created by donating estates to corporations; still, after all these objections should be gotten over, another would remain which cannot be overcome. Of course, no one will deny that where the State (not the United States,) shall make a grant to a corporation, it can hold what is granted; because it cannot be necessary for the power which gives the license to license an act of its own; its own act of giving, being of itself, a sufficient license to take and hold. But while all our courts, and our governments seem agreed as to the evil, of alienating vast landed estates to corporations or municipalities, the only difference between our Courts is as to how the evil is to be effectually prevented. Some agree that it is done when no special permission is given in their acts of incorporation to hold lands as private property; and others decide that their power to hold must be limited by words of limitation in the laws under which they are incorporated. According to Kent, (which is sufficient authority,) the Courts in nearly all the States have held that *words of limitation* must be used, and that the ancient statutes against their holding, as private owners, without permission, we are not entitled to enjoy. Whether any such decisions have been made in any State, where the common law of England has been so broadly adopted as with us, and *where the Constitution expressly declares that "no perpetuities* shall be allowed," I seriously question, though I have not ascertained with certainty. But the same object has been accomplished in favor of San Francisco, as though the ancient statutes of mortmain were as far in force here as they were declared and decided to be, in favor of Pennsylvania. The charter of San Francisco itself expressly *limited the power* of that corporation to hold lands. So that, if the 14th section of the Act of Congress had been a grant, and if the United States Board of Commissions, and the United States District Court had been authorized to make the decrees of confirmation, still the attempt would have failed, and the title offered would have been void, at least as to most of the lands "from the incapacity of the alienee to take." (2 Bl. Com. 268.) The first charter of San Francisco, that of April 15, 1850, in its first section defines the boundaries of the city, and then provides that nothing in *that section* "shall be construed to *divest*, or in any manner prejudice any right or privilege to which the city of San Francisco may be entitled beyond the limits above described." All that can be made of this proviso seems to be, that the limitation of boundaries in that section shall not *divest* or prejudice any right or privilege *then* existing. But *the next section expressly limits its capacity "within the city,"* except for *specified objects.* It says; may purchase, hold and receive property, real and personal, *within said city;* may *lease*, sell and dispose of the same for the benefit of the city; "may purchase, hold and receive property, real and personal, beyond *the limits of the city, to be used* for burial purposes; also for the establishment of a hospital for the reception of persons afflicted with contagious or other diseases; also for a workhouse or house of correction; also for the erection of water works to supply the city with water." Now could the city, under that charter, hold after-acquired lands outside its limits for general speculative purposes? Of course not, unless the Court could legislate and give authority for monopoly and injury, which the law took so much pains to prevent.. But in precisely one year from that day, that charter was repealed and another law substituted. And the charter of April 15, 1851, positively *prohibits the city, by law, from owning or holding any "pueblo title" or any other general and sweeping title to lands.* This law expressly declares as follows: "may purchase, receive and hold property, real and personal, etc.; *provided*, that they shall purchase without the city only such property as may be necessary for the purposes of burial, or for the erection of prisons, hospitals, asylums, and water-works for supplying the city with water." (Laws of 1850, page 223, and of 1851, page 357.) What is the meaning of these limitations if they are not to be obeyed? We have seen that our Constitution expressly prohibits similar estates. And we have seen that the laws of the State, by virtue of which alone, the corporation of San Francisco even had an existence, have by express words of limitation, deprived it of the capacity to take such sweeping estates, as have been, without authority, "confirmed" to it for its own private property. Why then is it not the imperious duty of this Court to maintain these laws, and sweep away all these idle and mischief-making "confirmations"? They are both contrary to our laws, and contrary to the laws of the United States, authorizing confirmations of titles to be made, provided they are for the corporation itself as a private owner. Our statute laws limit the quantity of lands which our local governments may hold, prohibit their being corrupted, and their people hindered and harrassed by their local governments being made landed proprietors, and land speculators. And, I insist, it is the imperious duty of this Court to enforce our laws, and to protect our citizens against the evil consequences, which it has been the very object and sole purpose of these restraining laws to protect them against. Few general laws are more important, and certainly none can be more obligatory than these restraining clauses, against their acquisition of lands as private owners and for private purposes. Prior to the decision by the United States Board of Commissioners, "confirming" a title to the local government at San Francisco, viz., on the 5th May, 1855, the city of San Francisco was again re-incorporated, and the express prohibition against its becoming the owner of lands [which should belong to its citizens] was repeated with equal emphasis in these words: "*Provided* that it shall purchase without the city no property, except such as shall be necessary for establishing hospitals, prisons, cemeteries, asylums, powder-magazines and water-works." It could "purchase, receive, hold and enjoy" "real property without the city" for those specified public purposes, but could hold no outside property not "necessary" for those purposes. And the boundaries of the city were the same in that act as in the Act of 1851. (Laws of 1855, page 251.)

Now, I submit, it is no answer to the position taken, that these charters authorized the city to sell, and therefore lands granted to it would in no sense create estates in perpetuity; because the manifest purpose of the law is to prohibit *the power of holding* in perpetuity. If the laws compelled or expressly required the city to sell any lands granted to it, beyond what were "neceessary" for its public use, and to sell them immediately or within a specified time, then, I grant, they would not be perpetuities of any kind. But such is not the law. Nor does the question seem fairly to be, whether the corporation could sell, but whether it could take and hold estates indefinitely or "in perpetuity." (2 Bl. Com. 272.) The present law of the State absolutely *prohibits San Francisco from selling* any of its lands. (Laws of 1856, page 165 sec. 74.) And therefore it seems plain and indisputable, that if the confirmations "have given it a title to lands, it is a title in perpetuity, for the law compels it not to sell."

I insist it is no answer to say the law may be changed, and the city be hereafter required to sell, if it gets the lands. For the laws must be administered as they are, and not as they may be, provided changes take place, which may or may not occur. If the last clause of section 2 of the charter of San Francisco of 1855, (laws of 1855, p. 252,) be held to authorize the city to take any lands confirmed to it, it must be remembered that nothing was ever done under it, and it was shortly afterwards repealed, by the charter of 1856, just mentioned. And the law of 1856, which is the existing law, does not authorize the city to prosecute any claim for *United States lands*, for the city had already secured such rights *for its inhabitants*, under the acts of Congress and the ordinances before mentioned. But it was authorized to prosecute its claim for "the *pueblo* lands" only. And even that authority cannot be understood as being for the good of Peter Smith speculators, but only for the "use, benefit and behoof" of the same inhabitants in possession, as the city had already undertaken and promised, in said ordinances, as I have already fully shown. None of those provisions, therefore, can be fairly construed, I submit, to impair, or at all interfere with, the restraints against the city acquiring lands for itself, as a private owner, and for private purposes. But, on the contrary, they strengthen the evident intention of the Legislature to prohibit it from acquiring vast monopolies in lands, as a private owner. [Its authority to prosecute its claim further, applies only to "*pueblo* lands." See laws 1856, p. 167; place "23d."] Hence, the restraining provisions in the charters of 1851 and of 1855 were actually in full force, both when the petition for "*pueblo*" lands was filed in the Board of Land Commissioners by the city, on the 2d day of July, 1852, and when the "decree of confirmation" was rendered, in January, 1856. And I most respectfully submit, under the existing law, prohibiting the city from "any power to sell or incumber the same, or to lease it for more than five years," [sec. 74, charter of 1856,] a grant or patent made to it, to-day, by the United States, of all the lands in that county to the Buri Buri Rancho, or to "the Vallejo line," *it could not receive for its own benefit*, or as a private owner. Because, in the first place, it would be "tending to take the land out of commerce" for a longer period than the law allows, or creating a perpetuity. [See authorities sup.] And because, in the next place, it could not hold such an immense landed estate, as its own property, "from the incapacity of the alienee to take," under the restraining laws in said former charters. And because, before "the confirmation" it was bound, by its own agreement, to prosecute the claim *for its lot holders only*. Kent says: "The inference to be drawn from the statutes creating corporations and authorizing them to hold real estate *to a certain limited extent*, is, that our *statute corporations* cannot take and hold real estate for purposes foreign to their institution." [See 2 Kent, 283; and Jackson vs. Hartnell, 8 J. R., 424.] Kent further says, "those special restrictions contained in the acts by which they are incorporated, and which usually confine the capacity to purchase to special and necessary objects," are a "*legal check to the acquisition of lands by corporations.*" [2 Kent, 282.] Religious corporations are deemed strictly limited; then why not, also, municipal corporations? How is it that the same laws mean something in one place, but not in another? If they are to be rigidly applied to cases of religious and all other statute corporations, why not also to these political statute corporations?

In the general law "to provide for the incorporation of cities," passed March 11th, 1850, whereby any place containing over 2,000 persons can form an incorporated city government, it is enacted that "they shall not purchase or receive any real estate, other than such lands or lots within the city as shall be necessary for the erection thereon of public buildings, or for the laying out of streets or public grounds, or such lands without the city as may be required for burial grounds. [Laws 1850, p. 88, sec. 7.]

Suppose a hundred local political governments were incorporated under this law, and each sought to acquire a title to ten thousand acres of city lots, or ten millions of dollars worth of real estate, "for purposes foreign to their institution," would not the Court hold that these restraining laws mean something, and must be rigidly enforced? Is it the extent to which an evil may reach, which is to determine whether a law made to prevent it is to be rigidly enforced or not? The entire current of the legislation of this State upon this subject, evinces the utmost determination to prohibit the accumulation of vast landed estates in corporations. And precisely as obligatory and vigorous restrictions are imposed against our local political corporations becoming landed monopolists, as against religious or any other corporations. And such being the plain and settled policy of our State, as well as of all other enlightened States whatever; and being manifestly the most wise and judicious policy which our government could adopt; and a contrary system being declared and conceded to be "pernicious in a well governed State," [see 2 Bl., 272,] why should the United States tribunals in California be allowed to introduce a new, different, and hitherto unheard of policy, in contempt of our laws, in manifest injury to our cities, and in violation of our fixed policy concerning our local political government? If there be any good reasons why such proceedings should be countenanced and upheld by this Court, it is certain they are not to be found in any law.

Now all these laws seem like a tower of strength in favor of the principle announced by this Court in the case of Lowe vs. the City of Marysville, 5 Cal. 214. That principle is, that if corporations are to be created, with authority to purchase or receive vast landed estates, for example, seventeen thousand acres, as claimed by San Francisco, and one hundred and fifty thousand acres, as claimed by San Jose; then such bodies must be incorporated under *general* laws, and not by special acts. Because, corporations cannot be created by special act "*except for* municipal purposes." (Con. Cal., Art. 4, Sec. 31). In reply to a suggestion made here to my colleague, Mr. Williams, at the last April term, I most respectfully submit, all language is "merely descriptive." But this provision of the Constitution is descriptive of what? It is descriptive of two classes of laws, which the Legislature may pass for creating corporations, viz., general laws and special laws. Now, can a special law be passed to authorize the purchase, leasing, and management of vast landed estates, like those just mentioned? Why not? Only because "corporations *shall not be created by special act*, EXCEPT *for municipal purposes*." San Francisco and San Jose were created by special acts, therefore, they were created for municipal purposes, or else their charters are void. Now, being created for municipal purposes, every act they perform, and every purpose they attempt to carry out, must be municipal, or else the Constitution can be readily *perverted*, as suggested in said opinion of this Court. The rule of construction is well settled, that *what they could not be directly authorized to do, by* SPECIAL ACT, they cannot do indirectly, nor by straining or perverting the purposes for which alone they could be created by special act. Municipal purposes, as used in this clause of our Constitution, plainly means *political* or *governmental* purposes, *and no other*. (2 Kent, 275, Burrill's Law Dic.) As first proposed in the constitutional convention, it read "for *political* or municipal purposes." (Debates in Con. 108, 112.) And the whole debate truly shows (what this Court said in the case of Lowe,) that it was the determination of the convention to allow no special charters to be passed, unless (as stated in the convention) their "power shall be confined *strictly* to municipal purposes." (Debates p. 126.) As to the policy of strictly confining all municipal corporations to the purposes and duties of good local *governments*, and to that alone, the very example of the corporation of San Francisco, and the sweeping and continual curses it has brought against the growth and prosperity of the place, by engaging in schemes for lands, as a private owner, is a more forcible argument than anything I can say. Even the donation of a strip of water property to that city by the State, in 1851, lead to a hundred times more corruption, fraud, injustice, and loss, both to the State and to the city, than though the State had at once put up the property, in proper form, and sold it all directly to private hands. Local governments never want lands, beyond what they may require for actual public use. But, in San Francisco, the corporation created by the Legislature for purely municipal or governmental purposes, has almost neglected the purposes for which it has existed, in order to attend to titles to lands *for itself*, not for its people. Why has this been so? Ask these unprincipled schemers *who have been using it as a catspaw*, and who have made Alcalde title holders assist them, by means of the falsehood, that the city must own the lands to make their Alcalde titles good; whereas, they are precisely as valid without the city owning the lands, as with it, as has already been shown. And better, too, because, as we have shown, where the corporations under Mexican law, actually did own lands, *their officers could not grant the lands away* from the corporation to individuals.

Why should a title in the corporation of San Francisco be any longer encouraged? The existence of any such title is, beyond all rational controversy, a mere sham and falsehood, which must, from the very nature of things, sooner or later give way, and deceive all who shall place dependence upon it. What can be more insane, than to now ask this court to assist in bringing all the possessions and titles in the city of San Francisco, under the operation of no title at all, but of mere judicial mistakes? What conceivable advantage could be gained by it, even if the court were authorized to engage in any such business?

No man in his senses, and with any knowledge of the fact, can suppose that such a course would tend to quiet titles now in San Francisco, any more than the same course, if now started here, would quiet titles in Sacramento. It would manifestly produce the most sweeping outrages, and the most inextricable confusion and insecurity in titles, which fifty years would hardly be sufficient to wholly overcome; because error must perish, and truth must prevail, in time. Whilst on the other hand, *let us alone* as we are, and firmly assure us that we shall enjoy henceforth the full and rigid protection of truth and the laws, and in fifty days, instead of years, the titles to lands in San Francisco, will be deemed as plain and as secure, as in any city on this continent. And not an individual can be injured in any legal or equitable right, by adhering to law and the truth. Nor will any human being then be disturbed, except the few persons interested in these scandalous speculations.

I cannot conceive what policy will be consulted, if the policy of the laws and of truth shall be abandoned. I cannot conceive what policy has been thought of, in seeking at this late day, if ever, to endow our local political governments with vast landed estates. And it is impossible to understand, why it should be supposed that such a policy will be any more excusable against our old towns, than if the same policy be now attempted against our new towns. We are certainly, the inhabitants of the same State, governed by the same general laws, and entitled to the same protection in one part of the State as in another. And all our cities which are populous, have been made so by our own people, not by our corporations. And if every new title now sought to be created over the lands they occupy, would bring confusion, turmoil and injury, if aimed against our cities which entirely originated since 1846, how can it be supposed the same evils will not be experienced, if aimed against those which existed here, in adobes, prior to 1846? What sense is there in making the distinction, which only aids lawyers and speculators, by confusing titles where no confusion is necessary. But if deemed a privilege, instead of a nuisance, then why should San Francisco be endowed with lands, any more than all our other local governments? Indeed, can any one tell why titles in that city should be kept in eternal confusion, in order to indulge the baseless expectation, that if the lands it occupies can be kept long enough from its citizens, and can be defended long enough by its citizens against its speculators, they may eventually come to be the property of the corporation? But how can this court recognize it, as owning the vast tracts of lands described in the copy of the "degree of confirmation," shown in the record in this case? The law of this State prohibits it. And the authorities in the law say, "*there can be no doubt*, that if a corporation be forbidden by its charter to purchase or take lands, a deed made to it would be void." *Because its capacity to take must be determined from the instrument which gives it existence.* (Per Ch. J. Tilghman, in Lazuere vs. Hillegas, 7 Sergt. and R., 319; *v.* also Ang. and A. on Corp. secs. 151 & 152). And what right, I insist, has any court of the United States, to create any of our corporations into landed monopolists, when our laws forbid it? "*It is obvious*, (say the authorities) that the real estate of a *corporation* can be dealt with only by the judicial authority of the State in which it lies." And this is true, "even though the corporation is created by the concurrent acts of several governments." (Binney's case, 2 Bland's Ch. R. (Md.) 142; Ang. and A. sup. sec. 163). I am aware there are men in San Francisco who seem to think it would be "smart" to keep quiet about the "confirmation" affirmed by Judge Hoffman to that town; and to first get the patent of the United States to the lands, and then make the government of the United States pay some millions of dollars to that corporation for its own military barracks, and other buildings, and the lands between them and the fort on Fort Point, where millions are being expended by the United States for the defense of that city. With such men, no man of correct principles can have one particle of sympathy. No true man can wish his city government (any more than himself) to be enriched by property which does not in law, nor in equity, nor in moral right, belong to it. Nor is it to be even imagined, that the heedlessness which seems to have hitherto characterized the conduct of the law officers of the United States, *in this one particular*, will continue until such void and rotten confirmations can be made successful, through the voluntary folly of the United States Government, by issuing its patent against its own military defenses. I suppose a patent in such a case would be the source of new suits against titles in that city; although, if issued, it would be without authority of the Act of Congress of March 3d, 1851, because, as we insist, the United States has confirmed no lands to anybody by said law, and the provisions in said act for issuing patents have no application to any "RIGHT" or title, unless it be "*derived* from the Spanish or Mexican government," and the law so declares. (See sections 8 and 13.)

3. FURTHER REASONS WHY THIS "CONFIRMATION" AMOUNTS TO NOTHING, AS TO ANY TITLE IN THE CORPORATION.

My colleague, Mr. Williams, read to the Court, at the last April term, the United States Senate debates, which preclude all ideas of the said 14th section being a grant or a confirmation. In cases of actual doubt and uncertainty, of course, such debates are to be referred to, in order to ascertain, if possible, the meaning of the words used in a law. And those debates, in this instance, are so plain and so uncontradictory that only one conclusion can be arrived at. And that conclusion is, that if it is a grant or a legislative confirmation of any pre-existing right to any corporation of any particular *tract* of land in this State, then the Senate which passed it were in total ignorance of the fact. And not only that, but they did what they expressly refused to do, on a direct vote being taken to grant lands to San Francisco. (See Cong. Globe and Appendix, 2d Sess. 31st Cong. vol. 23, pp. 347, 348, 363, 394, 427 and *passim.*) It was expressly stated by Mr. Barien, Ch. of the Jud. Com., who drew the 14th section, that the object they then had in view was only to ascertain who already had titles, and not to make titles, or confirm imperfect rights, which would be the same thing.

It was, of course, well known in Congress that there were a large number of old Missions and villages existing in California in 1846. The Government had sent a special Agent to this country to ascertain the condition of private land titles in and out of the old settlements. And his Report was received and published before Congress attempted to pass a law on the subject. Moreover, this country had been in the occupation of the United States for four or five years, and had been organized into a State, and its Senators and Representatives were present in Congress when the law of March 3d, 1851, was passed. It is therefore unnecessary to suppose that the United States proceeded blindly, or adopted the 14th section of said law in a careless manner, or with a vague and unknown meaning. The law of March 3d expressly required that every person having a claim to lands in California, *at that time*, should present his claim; and if he failed to do so the penalty was, that the

United States would dispose of the lands as its own. But it was well known there were numerous towns and villages here, and, consequently, that the claims for "city, town, or village *lots*" would be almost innumerable. For the Land Commissioners to attempt to pass separately on each claim for a mere town lot, would have overwhelmed them with thousands of cases, and would, moreover, have been such a burden imposed on the holders of mere lots in towns, that to have imposed the expense of prosecuting a title to them, through the Board of Commissioners and the District Court, and, perhaps, the Supreme Court of the United States, would have amounted virtually to a direct confiscation. What was to be done, then, with "city, town, or village lots?" Why, that which we ourselves would do, if we should assist, to-day, in passing a law of the same kind—all such lots *were excepted from the provisions of the bill.* And the first words of the 14th section so expressly declare. Why then do we seek to bring them within the bill? But it was asserted in Congress, that some of the towns in this country owned the lands about them, and at least three cities (Stockton, Sacramento, and Marysville) were known to be erected on lands claimed by individuals. Therefore, *an exception was made in favor of the holders of* "*lots*," but no exception whatever is made in favor of any person, or any corporation claiming *lands*, as contradistinguished from town "*lots*." On the contrary, *towns* claiming "*land*" are expressly required to present their titles, *if they have any*, for "the land within the limits." And all the *lot holders* claiming under any such corporation, or individual, as claimed *the lands;* and, also, all the *lot holders* in the old towns existing here in 1846, claiming lands under such towns, or the authorities thereof, were to be regarded, *for the purposes of that inquiry before the courts under that act*, as having a title *in their grantees.*

The law does not say there is "*prima facie* evidence of a grant" to any corporation or town existing here in 1846; as has been stated in opinions of this Court. It may not be material, for reasons already given, but it is a mistake of fact. The law does not say so. What the law says is "*prima facie* evidence of a grant to *such* corporation *under which the lot holders claim.*" Therefore, whatever corporation or town existed here July 7th, 1846, "under which the lot holders claim" has a *prima facie* title to such "lots" for their benefit. benefit. *No other corporation* or town except those under which lot holders claim, and excepting such as existed *July 7th*, 1846, is mentioned, and hence no other can be included. Again, language cannot be used with more certainty, to indicate that only *lots* and not tracts or bodies of lands are referred to, than is used in this section. If that part of the section containing the words "*prima facie* evidence of a grant to *such* corporation or *individual* under whom the said lot holders claim," be made to include or to refer to any lands excepting merely *lots*, it is manifest it must be done by interpolating words into the law which the law does not contain. The law only says, "any town *lot*, village *lot*, farm *lot*," and "any city, town, or village *lot*," and neither includes nor mentions any "land" until the words about a *prima facie* grant for the benefit of "*lot* holders" is passed. And then, as if to render the meaning plain, it refers, for the first time, to "the *land* embraced within the limits" of towns, and says, "*any city*, town, or village existing in 1851, may present its claim for land" "embraced within its limits," but not beyond its limits. That is, of course, if they had any claim, they *could* present it. A lot is defined to mean, in law, "a *small piece* of land in a town or city." There are two kinds of lots, viz.: in-lots and out-lots. In-lots are "within the boundary of the city or town." Out-lots are "out of such boundary, and those which are used by some of the inhabitants of such town or city." (Bouv. Law Dic.) Such *lots*, and such only, are mentioned in connection with a *prima facie* title. And whatever may be said as to the sense of the section in other respects, it is plain in this particular. And the eyes of the keenest speculator in existence, cannot discover any mention or the remotest allusion to any tract of land, in connection with any *prima facie* title. And even when the law mentions *land* it confines it to the limits of towns. No *town* has any right whatever to present a claim for land *beyond its limits*. Another fact, before referred to, is plain, that is, that lands, not lots but *lands* in and about *the Missions*, WERE NOT TO BE CONFIRMED TO ANYBODY. Because the law expressly required the Commissioners to "*ascertain and report to the Secretary of the Interior*, the tenure by which the Mission lands are held." (Sec. 16.) And I shall submit that no provision of the Treaty, no law of nations, and no local law, nor principle of law or of justice, could prevent the rights of the Mexican *municipal* corporations, from passing to, and remaining entirely subject to the new sovereignty created over them. The laws which created them and gave them rights, of property as well as of government, were merely political laws, subject to be modified, or continued, or limited, or wholly abolished, as the new sovereign power might direct. [Story on the Con. sec. 1324.]

Another fact seems plain; that is, if the 14th section is a grant "to such corporation or individual" under whom the lot holders claim, it is not a grant "to such corporation or individual" under whom the lot holders do not claim. And it is also manifest, if it be a grant "to such corporation" it is also a grant "to such individual," for no distinction is made, and therefore none is admissible. Now, in San Francisco, three different sets of private speculators, besides the speculators with the pueblo title, presented claims for the general title to the lands in that city. And every person who held a "lot" under either of them is expressly allowed, *for the purposes of the Commission*, a *prima facie* evidence of title in the party under whom he claims. The purpose of the Commission was merely and solely to ascertain who owned lands in this country, by titles prior to that of the United States. And all lot holders in towns were assured by the law, that they need not present any claims for lots in any case; and if they claimed under any "such corporation or individual" then they could not present their claim for a lot, but their claim was to be presented for them, either by "the corporate authorities" or "by or in the name of the individual," as the case might be. As a matter of course the presentation of such claims was to be for the benefit of lot holders holding under the towns existing in 1846, at the date when the whole country passed to the United States. As to any title to any land in California, since that date, the United States is competent to provide for that, without requiring the aid of a Board of Land Commissioners, as to the disposition of its own title. The United States disposes of its title to lands in California to citizens, not to corporations. And it, long ago, nearly *seven years ago*, passed a law for disposing of its title to lands in the limits of *all the towns in California*, and in the most liberal manner. And yet the pests of the city of San Francisco, have been afraid to trace the titles of its inhabitants to lands, to their own country, and their own government, which was "the only true owner," after Mexico ceased to be.

It seems certain, that no more need be said to prove, that this law creating [merely for the purposes of an inquiry into foreign titles] a *prima facie* grant to *lots*, in towns existing July 7th, 1846, cannot be applied, under any pretext, to lands which are *not* "*lots*." And that authority to present a claim for *lots*, by "such corporation under whom the lot holders claim," is no authority of itself to present claims to vast tracts of lands, of from four to forty leagues, and *not for lots*, as the law expressly directs and provides. [Sec. 14.]

And the provision of the 14th section, so far as it creates any *prima facie* title, being confined specifically and exclusively to "lots," the authority for any political corporation in California, to present a claim for four leagues or forty leagues of lands, *is nowhere to be found in the Act of Congress of* 1851, or in any other act of Congress. Indeed, all attempts to cast the odium upon Congress, of justifying "decrees of confirmation" of vast tracts of lands, like that lately rendered by Judge Hoffman *against the people of the county of Santa Clara, of three hundred square miles*, to a town corporation in that county, must utterly fail. Because, no act of Congress, nor one line or word in any act of Congress, in the present or in the past, can be found to tolerate or countenance any such gross, palpable, and senseless outrage, *against the rights of property, held by citizens of this State.* It has already emboldened attacks against some of the oldest, and most genuine private titles, in this State. And we insist, it is the imperious duty, as it is unquestionably the privilege of this Court, to investigate the authority, under which such mischief-making and iniquitous "decrees" have been rendered. And if it can be found that the Congress of the United States has actually authorized such conduct, our citizens should be so informed, in order that those having genuine and confirmed Spanish and Mexican grants, may demand indemnity from the United States for its spoliation of their property. But, I insist upon it, that a candid and lawyerly examination will at once convince your honors, that such decrees have been entered under a total misapprehension of the sense, and the purpose, of said 14th section, in virtue of which they have been rendered. Because, as already abundantly shown, no *tracts of lands* are confirmed, or presumed to be granted to any towns, or so much as mentioned in the 14th section, in connection with any presumption of title. And the only authority for a town to present a claim, accompanied with such a presumption, is, for "*lots*" of such lot-holders as hold under it, [where any such case exists,] *as to towns existing in* 1846. And without any such presumption, "for *the land embraced within the limits* of the town," *as to towns existing March 3d*, 1851. [Read the whole section.] The least attention in reading the section, must convince your honors, that it does not contain any conveyance, or grant, or *confirmation* of title or right, *even in favor of lot-holders*. It only *presumes a grant* with reference solely to "lots," and for the benefit only of lot holders, with the evident purpose of preventing such lot holders from incumbering the Board, and incurring the expense of proving their claims of titles before the Board. And in plain fact, no such word as *grant*, or *confirm*, implying action on the part of Congress to convey a title, or to confirm a pre-existing right *to any tract of land; can be found* anywhere in said law, or in any other law. And I defy my learned brothers on the other side, to show any word or clause, expressing or implying any such thing.

The 14th section, in any view of the subject, cannot be construed to affect, nor to include any particular *lands*, for *none is described.* *All the lots* in the towns, existing here in 1846, is a description capable of certainty by proof. And so is, "the land embraced within the limits" of "any city, town, or village," "in existence *at the time of passing this act*," wherever, at that time, they had limits. But to confirm claims, not for lot-holders, nor for *lots* in such towns, nor for lands in their limits in March, 1851, but for three hundred square miles, *or wherever the boundaries of old political Mexican corporations can be shown to have extended*, is precisely, and *plainly* without any more authority of law, than to have confirmed, on such petitions, all the lands in the State of California. The law of Congress refers to, and includes all the lands in the State, precisely as well as the lands in the boundaries of former Mexican pueblos. It has no word about either. But "*prima facie* evidence of grant," in any view of the case, means only what it says, not what it does not say. It does not say it *confirms* a title, nor that it confirms a pre-existing right. If it had been intended to *confirm* any pre-existing right, the law would have said so, and mentioned what it confirmed, and to whom, and how far. A confirmation, is "a conveyance of an estate, or right, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased." [Coke Litt. 2,956 ; 2 Bl. Com. 225.] To hold that the 14th section is a confirmation by Congress, would be to hold that the words may be interpolated into the law, which the law does not contain. *Prima facie* evidence of a grant, does not mean *confirmed*, any more than it means *convey*. It means, I repeat, just what it says, and not what it does not say. What it says, is, that it makes "*prima facie* evidence" of A GRANT. And *prima facie* evidence, is precisely that kind of evidence, which can be overcome by positive evidence. If we leave another in the possession, and the claim and exercise of ownership over his property, that creates for him "*prima facie* evidence of a grant." But such evidence of a grant, is not a grant. And if an actual grant were made by the United States to another, that other could, of course, eject the party having only the "*prima facie evidence* of a grant." An actual grant is not *prima facie* evidence of one, but is *conclusive* evidence. And on the trial, and test of title, an actual grant is just as necessary, to a party who has only "*prima facie* evidence of a grant," as to a party who has no grant at all. To say *prima facie* evidence of a grant *is a grant*, is as plain a contradiction of terms, as to say presumptive evidence is not presumptive evidence, but is conclusive evidence. To say that *prima facie* evidence of title to "lots," answered all the purposes of the law, for inquiring into titles before the Commissioners, would be true. And that being the case, why the law should be strained and distorted, and made to justify assertions and confirmations, not warranted by anything contained in the law; and why this should be done for the manifest and sweeping injury of property, and the disturbance of communities, and *for the benefit of no human beings except Peter Smith speculators out of possession*, is beyond my comprehension. In my humble opinion, the utter lawlessness of such confirmations, is only surpassed by their gross and sweeping injustice. We insist upon it, that *nothing whatever can be found in the Act of March 3d*, 1851, conceding, granting, or confirming any particular lands, or right to lands, any where, to any corporation. And the utter folly and injustice of such decrees as have been rendered to *corporations*, regardless of the rights of all who are in possession of property, cannot be attributed to any act by the Congress of the United States, nor to any thing, perhaps, but sheer official carelessness.

If this Act of Congress did contain a grant, or did confirm lands to the corporation of San Francisco, of course it could maintain ejectment upon it. But the United States, as we all know, has never surveyed any lands under it, nor under any confirmation in pursuance of it, nor given any patent. Now, suppose San Francisco should sue to recover the lands, what particular lands could it mention as having been granted, or confirmed to it, by said act of Congress? None whatever, *except by mere averment.* And we have already seen that this cannot be permitted, because "that were to make all deeds hollow, and subject to averment, and so, in effect, to pass that without deed, which the law appointeth, *shall not pass but by deed.*" [Mesick vs. Sunderland, 6 Cal. p 312.] If the city itself could not now maintain ejectment, until the land is surveyed, as this Court has expressly, repeatedly, and most correctly decided, during the present year, that it could not, (see Waterman vs. Smith, Moore vs. Wilkinson, and Biddle Boggs vs. Merced Mining Company,) then how is it possible for this respondent to maintain ejectment, when he does not pretend to claim any other, or superior right, to that which the city itself had on the 22d of June, 1852, when all the interest, or right this respondent has, was conveyed to him by the Sheriff. If he did claim any subsequent acquired title, he could not receive it, because the law is settled, and the principle of law plain, against any such pretense. [See Weidman vs. Hubble, 1 Cowen, 613; Jackson vs. Winslow, 9 do. 13; Jackson vs. Peck, 4 Wend. 300.]

When this Sheriff's deeds, under which respondent claims, was executed and delivered, *the city had not yet even presented a petition, or claim for lands, to the United States Board of Commissioners.* It is useless to deny or disguise the fact, that all these Peter Smith titles, of which we complain, *were based on the idea of a title in the towns "by the laws of Mexico,"* or in other words, on "the pueblo title." There being no such title, it does now seem too bad to ask, that citizens of the United States, shall be driven off from the lands of the United States, and that those who hold valid Mexican titles, shall now have their property rendered comparatively valueless, when there is no law which actually compels or requires it to be done, and no conceivable good to be gained by it. No doubt the counsel will urge for this respondent, that this Court has made the act of Congress a title, by constructions now claimed to be settled by the rule of *stare decisis.* But no such pretense can help him. Because, what we claim is, that even if it were an actual grant, or confirmation, it *would be plainly void for uncertainty.*

And it is to be remembered, that although the *construction* of a grant is matter of law, still, its legal effect, as to what lands it includes, and what lands it excludes, is solely and exclusively "matter for the jury." And, as we have abundantly shown, the jury must act upon the testimony given as to the description or boundaries named in the grant. And, if no description, or boundaries, are named in the grant, *it is conclusive evidence*, that whether it is called a grant or not, it cannot be admitted, nor noticed as a grant, or confirmation to any particular lands, for the plain reason that it does not describe any particular lands at all, nor mention any particular lands, as being so granted, or confirmed. "A survey of lands, and a survey made by one officially qualified according to law, *is an indispensible link in a chain* of title." [2 Hilliard R. Prop. 263, cites 2 Ohio, 418; *V.* also the three cases decided by this Court, and just now referred to.] Suppose it is a grant, or a confirmation of any pre-existing right, can this Court, or any other Court, or any human being, ascertain with certainty, from any words in the act, or the grant, whether it conveys our lands or not? How can the lands be surveyed at all? Every Surveyor in the known world, will make oath, if required to do so, that he cannot survey the lands, conveyed in a grant, or a deed, or a confirmation, without boundaries, or calls; without a beginning or an ending; without form or shape; without any quantity, and without any limits. What sense would there be among lawyers, or among farmers, in talking about making a deed certain by survey, where the deed has no boundaries at all, and says nothing about conveying any lands in particular anywhere? This grant, as it may be facetiously called, is not even certain as to the counties of the State into which it extends. And all the ingenuity of Beelzebub could not survey nor locate it, for it says nothing about quantity, and contains no words alluding to quantity, or to any facts from which quantity can be fixed. And it has no boundaries to the east, nor to the west, nor to the north, nor to the south. And if there were boundaries, where they are, would be plainly, and according to sound authority, "exclusively in the province of the jury" to decide. [Frier vs. Jackson, (in Errors) 8 J. R. 508.] The opinion of Ch. J. Livingston, and of the Court, in that case, says: The construction of a grant, is matter of law. But its legal effect, can be deduced only *from its own terms*, and according to the intent at the time of the making it. [3 Bacon Abr. 393.] And matter subsequent, which may authorize a jury to give a more liberal, or restricted construction to it, as deduced from such matter, (meaning from the boundaries,) is exclusively in the province of the jury. It applies with equal force, whether the terms in which the grant is conceived, are certain or ambiguous; for *both require extraneous aid to give them effect, which aid it is not in the power of the Court to afford*. Thus, (e. g.) if the place from which the description commences is a lake, and the place to which it is to proceed is a brook, the Court would restrain the parties from taking a rock for the one, or a mountain for the other; but which was the particular lake or brook intended, must necessarily be left to the jury." (At p. 508.) "The Court below erred in deciding beyond the *mere question of law*, for, as to the facts, the jury were to decide exclusively." (Ib. at p. 515.)

PART XIII.

WHATEVER RIGHTS AND PRIVILEGES EXISTED IN MEXICAN "CITIES, TOWNS AND VILLAGES," WERE RIGHTS CREATED BY, AND DEPENDENT ON, THE MEXICAN SYSTEM OF LOCAL GOVERNMENT; AND THEY WERE (FORTUNATELY) NOT CONTINUED NOR CONFIRMED, BUT COMPLETELY EXTINGUISHED, BY THE NEW SYSTEM OF LOCAL GOVERNMENTS WHICH WE HAVE INTRODUCED.

There is nothing in the treaty with Mexico, by which this country was acquired; nothing in international law; nor in any principle of justice or right reason, to prevent all the rights of the Mexican municipal corporations, or "cities, towns and villages" in California, from passing to and becoming subject to the new sovereign, just as completely as did the rights of the greater Mexican corporation. They were [and are still] purely political institutions. They constituted parts of the Mexican system of political government, and were dependent for their continuance, change or abolition, then, as now, only on considerations of public policy. They could, at no time since the treaty, claim rights which did not pass to and become completely subject to the control and disposition of the new sovereign. [Story on Con., sec. 1324.] And the Mexican or foreign laws by which such towns were brought into existence and endowed with rights, be those rights what they may, were most manifestly laws of a political character, which could be totally abolished without the violation of any contract. [2 Kent, 305–'6.] And by express provision of our State Constitution, all such corporations are created to be continued only during the pleasure of the Legislature. [Art. 4, sec. 31.] It is no longer contended by anybody, that any of our towns acquired lands during the Spanish or Mexican dominion *by purchase* or *by direct grant.* But what is claimed is, that under general laws of Mexico, towns were endowed with rights or titles of some sort, in the lands about them. Now if such was the policy of Mexico (or Spain) concerning their towns or local governments, such is not the policy of this State concerning its towns and local governments. And if all those laws of Spain and Mexico, which are claimed to have created some vague right or title to lands, in favor of their local governments, have been abolished, what has become of the rights which entirely depended on such laws?

The act "subdividing the State into counties," etc. [Laws 1850, p. 58]; the "act to supersede certain courts, etc. [ib., 77]; the "act concerning officers" ib., 205]; the "act to regulate proceedings in courts of Justices of the Peace" [ib., 179]; the general laws "to provide for the incorporation of cities" [ib., 87], and "to provide for the incorporation of towns" [ib., 128]; and the provisions of our Constitution, expressly commanding the Legislature to everywhere make provision for new local governments over the country [art. 4, sec. 37: art. 11, sec. 4]; and the numerous special acts for creating local city and town governments, wherever such governments existed before under former laws, and in many places besides, which may readily be seen in our statutes; and the first section in the schedule of our Constitution, which provides that no laws in force at the adoption of our Constitution shall continue in force longer than "until altered or repealed by the Legislature;" and the law of this State passed on the 22d day of April, 1850, entitled "An act to abolish *all laws now in force in this State, except such as have been passed by the present session of the Legislature*" (ib. sup., p. 342), which law did positively *abolish and repeal* "*all laws in force in this State, except such as have been passed*, or adopted, *by the Legislature.*" These laws, we submit, prove conclusively that every municipal corporation, or local political government, ever existing in this State, under the laws of Mexico (or of Spain), and every Spanish or Mexican law by which "any city, town or village" in this State held any rights, either of property or of government, were totally and absolutely abolished and repealed. Therefore, whatever rights or privileges those political and public corporations may have held, under Spanish laws or Mexican laws, necessarily expired when those laws were extinguished. Because, whatever those rights or privileges may have been, they were manifestly political, and appertained exclusively to the general laws of those countries for the establishment of local political governments. And however wise it may have been for the government of a pastoral people, to reserve vast tracts of lands about their towns and villages, over which their peaceful and indolent inhabitants might go in common and from generation to generation, for wood and water, and pasture; still that system was wholly unadapted to the energetic, agricultural, and commercial people, who have succeeded to the inheritage of their country. And, therefore, the entire Spanish and Mexican system of local governments was swept away; and an entirely new and different system of government was introduced, upon the introduction of a new race of inhabitants, and the establishment of a new constitution, and an entirely new and independent nation or State. It is admitted by our learned brothers for respondent, and is declared in the decision of Cohas vs. Roisin, and repeated in the opinion of one of the Justices of this Court, in the case of Welsh vs. Sullivan, and seems to be on all hands conceded, that the rights of the pueblos to lands depended (I repeat) not on any formal or actual grants, nor on any particular law including a grant, but on the general laws of Mexico, securing such rights to all her "pueblos." Now all those laws, with no exception or reservation whatever, and be they what they may, have been repealed; and that repeal was required and commanded by the new constitution, and by the new order of general and local governments, which our new constitution introduced. Will it be contended that that repeal was unconstitutional, when the constitution itself required it? Unless the laws of this State, adopting a new system of local governments, and rigidly limiting the quantity of lands which they may hold, are unconstitutonal, they are in force; and no doctrine of *stare decisis* can repeal them, and re-introduce the Mexican laws and the rights enjoyed by Mexicans under their system of local governments. I am well aware that no law of this State, nor its constitution, can be made to impair the obligation of contracts; but, as we have already seen, the creation of such corporations, and the laws introducing and defining their rights and privileges, are not contracts. "A public corporation (says Kent) instituted for purposes connected with the administration of the government, may be controlled by the Legislature, because such a corporation is not a contract within the provisions of the Constitution of the United States." "In those public corporations (he continues, such 'as counties, cities and towns,') there is in reality but one party, and the trustees, or governors of the corporation, are merely trustees for the public." [2 Kent, 305–'6.] "The *main distinction* (says another standard authority) between public and private corporations is, that over the former the Legislature, as the trustee, or guardian of the public interests, has the exclusive and unrestrained control, and, acting as such, as it may create, so it may modify or *destroy* them, as public exigency requires or recommends, or as the public interests will be best subserved. The right to establish, alter or abolish *such* corporations, seems to be a principle inherent in the very nature of the institutions themselves, since all mere municipal regulations *must*, from the nature of things, *be subject to the absolute control of the government.* Such institutions are the auxiliaries of the government, in the important business of municipal rule, and *cannot have the least pretension* to sustain their privileges or their *existence*, upon *anything like* a contract between them and the Legislature; because there can be no reciprocity of stipulation, and because their objects and duties (and, it may be added, the advantages and disadvantages of their continuance,) are incompatible with everything of the nature of compact." [Ang. and A. on Corp., sec. 31; McKim vs. Odom, 3 Bland. Ch. R. (Md) 417.] "The framers of the Constitution (said Chief Justice Marshall) did not intend to restrain the States in the regulation of their civil institutions adopted for internal government." "If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the government," * * "*the Legislature of the State may act according to its own judgment, unrestrained by any limitation of its power, imposed by the Constitution of the United States.* [Dartmouth College vs. Woodward, 4 Wheat., 518.]

I am aware, the act of the Legislature repealing all former laws, contains the just and proper proviso, "that no rights acquired, contracts made, or suits pending shall be affected thereby." But this proviso cannot apply to any imaginary contract, or obligation to continue the old Mexican towns or local governments, for reasons already given. It could apply to no suits, then existing. And the only other subject of the proviso is, that "no rights" shall be affected thereby. But it needs no argument to prove, that the "rights" referred to, must be construed to mean legal rights, and not to mere community or public rights, conceded by a former government, from considerations of public policy, and affording the inhabitants of all its towns and villages, the right in common, to get wood, and pasture, on lands reserved by the former government for that purpose.

It is manifest, if any such rights must be retained at all, on the ground that their abolition would impair the obligation of a contract, or the rights of property, then they must continue forever, as they did exist under the Mexican laws. Because, if they canot be changed nor taken away by the State Constitution, and State Legislature, they certainly cannot be by this Court, nor by a sheriff's or constable's sale, on an execution.

It seems equally plain, that if rights were established under the general laws of Mexico, of the nature contended for, they were not personal rights, in the nature of private property. For, as we have already seen, they were not affected by death, nor absence of persons; nor could they be granted, or conveyed to another, or sold under execution, or be in any manner incumbered, or dealt in, or disposed of, as private property. And we have seen by numerous laws, here shown to the Court—and it is part of the history of this country—that the Mexican Government both did, and could, dispose of such lands. And if Mexico could do so, could not the United States and this State do the same thing? Are not our laws sufficient to govern us? Can we not adopt a system of local governments of our own, different from those of Mexico, and incapable of holding vast tracts of our soil in idleness? *We have abolished the Mexican system and all its laws.* Is our sovereign and national action void, because some former rights of former local political governments have been disturbed? The laws previously existing here, were unknown to us. Our people even yet have generally only vague and erroneous notions of the systems of town and district governments which prevailed under Mexico. They had never lived under any such systems, or any such laws, and they refused to do so. They abolished them all, and adopted laws and systems of local government which they understood. Had they no right to adopt laws and systems of government of their own? Both laws, and both systems cannot stand nor be continued, together. They are totally incompatible with each other. Which are best for us, and which shall prevail? Which are most constitutional with this tribunal? By the treaty with Mexico, the inhabitants of this country were to be thenceforth governed by our laws, and our constitutions. And all others being abolished and repealed, all *community* titles, and all *community* rights, ceased with the laws which created them, except to the precise extent to which they have been revived, and continued, under our own laws and our own systems of government. This is as true of the local governments of this country, as of the greater government over the whole country. And one has been as completely extinguished as the other.

PART XIV.

THE EXECUTION SHOWN IN THIS CASE, AND ON WHICH THE RESPONDENTS CLAIM ALSO DEPENDS, WAS ISSUED WITHOUT AUTHORITY OF LAW, AND IS VOID.

The acts of public officers selling lands (said Chief Justice Marshall) should be examined by purchasers before they buy titles so passed. If the validity of such a deed (he continued, in effect) depends on an act *in pais*, the purchaser is as much bound to prove the performance, and show the legality, of the act *in pais*, as he would be if it were part of his written chain of title. The acts of the officer selling, and the authority he had to undertake to transfer a legal title to lands, "forms a part of the purchaser's title, and is a link in the chain which is essential to its continuity." [Williams vs. Peyton, 4 Wheat. 77.] No sale by a sheriff will affect the title to lands not subject to sale under the execution. [Hewson vs. Deygert, 8 J. R. at p. 334.] "No case admits a title in the purchaser when the sheriff acted without authority" to sell. And "the proof of a purchase at sheriff's sale, without showing authority" sufficient in law, to authorize the sale [besides showing a title in the judgment debtor] gives no title to the purchaser. [Carter vs. Simpson, 7 J. R. 335.] An execution irregularly issued is a nullity. [Reade vs. Markle, 3 J. R. 525.]

The judgment debtor in this case, was a peculiar body, differing entirely from all ordinary persons and all business corporations. It was a corporation only to exert political power, and asssist the State to govern its inhabitants. It was that kind of a corporation which the old Supreme Court of New York, said—"More nearly resembles the Legislature [or government] of an independent State, acting under a constitution prescribing its powers." [Denning vs. Roome, 6 Wend. 651; 4 Cowen and Hill's Notes, 264.] In organization, in theory, in design, in the legal means of proceeding, and in the manner of supporting its officers, and paying its obligations, the city of San Francisco was a political state. In ancient times, it would have been called a state, instead of a city. [Aristotle's State.] In modern times, and by common law writers, it has been called a "little republic." [1 Bl. Com. 468.] We call it a city, which is but another name for a state, as originally understood. [Aristotle, Plato's Republic, B. 2 D.] It is no more an *ordinary* corporation, in any sense, than were the governments of each of the "original thirteen States," prior to their independence. They were of the same class of dependent political corporations. [*V.* 1 Bl. Com. 108.] Our Constitution expressly commanded the State Legislature to create such subordinate corporations, as essential organs of the main State corporation. [*Vide* Art. 4, sec. 37.] Our whole government is but a system of corporations within corporations. This judicial department of which we are all members, is, in a limited sense, a corporation.

Cities are usually more important organs of the State government, than counties. They have more dense and difficult populations to govern, and hence are given stronger local corporations or governments.

In the natural order of populations, States do not beget cities, but cities are the mothers of States. Cities are claimed to have been the schools of free governments, and the originators of free States. [See Ang. & A. on Cor. secs. 16, 17, 18, 22.] Cities are not only not subject to the same liabilities, or the same legal powers, as business corporations, but they are not at all of the same nature. A statute regulating judicial proceedings on execution against corporations, I submit, can no more be fairly construed to refer to the cities, counties, or towns of the State government, *ex vi termini*, than to the state government itself, supposing it also had been authorized to be sued. Because these local governments are all but parts of one and the same general political plan of State government. [3 Stephen's Com. 170, 191; 2 Kent 275, 305.] If the local governments of cities are more complete corporations than the local governments of counties, it is only because their more dense populations seem to require it. [*V.* 1 Bl. Com. sup.; 1 Kyd Municipal Cor. 15; Ang. & A. Cor. secs. 4 and 5.] The former county of San Francisco, was a corporation over the same lands included in the city corporation; and could sue and be sued, under the name of the "Board of Supervisors," etc. [Laws 1851, p. 322, sec. 7.] And the identical corporation, which was then by name an incorporated "city" of this State, is now nothing more and nothing less, than a strictly incorporated "county" of this state. [Laws 1856, p. 145, secs. 1 and 6.] Because our constitution compels every portion of the State to be in some county. And where there is but one local government, it must be *a county*, no matter what name be given to it. [Con. Cal., Art. 4, secs. 4. 5, 30; Art. 6, secs. 1, 7, 8, 9; Art. 11, secs. 1, 5; "Schedule," sec. 14.] Any and all our counties, I believe, can be sued, and judgments can be obtained against them, the same as against cities. [Wood's Digest Cal. p. 697, sec. 24.] But the right to obtain a judgment does not carry with it, *ex vi termini*, the right to an execution and sale of the debtor's lands, to enforce it. That right to sell a judgment debtor's lands, *does not exist at common law, even in cases of judgments against individuals.* [Comyns' Dig. c., c. 2; 4 Kent, 429.] There are many cases still, where the right to obtain a judgment is perfect, but the right to an execution sale of the debtor's lands, does not follow. Where the right to an execution sale of lands exists, it is *expressly given by statute*, and is by statute particularly provided for, as so serious a proceeding should be. It is contrary to the common law, I repeat, to sell lands on execution. And therefore, we insist, where it is not *expressly* authorized *and provided* for by statute, it does not exist. At present, it is a bad law in itself. And where statutes give remedies contrary to the modes of the common law, such statutes must be construed strictly, not loosely. And the remedy cannot be enlarged and extended to cases not expressly mentioned, or unavoidably included in the statute. [Cohen *v.* Barrett, 5 Cal. 195.] The statute authorizing the city of San Francisco to be sued, and judgments to be obtained against it, gave no new right. That right to sue and obtain judgment against such local governments, would have been just as perfect if the statute had not mentioned it. It is not a right created by statute, it is given by the common law. [1 Bl. Com. 475; 3 ib. 418, 419; Comyns' Dig. "Franchise," F. 10; 2 Kent, 275, 281]. It is also expressly declared in our State Constitution. [Art, 4, sec. 33.] But does that right give the further and statute right to sell lands on execution? Most clearly not. Municipal corporations, says Kent, such as counties, *cities*, and towns, exist *only* for *public* purposes. They are the mere creatures of the legislative will, existing, not for themselves, but solely for the public. [See 2 Kent, 275, 306, 283.] It is plain—for the constitution so authorizes, and their charters so provide—that they are to pay their debts and current expenses by "their power of taxation" and "assessments." [Con. Art. 4, sec. 37.] If any different process is to be resorted to, at the pleasure of creditors and county clerks, the law should be plain and careful which should leave it to them, and not to the Legislature or the city, to determine when and how its debts should be paid. Debts owing by our local political governments, are public debts, to be paid by public taxation on the property within them, as only public debts can usually be paid. If they are to be paid in any other manner, it seems to me most manifest, that the law must first make express provision for such other manner. I most seriously question the power of the State Legislature, to provide that the debts of our local governments shall not be paid by public "taxation" and "assessment," but only by sheriff's and constable's sales, on executions, so long as any property can be found. Because, such a system of paying their debts, though appropriate in cases of individuals, and business corporations, would not be at all appropriate to corporations not allowed to engage in merchandise, or trade, to make money; but designed to assist and protect its people in doing so; and dependent on their contributions for its support. "Each city," says our Constitution, "shall make provision for the support of its own officers, subject to such restrictions and regulations, as the Legislature may prescribe." [Art. 11, sec. 9.] The Legislature did restrict and regulate, and the city, in this case, did provide "for the support of its own officers," by taxation; and as to all its debts, contracted prior to April 15th, 1851, by giving *its bonds* with interest, also to be paid by taxation, as provided in the law. *That was what the law expressly provided for this identical creditor*, who is the respondent in this case. What authority was there for this creditor and the clerk of the court, to collect this debt *in a manner contrary to that which the law did expressly provide for him?* It cannot be pretended, that there was any statute authorizing him to have execution, and sell the lands of the city of San Francisco. What he claims is, that he had the right to an execution and sale, by inference, and merely because he had procured a judgment against the city, and because *by a general statute law* of the State, an execution and sale is allowed to those who hold a judgment. But this judgment debtor was not a corporation, nor a person bearing the remotest resemblance to the persons against whom executions were authorized by said general law. This debtor was a body created *by a special law*, and *subject to a special law.* That special law makes no provision, and gives no authority to any body to collect demands against it by executions. But it expressly provided, that all such demands should be paid by the bonds of the city, and the State again repeated that command by another law passed May 1st, 1851, expressly for that purpose. [Act to fund the floating debt, etc., still in force, and repeatedly upheld by this court. Laws of 1851, p. 387.]

The execution was issued in this case, in 1851, and it must be decided by the *laws as they then stood.* We demand the production of the law, which authorized this judgment creditor to have the execution, or the clerk to issue it, under which he procured this sheriff's sale of four hundred acres of city lots for fifty dollars. We deny that any such law or authority existed. We insist that it was a plain and unwarrantable departure from the provisions made by law; and that the constitutional power of this Court cannot now make such proceedings valid, be the consequences what they may. If they are to be made valid, the legislative power must be invoked for that purpose. No such power exists here.

There was not only no authority for issuing the executions in these cases, but I submit, not even a rational or just apology or excuse, for so doing. They were not issued by mistake, for we must presume the law was well known. And nobody is entitled to the consideration of innocence, who has purchased into the speculations they have created; for they all knew the law, and knew not only that no law did authorize, but that no law could authorize such proceedings, without endangering the usefulness and destroying the harmony and dignity of our political system of State governments. And besides, the subsequent dealers in these deeds so acquired, where they have never had possession of the land, show themselves, on the face of the papers, to be merely champertous speculators. And speculators in lands in the peaceable possession of others, can have no rights, except such as the laws clearly and unavoidably compel the Court to concede. Their claims are not so superior in equity and so far preferred in law, that the rights of others must be wrested from them, and the laws themselves be violated and set at defiance, in order to make good their speculations. I beg to submit a few words more on this point, and even at the hazard of some repetitions; for I regard this point alone, aside from the many others, as fatal to all such sales as these.

It is an axiom in law, that public debts are not private debts. It is a maxim of our law, that the individuals under a municipal corporation "do not owe what the corporation owes." (Maxim, "*Si quid universitate debetur, singulis non debetur; nec quod debet, universitas singuli debent.*"

It is also settled law, that the debts of a city can be "totally extinguished by its dissolution." [1 Bl. Com. 484; 2 Kent, 307; Con. of Cal., Art. 4, sec. 31, on which provision v. Ang. and A. on Cor. sec. 767 at p. 803.] Persons do not trust such bodies as they do individuals, or business corporations. These bodies are totally distinct from the business world. They exist "*only* for *public* (not at all for private) purposes." They are not designed to subserve private interests, and they cannot be forced to do so, without a violation of principle and right. When trusted at all, they are trusted solely on the *public* faith and credit, just as the State itself is trusted. We all know this to be true. All talk about "how then will you force them to pay their debts," has no more to do with the subject, than to ask how we will force the counties to pay their debts, and the State to pay its debts. All such debts are public debts. And if, in any instance, the public owing them does not pay them, *application for relief must be made to the Legislature*, not to the Courts. And such has been the course pursued at every session of the Legislature, since the State was organized. The right to sue in our Courts, is given against all persons and all bodies whatever capable of making a contract, with the single exception of the State itself. Attachments, executions, and forced sales, are given where merely private individuals and private interests are involved; but never where the people in their public and political relations are concerned. It is by their own authority, and no other, that any process can be issued against any body. [Con., Art. 6, sec. 18.] And it seems against principle, for the people of the State to issue execution against themselves, or any portion of themselves, in their merely political relations. These corporations are only intended to enable the people in their respective limits, to have somebody attend to those interests among them which are common to them all, and to protect them all while attending to their own business. We insist, they ought neither to be treated, nor thought of, nor are they thought of in the law, as mere business corporations, or private persons. Indeed they are, manifestly, exceptions from all ordinary or private corporations; and are so expressly indicated in our Constitution. [Art. 4, sec. 31.] Their creation by the Legislature, and their making contracts, does not prohibit them from being abolished, nor their contracts from being virtually annulled; because even their existence or their continuance at all, creates no contract, "within the purview of the Constitution." They constitute, "in reality but one party." And their officers who make any contracts, or contract any debts, "are merely trustees for the people, and act "for public purposes *only*." [People vs. Morris, 13 Wend., 325; 2 Kent, 305, 306.] In the poetry of lawyers, they are "the Flowers of Sovereignty;" and the power which wholly creates, can totally annihilate them. [*V.* Comyn's Dig. "Franchise" (G.)] There can be no question of the power of the Legislature to determine how their debts shall be paid; nor can there be any question, that private persons and clerks of courts, or other officers in pursuit of fees, cannot determine how such public debts shall be paid. Nor can there be any question, that when the State has provided a way to pay such public debts, the creditor must accept it, or go without being paid. The State having provided, by act of May 1st, 1851, that all debts and demands against the city of San Francisco, "due, or the consideration whereof accrued prior to May 1st, 1851," [sec. 2 of said Act,] should be funded, and the principal and interest thereof paid by a special tax, [sec. 4, ib.,] the officers or trustees of the corporation could not pay this creditor in a different manner; then how is it, that he could help himself to pay in a different manner? The law should be plain indeed, to authorize such conduct. Nor does there seem to be any doubt, that where the law makes special provision for the payment of particular debts, *the general laws of the State on the same subject do not apply.* [Titcomb vs. Union Ins. Co., 8 Mass. R. 326; People vs. Morris, 13 Wend., 325.] The necessary existence of contracts with corporations, is the very reason why they should be liable to be sued. For the power to make contracts should subject those who make them to their strict fulfillment. And where a failure ensues, some mode must be provided for trying the case and settling the damages, independently of the will of the failing party. The right to sue, therefore, is not only proper but necessary, and has always existed ever since corporations have existed. But the particular privilege of every judgment creditor of a municipality, to stay away from its public treasury, or avoid application to its officers for some orderly and proper arrangements for liquidating his demand, and after getting a judgment, to obtain an execution from a clerk or a justice of the peace for a sheriff or a constable, as the case may be, and then levy on and dispose of the *public graveyards*, and *parks* and *school-houses*, and all *public buildings* and other property acquired by our people in their public relations, and thus attempt to force payments against communities, and keep them subject to the whims, revenge or speculating schemes of a single individual; is a thing unknown and unheard of under "the common law of England." And if there is any statute of this State, authorizing and providing for such sales, under any circumstances, for public debts, and whether the public property be expressly exempted from execution or not, we ask that the statute may be produced, or specified, in order that the country may see it, and change it.

We insist, there is no statute in this State, and never has been, authorizing clerks of courts and justices of the peace to issue executions to sheriffs and constables, and sell the public property of a political community, and transfer the title of it to purchasers at such sales, in the manner which has been continually practiced in San Francisco, since these Peter Funk sales were begun. It is plainly contrary to principle, and to justice; and has been, from the beginning, a continual violation of special and continual acts of the Legislature, making provision for the debts of that corporation; all which special laws have been knowingly and intentionally disregarded, not because those special laws were insufficient for the just relief of such creditors, but for the sole purpose of engaging in these sweeping and most iniquitous speculations.

And now upon what conceivable principle of honor, or law, should this Court be called upon to excuse and uphold, such attempted plunder of public and private property? Where is the law authorizing it to be done? The Practice Act cannot be read without seeing that its provisions authorizing execution, have no application nor allusion to "The People" of a place incorporated for purposes of government, as at San Francisco. [Ministers, etc. vs. Adams, 5 J. R. 347.] Besides, it has been abundantly shown that such a corporation cannot hold lands for purposes foreign to its institution. There is no proof in this record that these identical lands, if held by the city, were not held for public purposes only. And we insist, *in the absence of proof to the contrary, the presumption of law must be, that they were held strictly for public purposes.* And this strengthens the view, that, all the lands it held, must be deemed, in law, to have been held by or in the name of the corporate body, purely *as a trustee for the public.* [2 Kent, 306,] And the idea that such trusts can be defeated, by a constable's or sheriff's sale, with no statute expressly authorizing such a proceeding, seems too absurd to need argument. [Wood vs. San Francisco, 4 Cal. 190; Munroe vs. Thomas, 5 Cal. 470; Thomas vs. Armstrong, 7 Cal.] In New York, [2 Revised Statutes,] in Louisiana, [Civil Code,] and no doubt in other States where executions are tolerated against political institutions, it will be found such conduct, where allowed at all, is under special provisions of statute law. Be the law what it may in other States, *there is no statute law of this State* providing, that whenever a judgment is obtained against a municipal corporation, it may be enforced the same as against a pecuniary or business corporation, or that it may be enforced at all, by ordinary execution. No statute law of this State ever has been, or ever ought to be passed, allowing executions and sheriff's and constable's sales, against our local political governments. And so long as there is no statute, making provision for such executions and such sales, it seems plain, that where ground for complaint exists, *application must be made to the Legislature.* Such institutions in this State, are peculiarly the creatures of the Legislature; and the statutes are full of special laws providing for the payment of their debts. As to these special laws, concerning this local government or political corporation at San Francisco, see Laws 1851, p. 361, sections 14, 15; ib. pp. 387 to 391. Laws 1852, p. 197, also p. 201. Laws 1855, p. 259, sec. 32; also pp. 285 to 287. Laws 1856, pp. 172, 173, 174, also 167. Laws 1857, 153, 255, 201. Laws 1858, pp. 183 to 190, also special Act, p. 191, also 235 "First" *et seq.* Laws 1859, pp. 64, 87, and 157, 158. Now, with all these special laws providing for the payment of debts, and of judgments against that local government, and *with no statute law* providing for forced sales against the special corporation of San Francisco, by constables and sheriffs, on executions, *where is the authority for issuing such executions? There is no such law to be found in any statute of this State*, nor can the Practice Act of 1851, by fair and legal construction, be made to include executions against such special bodies, created by special laws, and for peculiar and solely political objects. And, of course, no such right exists at common law, or in equity. It would then be by writ of sequestration. [Ang. and A. Corpo. secs. 670, 673; Comyns' Dig. "Franchise" (F. 19.) There was precisely as much authority to issue attachments, as executions, against "The People of the city of San Francisco constituted a body *politic.*" [Laws '51, p. 357, sec. 1.] If an execution could be levied against it, "the same as against an individual," then, an attachment could be. And in that case the institution could be closed, and its public offices placed in the hands of keepers. Why not? It either is to be treated the same as a mere individual, or money corporation, or else it is not. Those who say it is to be so treated, must apply the law as if such were really the case. What right have they to say, it is to be deemed applicable just far enough to uphold sweeping schemes of fraud and wrong, but no further?

PART XV.

THIS COURT HAS NO CONSTITUTIONAL POWER TO DECIDE ANY CASE CONTRARY TO LAW, NO MATTER WHAT THE PRETEXT, NOR WHAT THE CONSEQUENCES.

And this brings me to the concluding part of my argument. How far can judicial errors be continued, on the ground that they have been previously committed? This involves, I submit, the extent of the constitutional powers of this Court. Can this Court undertake to enforce erroneous decisions where they come in conflict with any law or legal right? What question could be more interesting to all of us, as lawyers, as well as citizens? And what subject is of more moment, or is more important to be distinctly settled and understood?

I regret, most deeply, my inability to present the subject in the manner I would like to see it presented, and in the manner its great seriousness and importance requires. And I am aware that to address Your Honors as to the powers and obligations of this Court, seems like speaking to gentlemen concerning their own rights and their own authority, or at least it has something of the embarrassment of personality; because it is difficult to address the Court, without thinking of those who constitute its visible organization. And it is hard to refer to errors without an effort of the mind to inquire who committed them.

Chief Justice Field—"You certainly need have no hesitation in speaking freely of the powers of this Court."

Mr. Justice Baldwin—"Of course, we expect your language will be respectful."

Most undoubtedly, Your Honor.

But, in order that all of us may be relieved from every embarrassment, and from every imagined reflection and allusion of a personal nature, I beg leave to speak of the powers of the Court as of the powers of an institution of our government, of which we are all brother members and all sworn officers, and of which Your Honors are admittedly the leaders, and the honored and respected presiding officers. I have no new ideas to advance, but I beg the indulgence of the Court to recall those which are not new. For what we desire is, that this Court will continue the noble task of returning this State to the rules and principles which are old, and quickly relieve us from our headlong career, under rules and principles which are not merely new and untried, but are opposed to those which are old, and have stood the severe tests of ages of experience. And as we have every reason to believe that some former decisions of this Court will be relied upon by the respondent more than either law or evidence, we beg the Court to allow us free scope in the argument, and, as before, free reference to familiar principles. An aged and profound English jurist of our own times, Sir Fortunatus Dwarris, in his recent and very learned general treatise on the written law, says: It is a remarkable fact, that in an enlightened age, and among so many intelligent inquiries into the philosophy, both of history and of law, so little attention should have been paid to this important question: What are the principles on which the jurisprudence of a country ought to proceed? [Dwarris on Statutes, 694.] "Our ancient (English) institutions" (said a committee of the House of Commons, as quoted by Dwarris) "having been adapted to a rude and simple state of society, the Courts, in later times, gradually became sensible of defects of jurisdiction and other inconveniences, to which the altered circumstances of the nation had naturally given rise. In some cases the remedy was supplied by legislative regulations; but where this was wanting, the judges were apt to resort to fiction, as an expedient for effecting indirectly what they had no authority to do directly. But to whatever cause legal fictions are assignable, we have no doubt that they have an injurious effect in the administration of justice, *because they tend to bring the law itself into suspicion* with the public, as an unsound and delusive system; *and the natural effect is a tendency to degrade the law in popular estimation.*" The same observations, says Dwarris, should be applied "to *all* instances of ingenuity employed (by judges) in contrivances to *evade* "laws." [Dwarris, 712.] *Stare decisis* is merely a fiction or dogma, created by English courts, to avoid the disturbance of questions after they had become settled by their decisions. It is part of an old verse—

"Stare decisis et non quieta movere."

"To stand by precedent, and not disturb what has been quieted." [*V.* Bouv's and Burrill's Law Dics.] The intention of the rule is, *to prevent decisions which unsettle and disturb the "settled and fundamental doctrines of the law."* To apply this rule to uphold new decisions made at this day, in plain and direct violation of the settled rules of property, of law, and of legal evidence, established by unbroken series of decisions for ages before, *is applying the rule to justify its own violation.* But this rule cannot be invoked to uphold the decisions of which we complain, for other, and, perhaps, still more serious reasons.

I submit it would be a fatal error for us, under our constitutions, to resort to English precedents to justify a repetition, in our courts, of the early English practice and experience as to the doctrine of adhering to decisions. When such precedents were being established in England, the government of that country was very rude and imperfect. Its legislation then consisted in mere generalities or declarations of general principles, making it imperative on the courts to supply details and omissions in the laws. [Dwarris, 705, 706.] At one time, the House of Parliament was held to give its assent to laws before they were written, by petitioning the King for statutes on specified subjects. If the King granted the petitions, he directed his judges to write out the laws, and whatever the judges wrote, constituted the laws on the given subjects. [Dwarris, 34–5–6–7–8.] In the beginning of those ages, you remember, judicial duties were always in theory, and sometimes in fact, performed by the Executive, *i. e.* the King. And judicial decrees, like merchandise, were bought and sold. And the King used to send out his justices upon their circuits, not to administer laws, but actually to make and to collect revenue. [Ib., 33, 39; 1 Reeve's His. Eng. L. 205, 206; Creasy Eng. Con. 45 *et seq.;* Stephen's De Lolme, 47.] About 1272, the Judges "were sent through the kingdom not to punish offenders, but to compound with them; not to execute justice, but to collect fines." [Stephen's ibid., p. 81.]

Many ages afterwards, even in the 17th century, English Judges, openly and upon the Bench, treated *Magna Charta* itself, with expressions of ineffable contempt. [Dwarris, 35, note.] Property, life, and liberty itself were still under the control of the English judges almost down to the beginning of the 18th century. And, previous to that period, their powers were so undefined, and deemed so unbounded, that they undertook to punish men with death by mere rules of court. An instance is given where all the judges agreed, that in any case before them, "a man who should challenge thirty-eight jurors should be hung." [Ib. 804, 805.] But the English posterity of the judges of those times neither tolerate, follow, nor excuse their examples. They accuse them of having acted "contrary to law." [4 Bl. Com. 449.] They charge them with having rendered valid laws ineffectual, in order to gratify their own opinions, and please suitors whom they preferred. [Dwarris, 809.] They charge them with having perpetrated judicial acts "on which," in the language of Dwarris, "it is needless and would be disgusting to dwell." [Ib. 815.] The Earl of Clarendon, a judge of probity, and once Lord Chancellor, who wrote about 1670, bitterly complained of the courts of England, for urging "reasons of State (*i. e.* public policy) as elements of law." And for rendering "*judgments of law grounded on matters of fact, of which there was neither inquiry nor proof.*" [*V.* note ib. 35, 36.] And Clarendon declared, in effect (and who can feel that it is without force in our own times and State,) that the judges were less to blame than unprincipled lawyers, who surrounded them and gave them countenance and support, and who, hoping for favors themselves, urged on the judges to the perpetration of illegal acts. [*V.* ibid., and Hist. Rebellion, p. 153, and *passim.*]

Not the conduct of the people, nor their representatives, but of the King's judges, who obeyed not the will of the law but the will of individuals, perhaps, tended most, of all other causes put together, to introduce the Revolution of 1688, with nearly universal joy. [*V.* Creasy Eng. Con. 272, 273, 278.]

Our own ancestors, who originated the plan on which this Court is organized, *were the posterity and countrymen* of the very men of those times. Can it be supposed *they* were forgetful of the always present dangers of the judicial power? Can it be questioned that they intended to *constitutionally prohibit* and render without obligation, all judicial acts not authorized by pre-existing laws?

England no longer tolerates what too many of us seem to regard as within the constitutional power of our courts. Is England farther advanced than we in the true science of administrative justice? If she is to be so regarded, *the fault is in our Courts, not in our polity.* King's Bench once held that "judges have power over laws, to mould them to the truest and best use, according to reason and best convenience." [Sheffield vs. Ratcliff, Hobart R., 346.] But the doctrine seems to be now firmly established in England, that their courts have no power at all over the laws. To admit they have, says Dwarris, would be equivalent to admitting that "the Legislature had abdicated its functions, and delegated all its powers and duties to the judges." [Dwarris, 617.] And he avows it as now the best law, in England, that in every case the laws in force, as well the settled principles of the unwritten laws as the statute laws, must be administered as they are settled. And if any change whatever is to be made in either the common law or the statute law, the legislative power alone is authorized, and responsible, for the alteration, or its refusal. If any changes whatever are to be made in the previously settled laws, or any deficiencies to be supplied, or any mistakes to be corrected, the legislative power, say the present courts of England, "is always at hand" to perform that duty. And if the legislative power neglect to do it, that affords no authority nor excuse for the courts to perform their functions. For a usurpation of authority by a court of justice is neither necessary nor justifiable, since the country has organized more numerous and more appropriate bodies to determine, in all cases, what policy shall be pursued and what the laws shall be. The Executive can attempt to make or change the law, or refuse, in any instance, to enforce it, under the same pretense, and with the same right and authority as the judges. [*V.* Creasy, pp. 4 and 287; also, ibid sup. and pp. 584, 587, 595, 597.] They have nothing whatever to do with questions of public policy, or with the consequences of enforcing the laws, as they find them. Each department of the government must perform its own duties only, and leave the others to perform theirs; and neither can be held responsible for what does not appertain to their own office. If the consequences be severe in any case, they alone are responsible who had the authority to avert them.

All pleas of policy, and all talk of consequences, belong elsewhere. The only question to be tolerated, or listened to, in courts of justice, should be: What is *the law?* Bad consequences invariably and only result, when settled laws are violated, or evaded; never when they are adhered to and obeyed. At this age of jurisprudence, and in this constitutional government, the doctrine is intolerable, that courts of justice sometimes find a "necessity," for disregarding the settled law.

I am aware that American-hating Mansfield, [Story's Life and Let. vol. 2, pp. 12, 20, 21,] made laws on the bench, in England, since the revolution of 1688, and as late as the time of our own grandfathers. But although he claimed to do so, only where no previous laws existed to the contrary; and although English judges, as we have seen and shall see, were not officers of a written constitution, defining their powers; still the example of Mansfield, is no longer tolerated even in England. And he is accused of having usurped authority, appertaining to the duties of Parliament. Such acts have already seriously lessened the respect for his official character; and will eventually rise up, as sure as the vigils of truth are eternal, and be the very means of dispelling the false lights, with which he sought to immortalize his judicial fame. [Dwarris, passim, 708, 709, 595, 597.] When the memory of Mansfield shall have been consumed by time, the fame of our own Marshall, will blaze afresh; and his views in regard to the judicial power, will be revered even in England itself. Truth alone, and nothing else in all this world, can be continual and without decay. Since the time of Mansfield it has become the settled doctrine in England, that the judicial power cannot be claimed to be exclusively vested in either of the three departments of the English Government. What the judicial power is understood to mean in England, and hence what it means under our common law, is thus explained by high authority: "The Constitution of England being a free constitution, demanded *from that circumstance* alone, extraordinary precautions to guard against the dangers which unavoidably attended the judicial power."

Hence "the judicial authority is not only placed out of the hands of the man who is invested with the executive authority, but it is even placed out of the hands of the judge himself." And not only the man trusted with the EXECUTIVE power, cannot exert that executive power, until he has received the permission of those who are set apart to administer the laws; but those who are set apart to administer the laws "are also restrained in a manner *exactly alike*, and cannot make the law speak until, in their turn, they have also received the permission" of the legislative power. And the legislative power being thus the controlling power of all, is not permitted to remain "a permanent body of men, who can have time to study how their power can serve to promote their private views or interests; but they are men selected at once from among the people, and who were perhaps never before called to the exercise of such a function, and cannot foresee that they shall ever be called to it again."

"In fine," (says De Lolme), such is the happy nature of this plan of government, that the judicial power, a power so formidable in itself, a power which is to dispose, without finding any resistance, of the property, honor, and life of individuals; and which, whatever precautions may be taken to restrain it, must, in a great degree, remain arbitrary; (this judicial power) may be said, in England, to exist—to accomplish every intended purpose—and to be in the hands of nobody." [Stephens' De Lolme Eng. Con. p. 785.] The learned Stephens adds to these explanations, simply this noble boast: "The consequence of this is, that no man in England ever meets the man of whom he may say, 'that man has a power to decide on my life or death.'" And, with equal truth, it shall be added, in our country, "or on my right to my property."

It will be seen from this explanation and this boast, that what is understood in England, as the judicial power, means only this: the power of THE LAW. Where *the law* comes, *all* must give it sway and reverence, or else none are bound to do so. For there are no exceptions, and none are exempt from obedience. Blackstone does not mention the mere opinions of Judges, as capable of making binding rules, even against themselves, much less against the legal rights of others. It is not opinions, but judgments, which sometimes grow into precedents. And in the course of many ages, sometimes, and when it is not for the sheer good of speculators *instead of bona fide* property holders, their former judgments come to be accepted as rules of property, important to be left undisturbed. But, I submit, no such effect should be given even to judgments, when they are admitted, all along, to *violate* the settled laws of the country, and especially when their longer continuance is not necessary to protect property, but only necessary to build up new, sweeping, and most iniquitous schemes of speculation. Stephens, in his introduction to De Lolme, says of a decision of the Court of Exchequer concerning an import tax: "This was a most illegal decision, because it made *the King* superior to the statute law." [P. 328.] I most respectfully submit, that the Cohas vs. Roisin, and Welch vs. Sullivan decisions, are worse, because they made *the Judges* superior to the law, and superior to all the laws at once, by disregarding the "settled and fundamental doctrines of law," and deciding that a private title exists (to an indefinite extent) to the soil of this State, without a jury and without evidence, and in a court where no jury is allowed to sit, and where no evidence can be introduced.

"In all political governments," it has been most truly said, "no man should be stripped of his honor, or his property, until after an impartial and strict inquiry." It was lately said by Lord Campbell, in deciding an application, to review a decision by an Archbishop against a clergyman, not merely that it is the first principle in law, but "it is one of the first principles of *natural justice*, that no man shall be convicted without being first heard." Even if the decision was right, said he, "it was wrongly made." And he adopted the maxim of Seneca, that "he who decides against a party without hearing him, though he decides justly, yet he is not just." [In the matter of Poole vs. the Archbishop of London, 1858.] What is it but condemning us without a hearing, to seek to apply those mere decisions against us, which are now being orally argued for the first time since they were commenced! And to which we were never parties. And in which cases, if titles have been made by the decisions, let not those decisions be turned against us, whom they will convict without a hearing, and whom they will ruin, for no want of law and of evidence in our favor; nor for any lack, or fault, or mistake of ours!

It is not the judgments, but the opinions of the justices, in the Cohas vs. Roisin cases, of which we complain. This Court, as we all know, is bound to render judgments according to law, but is not bound to deliver opinions. This was decided, by this Court, in Houston vs. Williams, at the last April term. It would seem that the opinions of the judges, do not constitute, in England, a part of the legal *records of the Court*." "At an early period of our Constitution, (says Douglas,) the reasons of the judgment were set forth in the record, *but that practice has long been disused*. [1 Douglas Reports, Preface, p 5, note.] How then can this Court be deemed bound by opinions of only a recent date, and almost universally admitted to be in violation of law, when the law did not even render them necessary. "The Court must exercise its own discretion, as to the *necessity* of giving an opinion upon pronouncing judgment." [Houston vs. Williams, sup.) Such opinions may be erroneous. They may be, once in a hundred years, like those in the Cohas vs. Roisin cases, in the very teeth of the law. They may be bad by mistake; they may be wilfully bad. It would be monstrous to say, that such opinions, when known, and admitted to be in violation of the settled laws of the country, must be obeyed. Judges, said Blackstone, "are bound by an oath to decide according to the law." They are not bound by an oath to decide according to previous opinions. The people are not bound to know judicial opinions, nor even judicial judgments. They are bound to know and obey the laws, and judgments of courts bind only those who are parties and privies to the suits, wherein they are rendered. We often hear it said, that courts make laws. And so they did in England during the early periods of which we have spoken. But our American constitutions prohibit it. And, as we have seen, and will further show, no such ideas now prevail, either in England or America, that courts make laws, or that their opinions are of themselves laws. "The opinions of Judges are their reasons for their judgments." [Houston vs. Williams, sup.] They "are, of great importance," (ib.) but they are not of themselves laws. And the reports of such opinions, are public relations of what has been done in the courts, concerning controversies there judicially determined; and they constitute infallible guides for the adjudication of other, or future cases, unless shown to be contrary to law to apply them to future cases. [*V.* Coke Litt. 293.] They are not referred to, nor treated as laws, but as evidences of what the law was considered to be, by those judges who wrote them, or followed them. But no court is actually bound by such opinions. What every court is bound by, and is sworn to observe and adhere to, is *the law.*

And if the law and the judicial opinion, in any case, do not agree, it is the opinion, not the law which must be disregarded. Opinions, not contrary to law, may be adopted as the rule for deciding future cases, provided no law will be violated by so doing, but not otherwise. The first inquiry is, what is the law which governs this case? This case, I most respectfully submit, is not to be decided according to the will and pleasure of any former members of this Court, nor according to opinions of theirs in other cases, but it is to be decided *by the law.* And former decisions cannot be, and in a new court like this, ought not to be referred to, as things to be obeyed whether right or wrong. No law, nor honorable obligation, requires any such thing, but they require that they shall not be obeyed, when known to be wrong. An act passed by the Legislature itself, and expressly requiring this Court to obey former erroneous opinions, in the decision of these cases, would require to be disobeyed, for it would tend to violate the solemn obligations of this Court to decide all cases according to pre-existing law. "The will of the Legislature, (says Kent,) is the supreme law of the land, and demands perfect obedience." And though "the principle of the English Government, that the Parliament is omnipotent, does not prevail in the United States, yet if there be no Constitutional objection to a statute," it is as obligatory in our State, as is an Act of Parliament in England. [*V.* 1 Kent, 448.] If, then, an express act of the supreme legislative power, could not be of any obligation in compelling this Court to follow erroneous decisions by its predecessors, how can the mere act of committing and continuing those errors, be of any actual obligation. A law passed by the Legislature, requiring judges to follow all decisions of their predecessors, would be plainly unconstitutional. The plan on which this Court is organized, the limitation of the terms of its judges to six years, and requiring one to be elected every two years, was manifestly *intended* (though unwisely designed) to protect the country against errors, not to allow errors to be continued. And not only this, but the constitutional oath of the judges seems to prohibit them, from obeying decisions which they see and know to be in violation of the law. Judges, (says Blackstone,) "are *sworn* to determine, (every case which comes before them) *not* according to their own private judgments, but according to the known laws and customs of the land." They have *no authority*, or to use his language, they are "not delegated, to pronounce a new law, but to maintain and expound the old one." And he expressly repudiates the right, to follow precedents set by the Court, where there are opposing precedents, set by the law. He declares it is unjustifiable for courts to follow former decisions, "where the former determination is most evidently contrary to reason, *i. e.* contrary to law, which is the perfection of reason." This same concise and reliable "father of our English common law," says, it is "always" the "intention" of the common law "to conform with reason."

And he shows that the mere declaration of a judge that law "is not law," has no binding force; it is reason, not assertions without reason, which is of binding force. It is reason (not mere assertion,) which is able to declare "what is not law." And when subsequent judges disregard even former judgments of the Court, he says, "they do not pretend to make a new law, but to vindicate the old law from misrepresentation. For if it be found that the former decision is manifestly absurd, it is declared, not that such a sentence was bad law, but that it is *not law*, that is, that *it is not according to the established custom of the realm*." [1 Bl. Com. 69, 70.] He boasts that while in other countries judges *can* render judgments without respecting the laws, yet that in England they cannot do it; for according to the common law of England it is not *courts nor judges*, *but only the law itself*, which can render valid judgments. And the courts and judges are the mere instruments of the law, not to announce *their determinations*, but to announce the previous determinations made by the law. He says they cannot "make or new-model the law," but all they *can* do, is "*only* to declare and pronounce it." [3 Ib. 327.] Judgments, says the same familiar authority, as to what the common law is: "Judgments are the sentence of *the law*, (not the judges,) *pronounced*, (not made,) by *the court*, (not by the judges,) and *upon the matter contained in the record*," not upon statements for facts, made by the very judge himself who renders the judgment, and with nothing to sustain him but the statements which he himself makes. I most respectfully submit, that all judgments or decisions, involving important questions of fact, like that of a corporation owning vast landed estates, based upon no legal evidence in the record of the existence of such ownership, are not legal judgments nor legal judicial decisions, excepting in form, but are void for want of authority to so pronounce them. If they are not void, then they may be rendered against law, against reason, against evidence, against truth, and upon matters not contained in the record, and still be valid. That is, whatever the judges chose to do and do is lawfully done, and is obligatory upon their successors in office! The great English authority from whom I have just quoted, utterly repudiates the remotest verge of such doctrine. He insists throughout, that judges or courts, by means of any wills in its judges, cannot render any judgment at all, in any case whatever; and that the law, and the law *only* is competent to render judgments; and that the judges are sworn to pronounce judgments on the evidence shown in each case *just as the law would pronounce them if the law could speak without their assistance.* The judgment, he most carefully and most emphatically *reiterates:* "The judgment, though pronounced or awarded by the judges, is not *their* determination, nor their sentence, but the determination and sentence of the law." [3 Ib. 396.] If an erroneous decision be made, says Dwarris, is it not too much to contend, (on any ground,) that it may not be corrected? To say, he insists, to say that an erroneous judgment, when brought before the sworn judges of the land, sitting to administer justice *according to law in all cases*, brought judicially before them, neither seeking nor declining, but only conscientiously deciding questions which must be decided; to say that a judgment of which they, the recognized interpreters of the law, *discover the unsoundness*, must be received as valid—must be allowed, adopted and enforced by the judges sworn to do right, and all the while perceiving this to be wrong! Is not this absurd and most unreasonable? *Is it not monstrous?* [Dwarris, 113.] And this language is not used in reference to the imperious and sacred duty of a court of justice to correct its own errors, but concerning the duty of a court to even reverse a decision by the court of the House of Commons itself, (although it had undisputed jurisdiction,) in order that the sway of the laws be rendered impregnable to all attacks from within the government itself, as well as from without. Stephens, (in his Introduction to De Lolme's English Constitution,) says: "The arbitrary discretion of *any* man is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon condition, temper and passion; in the best it is often times caprice; in the worst, it is every vice, folly and passion to which human nature is liable." [Page 455.] The sacred, and of all others the most important doctrine of *the complete inviolability of the laws*, was aimed at in England by ages upon ages of dear-bought experience. For no written constitution there devised it, as it has been devised with us. True, a recent author, on the English Constitution and the "present distribution of political power," in England, lays it down as the second cardinal doctrine of that government, that "*no law can be made or changed*, except by consent of Parliament." [Creasy, page 4.] And it seems also true, that Parliament passed a law about 1707, [4 & 5 Anne, c 16,] for the "better advancement of justice," but apparently of little point and vague meaning. [Dwarris, 852.] But no written law seems to ever have been passed, not merely prohibiting, but expressly taking away all power in courts of law to exercise any control whatever over the laws, as has been done (though not, perhaps, in the best manner,) by our written constitutions. It follows from this, that the true English doctrine of the power of courts, as just mentioned, (and, I submit, the only doctrine which can be supported by any people who wish to *enjoy* and not to *talk* of liberty,) was arrived at in England, by direct force of the sufferings which were endured by its inhabitants until that doctrine was adopted in the present century, and adhered to with the utmost rigor. Dwarris alluding to this subject, says, "it is certainly a remarkable fact, that the jurisdiction or methods of proceeding in all our superior courts, (in England,) will be discovered, on inquiry, to be founded in usurpation, and sanctioned by fiction." [Ib. 710.] But, I submit it would be a fatal error for an American court to go back to the days of "judicial discretion" in England, to determine the obligations of either an English or American court at the present day. The days of "judicial discretion," as formerly understood, (as we have already seen,) have long since passed in England. And in the United States, as we shall see from the very highest authority, they have never existed since the adoption of our written constitutions.

Our ancestors, whom Burke so highly complimented for their extraordinary devotion to Blackstone, and whom we remember and revere, only because of their implacable detestation of all official usurpers, and usurpations; those men whose experience we cannot forget with impunity, were especially alive to the *necessity* of restrictions on the judicial power.

Fortunately for their endeavors, the dreadful experience of England, in attempting to administer justice under a system of "wise judicial discretion;" had brought her wisest jurists to openly deny, that any officer or court in the kingdom had right or authority to make any rule or decision, or order any judgment, or process, whereby any man should be deprived of his liberty or his property, except in pursuance and by authority of previously existing laws. And to crush "judicial discretion" out of existence, as to the final judgment, and the final process to be issued, in any suit, seems to have been the earnest determination of the originators of our plans of government. The powers of court, said one of their first constitutions, "shall be limited and defined by express laws." [Con. N. H. 1792.] Each individual has a right, said another, to be protected by standing laws. [Con. Mass. 1780.] The Constitution of North Carolina, of 1776, like others made during the same period, avowed in terms, that no man shall be deprived of his property "but by law," And that *no power* should exist to suspend the operation of the law, except the Legislature. And all seem to have been determined, to adopt strict governments of laws, not courts. And to insure this, they at once completely separated the judicial department, from both the other departments of government, and vested it with no power at all, except only to apply pre-existing laws to the cases brought judicially before it. The first sentence of the first Constitution agreed to after the Declaration of Independence, (that of Virginia, July 5th, 1776,) declared that the judicial department should be "separate and distinct," from the others. The judicial department was relieved of all care and responsibility, as to what the laws should be, which they were to administer. That care and responsibility was devolved exclusively on the other two departments, and carefully guarded and regulated, as to its performance. And, in Virginia, maladministration was made matter of impeachment, the same as corruption. That the courts could decide laws to be in violation of the Constitution itself, was perhaps rather too loosely conceded. But that they could disobey, or evade, or avoid faithfully administering any law, except on the ground that it was unconstitutional, was not provided against, further than to deprive the courts of the power to do otherwise, and to swear their members to discharge their duties "agreeably to the rules and regulations of the Constitution *and the laws*." [Cons. Mass., Connecticut, and perhaps other original States.] The greatest precautions were taken, to insure that no few persons, nor persons long in office, should have anything to do with preparing, improving, making, or changing the law in any respect whatsoever. Whether all the precaution in this regard, was wise or not, it proves conclusively, that not one iota of that power, was vested in the judicial department, created for a totally different and distinct purpose. To deprive those who were to administer the laws, of all power over them, except to administer them, as they should find them; was thought to be as necessary, as to deprive those having control over the laws, from the power of administering them. And by the law, was meant, as we shall see, "the common *law*," as much as the statute law.

The Constitution of this State, as to this complete division of powers, is only a reflex of the Constitutions established by our forefathers. And the only power vested in this Court is the power to judge and decide, or "The Judicial Power." That is, that most sacred, and morally sublime Power, of all the powers which can be witnessed on this earth. That Power, which works in silence, the machinery of the laws, and the *daily government* of enlightened nations. That Power, which seems indeed to be but the reflex of that other Supreme Power, which we are taught is to be next administered over our race, by God Himself. It is a Power which cannot be moved by consequences; because it is not at all responsible for consequences. It foretells what shall be the consequences of every outward human action against the property or the rights of others. And they produce the consequences who act. The judicial power remains impassive and immovable. It is no more in the hands of the judge, than in the hands of all the other inhabitants of the State. It can see nothing, hear nothing, and understand nothing, but the recorded and abstract facts, brought before it in the record of every suit. And upon those facts, and those facts alone, the judicial power is to be exerted, and the legitimate rewards and consequences which the laws had fore-ordained, are to be applied, undisturbed and unprevented, by any act, or opinion, or wish, or will, of the mere judge, chosen to be its oracle, and not his own oracle. If mercy be due in any case, the Government has provided the means of exercising mercy. But not one iota of mercy is reposed in the judicial power. The exercise of mercy, requires that it be reposed where some discretion can be indulged. Our Constitutions therefore repose that quality in the Executive, in all criminal cases. And in the Legislature with the Executive, in all other cases. What our fathers sought to accomplish above all things else, after they had achieved their independence, was a right which they had previously but imperfectly enjoyed; and which, to our own disgrace, is better secured to-day, in England, than in most of our own States. I mean, that right of rights: that right, without which there are no civil rights: that right which alone produces liberty; and without which, all talk of liberty is a sham and a mockery: that right, which it was the special glory and pride of our forefathers to assert and seek to achieve; and which it should be the glory of our age to consummate and complete; I mean the right, *to be governed by laws;* not by any man nor set of men, however numerous, or however few, but by laws alone. And not laws made by the consent of those who are to administer them (for none but a God could be safely intrusted with that power); but laws made beforehand, and by the consent of those amongst whom they are to be administered. And not laws either, which judges are merely required to administer, "without fear, favor, or affection;" but laws which they are required to administer, *without the power of exercising or inflicting* either their fears, their favors, or their affections. To accomplish this, our Constitutions have removed from our Judges all power whatsoever, which they could call their own, or make their own. And have invested in incorporeal civil bodies, the application of that resistless power contained in the pre-existing laws of the commonwealth. And the judicial power, so invested in all our courts of justice, is that power which is authorized to apply our *pre-existing laws*, and *our laws only*, to the decision of judicial cases. Courts and Judges can have no more authority to disregard the will of such laws, or to new-model, or change, or suspend that will, than the ministers at our religious altars, can have, to change, new-model, or suspend the will of their Maker.

And however much the judges or the ministers may err, the laws, as previously settled and agreed to, continue in force the same as before; unchanged by their errors, and unrepealed by any acts of those who have been vested with no power to change or to remodel them. Now it is plain, that the power contained in the Judicial Power, is only the power contained in The Laws. Or, that the power which courts possess to decide cases, is that power only which is contained within the pre-existing and fore-ordained laws. And if this be the only power which courts do possess, they cannot decide cases by any other rule or authority; because they have never been vested with the right to decide cases according to any rule or authority, not found in the pre-existing laws, to which all their authority is sacredly confined. And to make new rules for their decision, and adopt new principles for their guidance, which pre-existing laws do not contain, would be making the court a body which is capable of manufacturing its own powers; and capable of proceeding, when it may choose to do so, independently of the pre-existing laws. A court which could so proceed, when it has been given no authority so to do, could accomplish it with equal propriety, if expressly prohibited from doing it. Because to do that which there is no authority for doing, and which the laws oppose being done, would be to do what is prohibited. But the Constitution of this State, exercising extreme care, and going further in language though not in plan, than most of our State Constitutions, not only vests our courts with no authority at all, except what the law alone exercises and requires; but also prohibits them in terms from exercising any which even "appertains" to any other functions of the government. [Arts. 3 and 6.] This Court, I submit is an incorporeal body, the sphere of whose powers are as clearly defined as the corporations of the Governor, and the two houses of the Legislature, with this grand and most essential difference, that the latter one can exercise discretion, and can do whatosever it chooses to do except what it is prohibited from doing; whilst this department cannot exercise any discretion where the law is plain as to how it shall decide, in any case.

The *right to act*, which our courts possess, does not come from the common law, nor does it come from decisions which our courts have made, which are, at best, but guides to ascertain the law. But for *their right to act*, our courts must look to the Constitution and the law; which is the supreme authority in all cases, and under all circumstances. [*V.* 1 Kent, 339.] The third article of our Constitution expressly prohibits this Court from exercising any control whatever over the laws, except to administer them, as previously settled and agreed to, wherever they are settled; and in the same words which prohibit the executive and legislative departments from exercising the judicial power. There is no law of the State of California, except that introduced by the Constitution, and the Legislature of California. Its Constitution, its statutes, and "the Common Law of England," which they introduced, constitute the entire laws of this new State. If either or any of said laws are to be changed in any respect, it must be done by legislative authority, as a matter of course. And inasmuch as the Constitution has vested no legislative authority in this Court, and has expressly prohibited it from exercising any, it is absurd to say its opinions or decisions constitute any portion of "the laws" of California. As to the Constitution and the statutes, our reports contain evidence of their construction and their application to actual cases. And as to "the common law *of England*," our courts do not and cannot make it for us, any more than they can make it for England. If it had been intended that the decisions of this Court should constitute our common law, or any *law*, except the law of the case decided, the Constitution would not have expressly prohibited it from making any laws whatever. Its decisions are not "the common law of England," and therefore they are not in force as laws. Our people must not look to the decisions of this Court, to ascertain what "the common law of England" is, any more than they must look here to ascertain what our statute laws are. They must resort to the original sources, and refer to our reports to assist in the investigation, not to dispense with it. For our reports, on what the English common law is, must be received as reliable, but not as conclusive authority. And when any decisions of this Court are shown, with certainty, to be contrary to the law of this State, (whether the statute or the common law,) I insist this Court has no legal right to decide new cases according to its own mistakes, but must decide them according to the law. All talk about this course producing a want of uniformity and reliability in our decisions, is on a par with applying the rule of *stare decisis* to justify its violation. [Read 3 Bl. Com. 328 to 331.]

How can decisions become uniform and reliable, when they are allowed to be made according to the will and pleasure of every officer who shall come to preside in this Court? Nothing can be uniform and reliable in courts of justice except the law. Therefore every decision of this new court, in this new country, should be carefully tested by the law, not with reluctance, but as the highest service to be rendered the court and the country. And when the settled common law as to the "manner and form of acquiring and transferring property," "the rules of expounding deeds and acts of Parliament," and "that real-property may be acquired and transferred by writing" only. [See 1 Bl. Com., 68.] When these doctrines are violated, as in the Cohas vs. Roisin, and Welsh vs. Sullivan decisions, uniformity and reliability require, according to all principles and all authority, that such decisions should not be suffered to subrogate such settled law. These views do not tend to lower the dignity nor to lessen the power of this high tribunal, nor of any judicial tribunal. It is not the assumption of new powers, but the capacity to discharge well what it has, which exalts judicial tribunals. It is not the capacity to go wild lengths to find modes of relief and rewards for mere violators of law, but the firmness to convince the country that those only who rely on the law shall not be disappointed, which constitutes judicial policy. It is not adherence to mere personal power, but adherence to the mightier and wiser power of the law, which alone becomes and proves the presence of the great, far-seeing and wise judge. It is not the desire to be the Almighty God, but the desire to imitate Him, which inspires the truest confidence in mortal judges. But courts are not only absolutely, and by constitutional plan and design, devoid of every vestige of power which they can call their own, and possessed only of the authority of uttering the judgments previously prepared for all cases by the laws; but this very exclusion has carried with it an exclusion from all power over evidence, and over facts. Laws have no power over the creation of facts. Laws, to be laws, must be pre-existing. Facts to which they can be applied must arise afterwards; and out of the facts the law arires, and pronounces its fore-ordained and foreknown judgments. [3 Bl. Com. 330.] Decisions are not always the same. They must vary; not from any variableness in the law, nor in the courts, but because of the continual variableness of the cases presented. The facts, first legally ascertained and certified in the record, are what constitute the case. And there must be a case, legally presenting the facts shown, by legal proof, before the law can pronounce its judgment. "*Ex facto jus oritur*," says the maxim. Thus administered, the law is a science. It concerns itself no more about consequences when some few persons' property is concerned, than when their lives are concerned. It knows no policy equal to the unvarying application of its own foreknown and foreseen will, and it sees no consequences so disastrous as to withhold the expression of its own judgments and adopt judgments not its own. To gratify the views of some transient and time-serving purpose, or some transient and scheming individuals, or some incautious purchasers, forms no part of its plans, or its intentions or purposes. On the contrary, any such undertaking is entirely incompatible with all the principles on which it proceeds. Because, it tends to impair that *impartiality* which forms the entire basis on which the court is established, and constitutes the very ground on which its judgments are entitled to respect, and ought to be implicitly obeyed; and which impartiality is necessarily impaired the instant the court strains the law, or wavers from it, to uphold the claims of any one man or set of men, where the rights of others may come in controversy to the same thing before the same tribunal. And where the facts are not in favor of any claimants before the court, the court has no power to make judgments to favor them. For courts cannot create or change facts, any more than they can create or change laws. And they can no more make cases, and then decide real cases, by the cases they themselves have made, than they can make judgments on their own cases and by their own rules.

It would be an easy matter to decide cases according to our own statements of what the facts are, and what the laws are. But any proceedings of that sort, I insist, would be plainly extrajudicial, and completely without obligation on any court. For what the constitution, the constitutional laws, and the rights of the country, demand of the courts, is the application of the laws of the country, to the facts actually transpiring and transpired, among the inhabitants of the country; and not to supposed transactions which have been honestly believed to have transpired, but have never been proved; and have been ascertained, on better investigation, to have never occurred. Surely facts, and conclusions of law on facts, which might have occurred, but have not occurred, cannot be made to control and change the actual condition of things. And wherever real laws, and real facts do exist, all merely supposed laws, and supposed facts, coming in opposition to them, must give way. If our courts have the constitutional power to disobey the law, under any pretext, or if they can in any case, be legally excused for not rigidly adhering to the law, or for avoiding the application of the law, and its "settled and fundamental principles," by reason of "judgments of law grounded on matters of fact, on which there was neither inquiry nor proof;" and by adhering to such judgments and enforcing them against us, knowing them to be contrary to law; then it follows that they have the constitutional power to deprive us of the protection of the law, if they chose to attempt it, or to exercise it. We do not merely urge that it would be a wrong to attempt it. We insist that *the power* to do it has never been vested in our courts. If the power has been vested, then our courts *can*, either with or without pretexts, render such judgments as their judges approve, whether in known violation of law and of "fundamental principles," or not. And *can* subject us to other kinds of judgments than those which the laws would pronounce; and *can* subject us to other and different kinds of facts from those which the records of cases present. That is, if we concede they are vested with the power, if they chose to exercise it, then our courts can, constitutionally, subject us all to judgments, made admittedly contrary to law, and contrary to truth. And they can constitutionally, if they chose, subject the innocent to the penalties of guilt, and extend to the guilty, the rewards of innocence.

To decide now *for the first time*, that our property shall be taken from us, and shall be delivered to this respondent, who neither shows to the court, nor produces in the record, any of the evidences of title which the laws demand as the only evidence of legal ownership amounting to proof, would seem to be plainly unjust, unathorized, and illegal. But to so decide the second time, would seem to be worse, not better, than to make the first decision; because the first decision might have occurred in entire innocence and mistake, as I have every reason to believe, and do believe it did, in the Welch and Sullivan case, at least so far as Mr. Justice Burnett is concerned. But to justify such a decision now, on the ground that the court has often decided so before, and is now thoroughly committed to that line of decisions, even conceding it to be true, and conceding it to be possessed of the power to make laws stronger than the laws themselves, and conceding that the court may decide cases, not by laws, but according to its own previous judgments; still all justifications and excuses for the court, no matter on what ground, nor how ingeniously put, would not be giving us our rights; and would be giving others more than their rights, and at our expense. And not on account of any errors of ours, but on account of the errors of the court itself. It would in fact, simply be making us suffer on the ground that the court has, in former times, made others suffer; and would be depriving us of our rights, on the ground that others have several times been deprived of theirs.

To change or suspend the operation of laws favorable to us, and follow unauthorized decisions which have been made, we submit, would be the same thing in effect, to all intents and purposes, as to do it at once, without there being any such unauthorized decisions to follow. Because such decisions being of themselves without authority, can confer none. If this court is without the power to change, and is moreover, constitutionally prohibited from changing any settled and existing law or fundamental rule of evidence, it cannot do so at all; no matter what the contrivance or the ground. Conceding the Cohas and Roisin decisions to be contrary to law, so far as it finds the fact of a private title to indefinite quantities of lands, in favor of persons never in possession of them, and finds, *prima facie*, where the boundaries of the lands are, with no evidence legally before the court, and none anywhere, of there being any such title or any such boundaries at all; and conceding that the mode or manner adopted for ascertaining such facts, is unknown to the constitution, and unknown to the laws, and is morever, in violation of both; and then, certainly, it cannot be doubted that such decision is null and void, at least to that extent. And this appearing plainly to be the fact, it is, so far at least, without authority for any purpose, much less for the purpose of depriving us and all our neighbors, of our constitutional rights, and also of our natural rights. I am not speaking loosely, but precisely; and what I mean by our constitutional and *natural* rights is this: we have been long and peaceably in possession of the property in dispute. If there were no laws which have created the higher and abstract idea of property, it would be wrong, *i. e.* "contrary to the law of nature," to force us from "the use or occupation of it." (2 Bl. Com. 3, 4, 8.) Possession was the origin of the right of property in lands. (Ib. 258.) And our possession gives us, therefore, the *natural right* to be left in the enjoyment of it. (2 Kent, 368, 369.) We have before shown by abundant authorities, that our possession gives us also the *legal* right to be left in the enjoyment of it, as against all the world except the true owner; and by this I mean our constitutional right. Because the right to be governed only by laws, and to be deprived of the peaceable and bona fide possession of property, *only in pursuance of the law, and the legal rules of evidence of this State*, are our obvious constitutional rights.

If we are to be now driven from our property, on the ground of "*stare decisis*," it is necessary to regard it as a constitutional law, or else it cannot be sufficient authority for "*the due process of law*," requisite to such serious undertakings. And if this new "*stare decisis*," which violates the very "fundamental doctrine of the common law," is now a constitutional law, who made the law? Who made it to repeal the former law, and to require this court to obey it, instead of the law?

To admit the notion that mere decisions can be carried that far, at once "impairs the harmony," and destroys all certainty in the law. And reduces the law from a science, in which the sole object and pursuit of the lawyer need be, to ascertain the precise law applicable to his case; to a mere system of guesswork and uncertainty, in which the inquiry is to be less anxiously made, as to what the law is, than as to what the judges will decide. We insist that the very object of having laws made and adopted by the Legislature, is to prevent their being made and adopted by the courts. And if there is anything positive and certain in the constitution, it is this: that our courts are absolutely excluded from the power to withhold the "settled and fundamental doctrines" of the unwritten law, or of the statute law, from the adjudication of any case, either civil or criminal, and of substituting, instead, the merely new and mistaken views of their presiding officers. Where there are no settled legal doctrines nor laws, against decisions of a court, then the public have a right to regard them as correct evidences of the law. But where the public know and see, and hear the entire profession admit, that decisions are in violation of law, and of the settled rules of legal evidence; then we insist, the community against whom they were made, had no right to regard them as law, nor to act upon them as law. And all pretense that men have been misled by such decisions, would seem reasonably to be but the mere pretense of persons who have in vain endeavored to deceive themselves, as to what the law is, and has been.

How can such decisons be treated as law, when all admit they violate law? How can any one rationally claim that there can be such a thing thought of, as a *legal* justification of what is continually illegal? And who shall dare to utter here, in this court of last resort, the lawless sentiment that the laws cannot be adhered to, because there is a "necessity" for adopting a new or different rule? What "necessity?" Whose "necessity?" Even if such a proposition could be listened to, there is no power here to obey it; for in courts of law no "necessity" for violating law can be listened to. And besides this, there is no "necessity" at all in these cases to justify or excuse the adoption of a new rule, unless an attempt to deprive other people of their property, without authority of law, can be treated as a necessity.

Why should we resort to new rules, to determine the rights of property, for any man or against any man? Are not the means adopted by the law sufficient? Are they not just as old and just as well settled concerning the rights of property, as concerning the rights of life? And if the Court is devoid of discretion in the greater judgment, where the law must destroy life, is it not equally devoid of discretion in the lesser penalty, where the law must destroy some mere speculations? Who on this earth can do anything, or settle anything, as purely and as wisely as the law? Indeed, the means of settling all our controversies on earth, by purely abstract and previously agreed on laws, principles, and rules of evidence, to be applied through the machinery of the courts, and irrespective of the views, feelings or opinions of any man or set of men, in the courts, or out of them, is the very object of all our efforts and expenses to organize and support a constitutional government of laws. And he who impairs it, is an enemy to the law, and an enemy to his race; for it is the only true means of human justice. It supplies for the settlement of all human rights, the judicial experiments and experience of all ages of the world; the wisdom of all mankind, [4 Kent, 522,] the teachings of all nature; and the moral directions and example of God himself. [Story's Life and Letters, vol. 1, p. 31; vol. 2, p. 8.] It enables every human right to be most carefully and impartially determined, not merely without the "necessity," but without any excuse for subjecting any human being, or any of the agreed rights among human beings, to the prejudice,the will, the passions, or the power of any other human being, or any number of other human beings. And in the same ratio as this system of government by laws, is perfected and rigidly adhered to, the liberties of our people are not diminished, but increased; and precisely in the ratio it is departed from, their protection becomes less and their liberties depart. It is a system introduced and supported for the sole purpose of obtaining and enjoying liberty; and without which "liberty" cannot by any possibility exist. Liberty, except in the minds of dreamers, is the protection of each man and his property, against all other men. And to secure that protection is an impossibility, except by submitting every act done or undertaken against another, to be judged of and decided by laws, and according to their settled principles and rules. And to do this, the government must secure officers learned in these laws, principles and rules. But these officers have no more right, or legal authority to change the laws by any act, or repetition of acts of their own, than governors, legislators, or any other officers have. And from the very fact, that the office of the judge affords him opportunities, to interfere wrongfully under the guise and shield of his sacred office; therefore our judicial systems have been so devised as to render judicial treachery almost legally impossible. Under our existing laws and judicial system, if the judges of any court by any mere order, decision or act of *theirs* alone, and not of the laws, should undertake to interfere with the property of any man, that man would have the same right to resist as if the same thing were attempted by the Governor of the State, or any officer. But what *the law* commands *must not be resisted* nor disobeyed by any one, anywhere; for among freemen obedience to *the law* of their own State, is the command of God. And disobedience by the law's own ministers, is no less an offense than though committed by those who do not stand in its altars, pledged by an oath, to make no judgment of their own, and to obey no voice but the voice of the law. With the policy of the law, said Justice Baldwin of this Court, in Patterson vs. Supervisors of Yuba county, [1859]: "with the policy of the law, as the Courts of Indiana and New York remark, *we have nothing to do.* Our duty is to declare *the law as we find it.*" So strictly are judges compelled to listen to nothing but the law, that they are deemed in theory, absolutely incapable of performing any judicial act; and if they attempt to enter any judgment *of their own*, judicially, they are punishable. For example, if a man were charged with murder, and the judges before whom his case was brought, should adopt some such plan and grounds of decision as in the case of Cohas vs. Roisin, that is, should act entirely upon assumptions and presume the man guilty, and render a judgment against him of murder, when there was no evidence at all in the record of any offense or any guilt; the judges, according to our common law, would be guilty of murder. [4 Bl. Com. 178; Stephens DeLolme, Eng. Con. p. 783.] The reason is, because what *the laws* do not require to be done, concerning another man's life, the court has no power nor right to command to be done.

We submit and insist, that according to our settled laws and rules of evidence, the same principle applies in cases of property as in cases of life. And when *the law* does not *require* that a man's property shall be taken from him, and given to another, there is no authority in existence, which has any right to do it, or to command it to be done. Now, how is it to be positively determined when *the law does require it*, in cases of criminal cognizance, and in cases of ejectment? Let us review the familiar subject. The common law suffers no substantial distinction to be made between trying a man on an indictment, and trying him on an "ejectment." The plea in both cases is the same. In both, the defendant says he is "not guilty," and that he "puts himself upon the country." [Ad. Eject., 270, and App. No. 30; Wharton's Amer. Crim. Law, 134 "Pleas."] In ejectment, if there be a defendant not proved to be in possession, the Court may direct the jury to find him not guilty, in order that he may be examined as a witness for the other defendants." [American case "cited in Coxe's Digest," 272; see Amer. note to Ad. Eject., p. 319.] In England the judgment (in ejectment) "used to run, *quod defendens capiatur*." [Ad. Eject., 331, note (d).] In England, the suit is still, in theory and in form, a suit for *trespass vi et armis*. [Ibid. and App. ibid. Nos. 10 and 12.] It is declared on in England as a wrong, and an act *against the peace and dignity of the State*. [Adams' Eject., p. 466.] And the defendant is compelled, before proceeding to trial, to take the responsibility of admitting himself in possession, and of admitting he removed the claimant from the land, and of agreeing that at the trial the question of his guilt or innocence, shall depend on the fact whether the plaintiff holds the legal title to the land or not. [Ad. Eject., App. Nos. 24, 25.] It is a serious thing to charge a man with openly taking and holding another man's property. If the plaintiff proves and shows to the Court that he holds the legal title, the verdict of the jury is "guilty," and the judgment runs that he has been "convicted." [Ibid. Nos. 36, 40, 41.] And, according to the American forms of judgments (and it is manifest that the judgments in these cases are the same in legal theory in this State as in others,) the record runs that the defendant has been found guilty of an unlawful act. [Ibid. sup. "American Forms," Nos. 13 *et seq.*] By express law of this State, the question of the legal title to lands cannot be submitted to arbitration any more than a question of guilt can be. [Practice Act, section 380.]

Titles claimed to lands in peaceable possession of others, must be tried and determined *according to the evidence and the law*. They cannot be tried by such judicial interference as the charge to the jury in this case discloses, except where they are tried without regard to either law or evidence. The Constitution expressly prohibits judges from charging juries concerning *matters of fact*. And yet the judge below not only charged the jury that a local corporation owned lands merely because this Court had said so in some opinions, but also charged *where the boundaries of that ownership extended,* merely because this Court in some opinions had said so! And without one scintilla of evidence before the judge, or the jury, to prove the truth of either such ownership or such boundaries!! Animadversion on such a proceeding is due from this Court, but not from me in its presence. The charge of the judge and the record of the evidence offered in the cause, show its utter want of authority in law, in truth, or in common sense.

Douglas, in the preface to his reports (K. B.,) says: "The law of this country (England) has been peculiarly watchful to prevent the approaches of falsehood in the investigation and proof of the particular facts litigated between contending parties. For this purpose, many rules have been established relative to the competency or admissibility of evidence; of all which rules the ultimate object is, to guard the avenues of belief, and to secure the minds of those who are to decide against imposition and mistake." But of what use are these rules for ascertaining the truth, if the very fact of having acted independently of them, and of having, in consequence, been imposed upon and mistaken, is to be urged as a good reason why such rules should continue to be neglected, in order that we may continue subject "to imposition and mistake." Would this Court undertake to incorporate such a blotch upon the law? would it undertake to pursue such a line of decisions, even to save life? And if it could exercise the power to save one life, by such means, would it not have to be admitted that punishment and the withholding of punishment depends on the decisions of the Court? But is not the occasion infinitely contemptible, when the court is asked to exert its influence, and subject its decisions to such an undertaking, merely to stir up strife and litigation, and benefit nobody, unless some dozen speculators, and which could only benefit them by a cost to the cause of justice more sweeping and pernicious than their lives, much less their mere speculations, could compensate the country for committing? Is it not monstrous, to ask that thousands of citizens (or even one man) shall be deprived of their property merely and only on account of the past errors of the court?

We insist it is not in the constitutional power of *this Court* to make titles, nor to make boundaries, either *prima facie* or otherwise; nor to determine, of its own power, or on the knowledge of its own justices, who are guilty of withholding other people's lands. That power, we insist, rests only with the laws, and can be exerted only by means of legal proof, introduced in the courts authorized to try cases. We insist that facts which the law requires to be proved by legal evidence, must be so proved; and that this Court cannot authorize courts below to dispense with such proof. Nor can the nature of such proof be changed in this Court, nor can its omission be excused or supplied through the instrumentality of opinions or decisions, or in any manner or form, or to any extent whatever. It is manifest, without argument, that if this Court had jurisdiction to determine material matters of fact, in issue in suits at law, (like the facts of this respondent holding the legal title to our lands, and the *prima facie* boundaries of the lands which he or his judgment debtor owns,) it would be its imperious duty to impannel a jury, and demand that evidence be introduced to establish such ownership and such boundaries. Because that is the only mode known to the laws, and the only mode compatible with certainty or security, for determining such issues. But a Court cannot acquire jurisdiction over such matters of fact, by deciding that it has it. [Dwarris, III.] The Court, (said Ch. J. Marshall,) is under equal obligation, not to exercise jurisdiction where it is not conferred; as it is to exercise it where it is conferred. [Bank U. S. vs. Deveaux, 5 Cranch, 61.] If all the parties concerned should consent, and the court should order a jury to be impanneled, and the evidence to be introduced, the whole proceeding would of course be null and void. Why then is it not null and void, when done here without any jury, and without introducing any evidence? The Constitution has excluded this tribunal of last resort, from all control in ascertaining questions of fact, which require to be proved. Suppose the combined powers of the Legislative and Executive departments of this Government should pass an express law, that the city corporation once existing in San Francisco county, or the corporation now existing there, owned large tracts of land about it, and suppose they re-enacted the law fifty times, would that law be binding on this Court? Would not this Court feel bound to protect us, in this case, against such a monstrous usurpation of power? Would not the court say, that if the legislative power could give the lands in San Francisco to that corporation, without requiring the consent of its true owners, it could give it as well to the corporation of Marysville, or Sacramento, or any other? Would not the existence of such a power endanger the foundations of property, and force us all to admit that there is a power under this government, to deprive us of our rights without jury, without proof, without inquiry and without compensation? If the combined powers of the other two departments of this government, by no conceivable nor possible means, could exert that authority, how is it that this department can do so, by any conceivable or possible means? And if this Court would be forced to declare such an act null and void, if attempted by either or both the other departments, how is it possible to deem the same act valid, if attempted by this department? Would the same act be any less wrong in itself, and less unjust to us, or any less unconstitutional and void, if undertaken by this Court by means of decisions and opinions, than if undertaken by means of express legislative enactments? It is of little consequence to us to have our rights secured against the usurpations of the Legislature, and the Governor, if they can be taken from us by the courts.

We insist, that as no evidence was introduced before the jury, sufficient to convict us, we cannot now be convicted here by mere opinions formerly expressed by this Court, concerning matters requiring legal proof. And whether we are guilty or not, of the unlawful acts charged in this complaint, must be established, if it is to be established at all, by legal evidence, and by the legal verdict of a jury, *i. e.* a jury not misled by the charge of a judge. To attempt to rule us, not by evidence nor by law, but by mere erroneous opinions expressed here, makes any defense by us, a mere mockery. It makes any investigation of a jury in our behalf, a mere farce. It makes juries find, not according to the evidence, but according to some decisions which have been rendered in this Court without any evidence, and contrary to evidence. It renders our reliance upon evidence a snare. It would make those of us who are innocent of any offense against the law, punishable for what has been made an offense by the court.

It is not, we insist, within the range of constitutional possibilities for this Court to create facts in any case. They must have occurred, or else they are not facts. If they occurred, they did not occur here but elsewhere, and can be shown here by evidence, produced in the manner and to the extent required by law. The idea of convicting a man, or depriving him of his property by presumptions made here, and without any evidence, and by adhering to such mere presumptions against law and against evidence, is, when we come to think upon it, monstrous beyond the power of becoming expression. To possess the power to establish facts "without inquiry and without proof," but by presumptions arising only from facts themselves presumed; and then to prescribe the consequences, would be to possess the power, not only to deprive citizens of life, liberty, and property at pleasure, but also the power to strip truth itself of all its force, and also of all its consequences. And, I submit, the exercise of such an extravagant assumption in times past, cannot authorize nor exercise its repetition now.

When juries should attempt to be governed by their presumptions, and to render verdicts for plaintiffs in ejectment, contrary to the evidence produced before them, or without any evidence in the case which was on trial, this Court would not uphold nor defend them, although it was known they were acting under oath; but would fearlessly set aside their verdict, and instruct them to decide according to the legal evidence produced before them in the cause. Why then should this Court feel bound by a finding, made contrary to evidence, and without any jury, and where no new evidence could be introduced? The law seems as well settled with courts as with juries, that they cannot exceed their functions and their jurisdictions. [Dwarris, III.] It would seem to be settled law, that not merely the decisions, but the very judgments of courts, if entered without the sanction and authority of pre-existing law, are mere nullities, and need not be obeyed. For when a judge exceeds the laws he exceeds his office. And it is an old *maxim* of our laws, that "*judici officium suum excedente, non paretur.*" [Jenk. Centuries Rep. 139, case 84.]

If unauthorized judgments should be persisted in, to the utter demoralization and corruption of a community, for five or six years, would that amount to any legal ground or rational excuse for continuing them?

If laws should be violated to the continual reproach of justice, for one year, or for five or six years, is that any legal ground why they should be violated now?

If some persons in San Francisco have been benefited by illegal decisions about lands, is that any reason why others should be ruined by the same process?

If erroneous decisions have been made in favor of the possessors of uplands in San Francisco, who hold grants from American town magistrates, is that any reason why the same decisions should be made to ruin all other possessors of uplands in San Francisco, who hold under the laws of the United States and of the State of California, and the ordinances of the city, and against whom no town magistrate's grants have ever been made?

If erroneous decisions have been made for the benefit of American Alcalde lot speculators, is that any reason why erroneous decisions should now be made for the benefit of the more sweeping, lawless and iniquitous Peter Smith speculators?

It will be pretended here in the most earnest, able, pathetic and elaborate manner, that these erroneous decisions must now be adhered to, because they preserve the rights of property. Whose rights of property do they preserve?

Are there no rights of property in San Francisco but those of some few speculators? What rights of property do they preserve? Are there no rights of property in San Francisco, except those which were created by, and which are now dependent on the Cohas and Roisin decision? They, perhaps, will venture to assert that millions of dollars of property would be destroyed if those past decisions are not now adhered to. We say, if any dollars would be destroyed, they are only the dollars which they calculate to have if their speculations succeed. We say, all the dollars they will lose, are the dollars they seek the aid of this Court to plunder from us, without law, without compensation, without necessity, and without possessing any claims to our property, founded upon any evidence, or upon any principles of law or of good conscience.

We say further, (and in justice to Judge Heydenfeldt, I will say, that is his opinion if I am well advised,) that all the Cohas and Roisin decisions, however rigidly adhered to, do not require their being used for the benefit of these claimants and for our ruin. Because to hold Alcalde titles valid, we reiterate, does not at all interfere with us, nor any of us. But to make Alcalde titles uphold Peter Smith titles against lands which have now been held, bought, sold, mortgaged, built upon, and dealt in for the last eight, nine and thirteen years by actual *bona fide* possessors, could not be done to uphold any equitable claim; because *the destruction of Peter Smith titles injures nobody in possession* any more than the destruction of the Bolton title, or the Limantour, or any other fraud. Whereas its enforcement, like the enforcement of either of said frauds, benefits none but the speculators in them, who have no possession; and brings poverty and desolation upon those in possession holding adversely to the fraud. We insist, that in point of fact, the Cohas vs. Roisin *decisions* never can have created any actual property, and that their cessation would disturb nothing, except the plans of speculators, who have never had possession. And, we say, that the laws of nearly all, and perhaps, all civilized States, excepting this State, characterize all such claims as these now here as "pretended titles," and from consideration of public justice and public policy, make all such claims *utterly void and illegal ab initio*, and even where founded upon valid titles originally. And that though a clause in our statute concerning conveyances, is held to tolerate such schemes in this State, yet that there is nothing in our laws, nor in the principles of justice or equity, which requires them to be favored beyond all other titles, and all other actual and vested claims to property. We flatly deny and pronounce the statement totally unfounded, that a refusal to uphold *Peter Smith titles* will impair and destroy *property;* on the contrary we aver it will completely lift from a whole community, the most sweeping and iniquitous, because the most baseless and unfounded, of all the frauds and attacks against property, ever yet attempted in this country, or perhaps in any other claiming to be possessed of a government of laws.

We say, that in point of fact, the Cohas vs. Roisin decisions have legally created nothing. That their errors have all performed their office, and their functions have ceased. And that, although they have left the traces of their delusion still behind, it would be inexcusable to recall and reinvigorate them into new life, and sweep their umbrageous torments over property which they have never yet clouded nor involved.

We say that the title to every lot of ground in San Francisco, is *now*, just as good without those decisions as with them. And that this Court is not only not bound by law to ruin us for the sake of adhering to such former decisions, but there is nothing in reason, nor in law, much less in equity and good conscience, to justify or excuse such a proceeding.

We insist that the powers of this Court are expressly confined to the *correction of errors* of law, occurring in the trial of causes in courts below; and that it is a plain perversion of the Constitution to knowingly require any court below to commit errors.

Suppose a District Judge trying a suit in ejectment, should instruct the jury, when there was no evidence in the case proving either title or boundaries, that from *his* knowledge of the parties and their rights, and the rights which one of them had under Mexican laws, he must instruct the jury that the plaintiffs' judgment debtor owned lands, and the boundaries of its lands were established *prima facie* wherever Alcaldes made grants of lots; and thus establish a case for the plaintiff, without requiring him to produce any legal evidence but a sheriff's deed, and without his having any other legal evidence to produce; and when it was known that what the judge said about boundaries, and about rights under Mexican laws, were not only devoid of proof, but also devoid of truth. Could any act be done by a judge, more completely one-sided, dangerous, and lawless? Would it not be the imperious duty of this Court to reprehend such conduct, and correct so daring and egregious an error? How then can this Court authorize him to do what it would be the constitutional duty of this Court to prevent him from doing? Nothing can be more plain, than that such opinions or instructions, usurp the authority to establish matters of fact without proof, which the common law, and the common safety of every man's property, require not to be established but by legal proof. It would be leaving the power to judges, appointed to pass upon title according to evidence, to create title and fix boundaries to property, without any evidence at all; and this too, while the law says such facts shall not be passed on by judges at all, but by juries, (where that right is not waived,) and the Constitution expressly prohibits judges, from even instructing juries as to any matters of fact whatever, and much more from finding the facts by themselves alone. Can opinions of this Court authorize District Judges to directly violate the law and the Constitution? Do not such opinions, and such charges to juries based on them, plainly confound the broad and settled distinction between the duties of judges and the duties of juries? Indeed, is it possible to obey such opinions, or approve and uphold them on any legal, or constitutional, or just grounds? To cite the mere authority of this Court cannot justify them. It would be an alarming doctrine to say a court can justify and legalize any opinions it may choose to deliver, by merely referring to its own opinions. They must be justified *by reference to the Constitution and the laws*, or else they cannot be justified at all. Over a century ago, Lord Hardwick, while Chief Justice of England, declared: "It is of the *greatest consequence* to the law of England, and to the citizens, that the powers of the judge and jury are kept distinct; that the judge determine the law, and the jury the fact; *and if ever they come to be confounded, it will prove the confusion and destruction of the Law of England.*" This language is prominently quoted, and adopted as evidence of the principles of the "English Common Law," by Chief Baron Comyns. [Com. Dig. "Enquest," (A. 1,) vol. 3, page 171.] Probably a thousand authorities could be collected to the same effect. And since the people of the United States came near rejecting the Constitution of the Union, for not containing an express clause guaranteeing the same doctrine to govern the courts of the United States, and since it is now guaranteed in that and all other American Constitutions, including our own, no question exists as to the fact that juries are judicial institutions, as sacred and as secure under our Constitution and laws, as under the Constitution and laws of England; and as the Courts themselves, of which they constitute an essential part, in all controversies of this sort. [Story on Con. sec. 1763, *et seq.*; Con. of Cal. art. 1, sec. 3; Pr. Act of 1851, sec. 155.] The Constitutional right of trial by jury, said Story, is scarcely inferior in civil cases to what it is in criminal cases. [Ib. sec. 1768.] *All questions of facts*, in suits at law, being "a material allegation in the complaint" denied by the answer, says our Constitutional Statute Law, "shall be tried by a jury," if that right is demanded or is not expressly waived. [Pr. Act, secs. 153, 155.] We insist on the perfect enjoyment of that right.

We deny the authority to impair that right, by asserting here anything which it is the legal object and purpose of a jury to ascertain in the court below. We insist, and reiterate again and again, that the question whether this respondent actually holds the legal title to our land, or the lands in any precise boundaries, or not, and where these boundaries are, does not depend on anything which has been or can be said here, and which has been or can be done here; but depends entirely on what has been done elsewhere.

It seems to be of no importance to determine whether the respondent is theoretically, and according to some erroneous opinions, possessed of a legal title or not; but the question to be decided is, whether he is *actually* and *in truth* possessed of the legal title or not.

Let that question be submitted, not to this Court, nor to the Court below, but to the jury, as the *law* directs. Let not the jury be told, that here it has been said the plaintiff has a title, and whatever is here said is law, and not to be called in question. On the contrary, let the jury be made to do their duty according to their oaths, "and a true verdict render *according to the evidence.*" Leave them alone, as the Constitution commands the inferior judges to do with respect to all matters of fact. In a word, give us a fair trial *according to the laws* of our country, and what will become of this plaintiff's pretended title? How will he go to work to prove, before the jury, and with no assistance from any judge or court with respect to the facts, that *in truth* he does own and hold the legal title to our lands? Must he not prove it as a fact, *i. e. as a truth?* Must he not prove it by introducing truth, and not by introducing error? Must he not prove it by producing the legal evidence *before the jury* which *the law* requires to be produced? Can this Court authorize him to prove it by producing other and different evidence, from that which the law has prudently and most wisely exacted from all such claimants? If this Court can authorize him to prove it by scraps of old papers, chapters from books of travels, records that other persons have had grants made to them, and have been put in possession of their lands; whole books from the office of County Recorders; forged documents about some boundaries to lands; and such heaps and loads of irrelevant papers, as constitute this immense record, and which it has cost more than the lands of some of us are worth to get copied, in order to bring this case to the notice of this Court; I say, if this Court can authorize the plaintiff to prove his title in this manner, a manner wholly unknown and hitherto unheard of, could it not just as well authorize him to prove his title without producing any evidence at all? All these heaps of papers not only do not prove, but they do not refer to, nor purport to prove a title to land. The record in this case positively shows *no legal evidence of any title in this respondent.* And yet, we shall hear it pretended that to put an end to such proceedings, and such suits as this, will impair the rule of property—will interfere with *stare decisis.*

If property will be destroyed, let it perish; for it is not only better that property should be destroyed, but that lives should perish, rather than suffer the laws and the administration of justice to be brought into contempt. The law never requires a man to prove impossibilities; nor should it be *trifled with*, by such idle attempts to do so, as are here displayed.

If these schemers have acquired the legal title to our property, they can prove it; can they not? If they cannot prove it, it should not be given to them, any more than to anybody else who cannot prove it; should it? The law has not imposed any unnecessary difficulties on the *actual owners of property* to prove their title. If these parties were the actual owners of lands, they could prove their title and their boundaries, with the precision and certainty, and written evidence, which the law secures for every true owner of lands in the possession of others; and unless they do prove a title as *the law* requires, by what right are the Courts to drive us off, and put them in possession? The law does not uphold such attempts as this to prove, what it has rendered so easy to prove, when the attempt is not made falsely and to confuse and deceive? And they are poor babes—are they not?—who hope to deceive our far-seeing and venerable Father—The Law? And if this new rule of property, of which we shall hear so much, depends on so much uncertainty as this, where certainty is so necessary, and depends upon bringing before this Court such a record as this, which is an insult to our intelligence, and an insult to the law, the best thing to be done with this new rule is to immediately break it; is it not? What do these men desire? What do they demand? They demand that they be allowed to take from our citizens in this State, at least ten millions of dollars' worth of property. By what authority do they make such an astounding demand? By authority of the owners? No. By authority of the law? No; but by authority of *stare decisis.* Who is *stare decisis?* Is he the owner? Has he got the legal title? How did he come by it? Is not the mere fact, that such a request as this is to be made in this court of last resort, and that such a record as this has been brought here to justify the request, enough to startle us at the departure from the law which we ourselves, as lawyers, are going to ask or listen to in this very palladium of our laws; and from these very judges whom we all know to be under the most solemn obligations to grant nothing either for friend or foe, but to preside like impassible gods, and to administer to all, not what might please them or displease them, but what the laws command? Can we regard it possible, that we can secure a reverence for the laws and the judicial tribunals of our country, when we see the attempt seriously made, and actually advised, to wrest property from whole communities, who are in lawful possession of it, on *mere talk* about "*stare decisis*" or some "rule of property" which has been established here with no consent of the owners of the property, and established, as we all know, and as has been stated on this very bench (by one who concurred to aid such an undertaking) to be of such plain and manifest illegality, that no man of ordinary intelligence can pretend that there is any law to support it, or any evidence to uphold it? Can we suppose our people *so ignorant* as to believe that the Court is compelled, under a sense of duty, to inflict judgments against a whole community of people, or against any one man, when it is known and admitted, that such judgments have not originated in anything which was sustained by evidence or upheld by the laws? What do our people understand about *stare decisis?* What do they know about "a rule of property" which has been made here for their ruin, without their knowledge, privity or consent, and owing to no faults, or mistakes, or disobedience of any law, on their part? How are they to be satisfied that an outrage against their rights is not attempted, when they are told that although they have been in the possession of their property for the past eight to thirteen years, still it must now be taken from them and be delivered to these speculators, not because of any legal title against them and in favor of these persons, but *because it is necessary to preserve some errors of court which have been committed here, in decisions about some other people's property!* I say it is but treating the laws with contempt and mockery, to come into a court of law with such a record as this, and upon such a claim ask, that the rights of a community, or of any one person, shall be or ought to be sacrificed. If the ceaseless and heartless speculators, who are eternally hatching their machinations, have acquired a legal title to our property, let them produce it; and we will immediately acquiesce. If they have a title, the laws, I repeat, have imposed no difficulties, and admit of no uncertainties, in their proving it.

If this mode of proving a private title to lands, which is here attempted, be sufficient to warrant the issuing of process to drive our inhabitants from their property in one county, the same species of evidence must be sufficient to do it in other counties.

And if individuals can establish a title in themselves to nearly all the lands in the largest city of this State, without ever having had possession of one foot of it, and without showing any legal chain of title, or producing the legal evidence of any; it is certain, that it must not only be done without any authority, but in plain and direct violation of several of the most essential, most familiar and most just laws, which are in force in this State. And if it can be done by the process here to be recommended, and which will be here insisted upon, of *stare decisis;* it is perfectly manifest that the formality of a suit, and the impanneling of a jury, and the introduction of such stuff as composes this record in this suit, are all useless; because, these suits cannot be governed and conducted according to the laws, and at the same time according to these *stare decisis* notions, which are contrary to the laws. The laws, I repeat, require every plaintiff asserting such a claim as this, to prove his title, by complete and indisputable legal evidence in regard to boundaries, as much as to title. But these so called "*stare decisis,*" and "rule of property" opinions, do not require anything of the kind. They are based on the idea, that this Court, whose duty it is to see to it, that inferior courts do not determine questions of boundaries and of titles to lands, except according to legal proof; may itself determine them for the District Courts and for all parties concerned, without any jury and without any proof at all! And that when so determined here, by Justices of this Court, without any jury and without any proof, District Judges, and juries, and this Court, must obey such decisions; although admitted here on the bench, by one of the justices who made or adhered to them, (J. Terry,) to be "without any law to uphold them, or any evidence in the record to sustain them." I most respectfully submit, that such views of "the principles on which the jurisprudence of a country ought to proceed," are abhorrent to every legal view, and object, of the doctrine of *stare decisis;* and imperil at once every principle of law, and every security in administrative justice. And so far from our being required to produce decisions, showing that such precedents ought not to be followed, I insist that some authority ought to be produced showing that they can be followed; for there are no such decisions to be found in any volume of reports extant. They are absolutely without precedent or parallel. And if they possess any authority at all, it is, I most respectfully submit, not to be found in the Constitution, nor in any law or principle of law adopted and introduced by this State.

Suppose a District Court of this State in a case where the owners and possessors of lands could not be heard, where no jury was allowed, and no issue on the question of title and of boundaries was formed or proved, and where not one scintilla of legal evidence was introduced to prove any survey, any boundaries, or any title at all in a corporation—should decide, dogmatically, and without jury, proof or truth, that such corporation, created by the Legislature of this State, did own all the lands of such possessors and claimants, and should prescribe, on the bench, a *prima facie* rule for ascertaining the boundaries of such ownership,—this Court would, undoubtedly, treat such a decision as a monstrous usurpation, not to be countenanced nor tolerated. For, a more lawless, revolutionary, hazardous and iniquitous mode of determining the rights of property, could not be attempted within the precincts of Courts, and under the garb and forms of law.

Indeed, it is self-evident, that such matters must be proved by legal issues and a trial thereof, in the manner, the form, and to the full extent required by law, before courts of justice can properly attempt to proclaim what *the truth* is, and declare the consequences. And for the very reason, that falsehood cannot be respected nor acted on as truth, without acting iniquitously; the first step demanded by law, in every instance, is, to ascertain *the truth*, and the law has in nothing taken more pains than to elicit the facts, that is *the truth* in every case, and to decide according to the truth. In all acts concerning property, a falsehood is a fraud. And it is the falsehood and the iniquity resulting from acting on it, and not the manner of telling it, nor its source, which constitutes the fraud. Hence in the case supposed, the District Judge would not only outrage justice, but would perpetrate a fraud against the peaceable possessors and owners of the lands, so sought to be taken from them *by falsehood.* And whether the person so "misrepresenting a material fact, knew it to be false, or made the assertion without knowing whether it was true or false, *is wholly immaterial;* for the affirmation of what one does not know, or believe," (on good and clear proof,) "to be true, *is in morals and in law, equally as unjustifiable as the affirmation of what is known to be positively false.*" [See Story Eq. Jurisp. sec. 193, etc.] "Fraud is even more odious than force." [Ibid. sec. 186.]

"Fraud includes all acts, omissions and concealments, which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another." [Ibid. sec. 187.] Truth cannot defraud any man, nor can the law. But if a man be deprived of his claim to property, contrary to law, and by means of a falsehood, is he not defrauded? And surely the injury would be the same, whether done where it could be relieved by the court, or done by the judge himself presiding in the court, and beyond the means of relief.

And surely if this Court would be bound to correct such a course of proceeding by District Courts, as in the case just supposed, it cannot be bound to justify and authorize such a proceeding. And I most respectfully submit, if a District Court could not so proceed, this Court cannot, because this Court cannot try any suit, nor determine by itself any question requiring proof. On the contrary, this Court exists solely for the purpose of correcting errors occuring in the courts below, where all suits must be tried, and where all matters of fact not admitted, and material to the parties, must be proved, and if not proved, must be regarded as unproved, and not to be presumed. In the debates in the Convention which formed the plan and defined the jurisdiction of this Court, it was declared, "In the Supreme Court new evidence is not granted." If an appeal is made it is made upon some *wrong decision*. [Debates in Con. 227.] Again, it was said, as if the matter was on all hands taken for granted: The Supreme Court "has nothing to do with trying questions of fact (to be) tried in the Court below." But no language could be reasonably used, more explicit and emphatic, than the words of the Constitution itself. It not only gives this Court only appellate jurisdiction, which of itself excludes everything coming before it except the record; and it not only says its appellant jurisdiction shall be on questions of law; but it confines its jurisdiction beyond cavil or question by adding the adverb only or "alone." It says "the Supreme Court shall have *appellate* jurisdiction in all cases," etc., etc., etc., "ON QUESTIONS OF LAW ALONE." [Art. 5, sec. 4.]

Is the fact of the existence of a Mexican act of incorporation, creating an incorporated town on the peninsula of San Francisco, and by a particular corporate name, a question of law? Is the fact of a grant, or concession, or national dedication to public use, of five thousand or seventeen thousand, or one hundred and fifty thousand acres of land, to such a town corporation as San Francisco, a question of law? Could it, in the nature of things, be any more a question of law under Mexico than under the United States? Is the number of acres which were granted, conceded or dedicated to such imagined corporation, a question of law? Is the place where these acres are located a question of law? Are the boundaries of the lands so granted, conceded, or dedicated, questions of law? Is the time when the grant, concession or dedication was made a question of law? Are the terms, conditions and names of the parties, and the nature and extent of the subject matter of this supposed contract or agreement as to lands, questions of law, to be decided by this Court, with no proof of any agreement at all? Are the facts whether lands were ever surveyed and set apart by the Mexican Government, or specified or described by that Government, to or for the ownership or use of any particular person or corporation, and the name of the particular person or corporation, questions of law? Can all or any of these facts be determined by the justices who preside in this Court, with not one scintilla of legal evidence to prove any of them, and with the Constitution expressly limiting their jurisdiction to "questions of law alone?"

I insist, that every and all material and important questions of fact raised and involved in suits at law, must be proved by evidence duly introduced on the trials thereof. And that to *presume* such facts in any case, either by this Court, or by any District or other Court, acting under the laws and Constitution of this State, is a direct violation of the settled and fundamental doctrine on which the judiciary must proceed; and if done by this Court, is also a plain violation of said constitutional limitation to "questions of law alone." And therefore that the presumption of facts of great moment to these claimants, and to the ends of justice, which were made in the Cohas vs. Roisin decisions, cannot be adopted nor acted on as facts affecting these cases. But they must be regarded as having been announced merely as the "*prolata*" or views of the justice making them, with no expectation nor intention to have them acted on as facts, destructive of the claims of third parties, and decisive of new controversies wherein they are not only not proved to be true, but shown to be untrue. The notion that opinions of judges can be received as, of themselves, conclusive on an inferior court, or on a jury, *as to any matters of fact* material to the rights of parties in suits, is plainly subversive of justice; subversive of the "settled and fundamental rules of legal evidence," and the purposes they are intended to accomplish, and subversive of everything material in the right of trial by jury.

It is essential to a free people (says Blackstone,) "that *their property* may be *as certain and fixed* as the Constitution of their State." [3 Com. 327.] Property cannot be secure, where judges or any other officers are possessed of the power, by official acts, to take it away. It is not secure unless it is secure against all the powers of courts and lawyers, as well as other persons. It is not secure except where it cannot be disturbed nor taken away "but by *the law* of the land." Our courts are appointed and their judges sworn to administer that law according to law. The law imperiously demands that every case be decided according to the law and the truth. And where the truth is plainly violated, or the law disregarded, a new trial is ordered for the purpose of arriving at a legal and truthful adjudication. How degrading to the law; how abhorrent to justice; how contrary to the objects and purposes of the courts, is the base idea, that what is known and seen to be untrue shall be made to take the place of truth, and what is known and seen to be contrary to law shall take the place of law; and upon this basis of lawlessness and untruth, the rights of property of a whole community, or of any one man, shall be attempted to be settled and adjusted! Who but an idiot, or an enemy, could desire to see the titles to the lands on which a great city is to be erected, placed upon the basis of falsehoods, whereby security and repose are not only postponed, but rendered impossible.

Property, as we have seen, is the *legal* right to things. Therefore, when the legal right to things is made to give way to a merely assumed but not legal right, property is made to give way to assumptions against property. Justice cannot be done concerning material issues between suitors, except according to the facts. Therefore, when it is attempted, not according to the facts, but according to admitted errors, it may be called justice because done in courts of justice, but it cannot be justice, because justice cannot proceed on errors of fact. The decisions of courts do not constitute laws. [Story, J., 16 Peters, 18.] And hence they cannot be deemed to have the power to suspend, repeal, or at all modify or change any law. And although the courts should fluctuate in their opinions, the law remains the same. Though the courts should seek to shun the laws, the laws will not shun the courts. Though the courts should seek to surmount the laws, still the laws will remain above them. Though the courts should seek to get round the laws, still the laws will get round the courts. Laws cannot be changed nor destroyed by violating them, wherever the attempt be made, and however constantly it be pursued. And falsehood can never be made truth, wherever attempted, and however frequently and solemnly repeated. How idle and foolish and unjust, then, is the idea that the courts should attempt to settle titles to the lands of a country, or a city, not according to law and evidence, but contrary to law and contrary to the facts. God Himself (I say it with profound reverence) would act iniquitously should he render judgments upon such a basis.

Again: The law of Magna Charta, so far as applicable to our condition, has always been insisted on in the United States, as part of our common law. [1 Kent, 523, 524, 604, 605, 612, 613.] That law, as written nearly six hundred years ago, and so far as applicable to this case now at bar, is in these words familiar to us all: "Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur de aliquo libero tenemento suo * * * * * * * * nisi per *legale* judicium parium suorum, vel per legem terræ." [Magna Charta of Ed. I, ch. 28; Creasy's Eng. Con., 153; Stephens' De Lolme, 53. As to want of authenticity of King *John's* Charter, see 1 Reves' His. Eng. Law, Law, 214; Dwarris, 716.] No freeman shall be arrested or imprisoned, or be *deprived of the possession* of his *freehold* (*i. e.* of lands in his possession, with, it may be, a title less than the fee,) except by the *legal* judgment of his peers, or by *the law* of the land. The words in our Constitution, "due process of law," have been expressly decided to mean the same thing as the said 29th chapter of the Magna Charta. [Dwarris, 722.] And the words, "law of the land," have been expressly decided to *include the common law just as much as the statute law.* [Ibid.]

It seems to be sufficient to say, because the fact is plain, that if process be ordered to deprive us of our property, not by reason of law and evidence, but only by reason of decisions contrary to both, it will not be a "due process of *law*," because the law cannot be accused of authorizing what "no person of ordinary intelligence can pretend" it authorizes. And therefore, the direction of process against us, in such a case as this, would be a plain and direct violation of those few words in our Constitution which constitute its very heart's core; and which cannot be violated without defeating all the other provisions of our Constitution, and all the purposes for which governments of laws are instituted and supported.

As to what ought to be done on account of the errors committed here under the Cohas vs. Roisin opinions, it seems enough to say, that the present members of this Court are not responsible for a single one of them; and the benign maxims of our law enable this Court to relieve against them, without imputing dishonesty to those who adopted and concurred in the opinions to which they are confined. They who commit errors in the judicial office, says a benign maxim, have never intentionally consented to them. [Bouv. Inst., n. 581.] And "The progress of time (says Coke) reveals many things which could not have been foreseen at the beginning." [6 Co., 40.] But (says Coke) what is found to have been done contrary to the reason of the law, ought not to be drawn into precedents. [12 Co., 75.] And he who *can* avoid continuing evil precedents, he further says, and does not do it, *himself causes and consents to continuing them.* [2 Co. Inst., 146; Jenk. Cent., 271.] And "Whatsoever has not been done with sufficient consideration" (still further say the sages of our law) "upon further consideration we should revoke." [Co. Lit., 260.] The real ultimate object in the last resort of judicature (says Dwarris) is to *correct* ALL mistakes, and *repair* EVERY possible wrong. [Dwarris, 123.]

Whatever good these errors may have been imagined to do in times past, it is certain that they cannot justify nor require new and far more extended and more cruel errors to be committed now; and it does seem hardly possible that any true friend to a government of laws, and to the honor and usefulness of this Court, can hesitate to urge that it pursue, firmly and fearlessly, the path it has evidently marked out; and that its position be steadily "*super antiquas vias*," where Kent says Lord Kenyon ascended to review the acts of Mansfield, and to recall "like a Roman dictator, the ancient discipline" of the law. [1 Kent, 477-8.]

"A solemn decision (says Kent,) UPON A POINT OF LAW, arising in any given case, becomes an authority in a like case, and the judges are bound to follow it so long as it stands unreversed UNLESS it can be shown that *the law* was misapplied or misunderstood in that case." But, says Kent, the doctrine of following decisions must not be carried too far. It is *probable* (he continues,) that the records of many of the courts of this country are *replete* with hasty and crude decisions, and such cases *ought to be examined without fear, and reviewed without reluctance*, rather than have the character of our laws impaired, and the harmony of our system destroyed by the perpetuity of error. Even *a series of decisions are not* always conclusive evidence of what is law. [Kent Com. 475, 476, 477.]

What says Chief Justice Marshall and the judges of the old Federal Supreme Court of the United States, who may be presumed to have been as friendly to the possessions and exaltation of the judicial power, as any true and just man could dare be. I know this Court must venerate, as all of us ought to do, the decisions of that Court on constitutional questions, when Marshall and Story were the authors and participants in its decisions. The Constitution of the United States vests the judicial power in its Supreme Court, in the same words which our State Constitution uses to vest the same power in this Court. [U. S. Con., Art. 3, sec. 1; Cal. Con., Art. 6, sec. 1.] The language is, "The judicial power shall be vested" in the courts, designated. Chief Justice Marshall had defended the Constitution of the United States before it was adopted. [Story's Miscel. Wri., p. 188.] Nearly forty years afterwards, when his great mind had become cool and careful by age, and accurate and precise by long continued habits of thinking; after he had actually been presiding for twenty-three years over probably the most learned judicial tribunal then in the world, and carefully investigated nearly all the decisions made by his court during that great length of time, [Story's Biog. of M.] it became necessary to explain what the "judicial power" should be understood to mean, under our American Constitutions. The question of the power of the Judicial Department of the government was raised and discussed, and involved in the case, (as to this see p. 866, and passim.) The case was elaborately argued by such men as Webster, Clay, Hammond, Wright and Sergeant. It was argued a second time by the direction of the Court; and we may rest assured that an opinion, written in a case, involving so much labor and examination, and in some degree involving the question of the true principles "on which the jurisprudence of (our) country ought to proceed," was not written hastily nor excitedly. The opinion is one of the most elaborate which Ch. J. Marshall ever wrote. In the decision and opinion of the court, the Chief Justice in a few brief and extraordinary sentences defines the true, legal, and constitutional meaning of "the judicial power." He excoriates the idea that courts can by any series of decisions not authorized by law, and still in disregard of law, create authority to justify and excuse renewed decisions regardless of law. The language used is, perhaps, of the most extraordinary emphasis and precision of any ever used by the same great, sagacious and venerated man. There is no way of avoiding his meaning or the conclusions to which he, in common with Story and his other learned associates, had arrived. It deserves to be repeated before any judicial opinion is read, or rendered, or concurred in. It deserves to be printed in letters of gold, and to be kept in front of every desk where a judge presides.

It is in these words: "The Judicial Department is the instrument employed by the government, in administering the laws. The judicial department of the government has no will in any case. Judicial power, as contradistinguished from the power of the laws, *has no existence.* Courts are mere instruments of the law, and *can will nothing.* When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; but always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law." [Osborne vs. U. S. Bank, 9 Wheat. 866.]

And Story, the tenderest and most intimate friend of Marshall, and universally admitted, even in England, to have been the greatest jurist of the age—[Life and Letters, vol. 2, pp. 429, 443, 446,) who exercised the judicial office for nearly thirty years with unsurpassed fidelity and correctness, may also be referred to, as one whose views and example on this question, will command respect with this Court. On an occasion, only three years before his death, when he had been assailed by fanatics for deciding according to law, not merely on a question of property, but on the question of the legal right of property in slaves where the law commands it, he used the following language in calm rebuke of those who deem courts possessed of some discretion to withhold the operation of the laws, and refuse to rigidly adhere to them in matters of final judgment, on the ground that public policy is opposed to it, and somebody's interests likely to be injured by it. Story said: "I shall *never hesitate* to do my duty as a judge, *according to the Constitution and the laws*, BE THE CONSEQUENCES WHAT THEY MAY. *I have sworn to do this*, and I cannot forget or repudiate my solemn obligations at pleasure." [2 Life and Letters of Story, 431.]

And now what says Kent, of whom Story once said to his class, "his fame will live longer in the coming ages of the world, than the proudest relic of the great Empire State in which he lived." This great American Judge has left, for our daily perusal, the following solemn and impressive admonition, not written in haste, but in his Commentaries, and like a warning from the Law itself. He says: "It requires more than ordinary hardiness and audacity of character, to trample down principles which our ancestors cultivated with reverence; which we imbibed in our early education; which recommend themselves to the judgment of the world by their truth and simplicity; and which are constantly placed before the eyes of the people, accompanied with the imposing force and solemnity of a constitutional sanction." But, "when the spirit of liberty has fled, and *truth* and *justice* are *disregarded*, *then private rights can* EASILY *be sacrificed under the* FORMS *of law.*" [Kent Com. 607.]

"A greater inheritance comes to every one of us," said Coke, "from the right and the laws, than from our ancestors." (Co. Inst. 56.) "The settled rules of law and of legal evidence," said Coke, "admit of no dispute in courts of justice. They must be obeyed." [Co. Lit. 343.] "Every innovation against the settled rules of legal evidence," said Coke, "disturbs more than it benefits, because experience has framed the settled rules of law." [4 Co. Inst. 50.] "If you depart from the law as your guide," said he, "you will wander without any guide, and everything will be in a state of uncertainty to every one." [Co. Lit. 227.]

Others have done, and will of course continue to do, as they please; but as for myself, I would no sooner advise this Court to attempt to further enforce mistakes of law and of fact, under the forms of law, than I would do it myself; when I knew and felt, that I was publicly pledged by a solemn oath, and by every principle of honor not to do it.

Indeed it does seem to me, that we, as members of the bar, and as inferior members of this Court, ought also to be held in some degree responsible for the justice, the necessity, and the excuse, of any longer attempting to continue and enforce such sweeping and admitted errors, instead of truth and justice, according to the established laws of the State. For what is the meaning of the oaths which we have taken and recorded as counsellors of this Court, if we too have not some duty and some obligations to perform towards the Constitution and the laws, which we too, as inferior public officers, have been sworn to observe? It seems to me our obligations bind us to the extent of the duties which we have to perform, as fully as the oaths of the judges who preside bind them to the extent of the more vast, more sacred, and responsible duties which they must discharge.

As for the rights of clients and suitors, they have no rights in courts of law which *the laws* do not concede to them. In my humble opinion, no lawyer would comply with his first and truest obligations, who should advise, defend, uphold or encourage sworn judges on the bench to knowingly disregard or falsely construe a law, even for the sake of life itself; and much less for the sake of upholding merely transient, unprincipled, detested, and purely mercenary schemes, like these now before this Court.

It seems to me to be the solemn duty of all of us, *the Bar*, as well as the Courts; it seems to me we owe it to the State, to the profession, to the parties interested, *and to our own reputations* in the coming history of our State, to carefully ascertain the laws concerning these cases, and when the laws are ascertained, *to follow* THEM, *and be advised by nothing else;* for it cannot be denied that we, ourselves, are at best but human men, who can err, and can do injustice. But THE LAW of our country, and THE TRUTH, CANNOT ERR, and CANNOT DO INJUSTICE. We have appealed to this Court for the protection of the laws of our country, and for their application and enforcement in these cases ACCORDING TO THE TRUTH. And we most respectfully insist, that every denial of this is a denial of justice, and a perversion of the purpose for which this Court exists. That to enforce the erroneous opinions against us, of which we complain, will be forcing us into trials which are not to be governed by law nor by truth, but by the errors of the very Court appointed to guard and protect us against errors.

It would be as wrong to disguise as to deny, that such a course would not be convicting us according to law and evidence, but only by opinions of the court admitted and most clearly shown to be contrary to the law and the proof. Would it not be most plain injustice, to drag this Court into such acts of wrong and oppression, merely to sustain the titles of Peter Smith speculators? No other mere speculators in other peoples' lands, have been so cruelly and mercilessly aided to titles and to boundaries, who cannot prove either; then why should these be so supported? They knew what the law was, *when they engaged in their schemes* in 1851–2. They knew there was no difference between lands in the legal limits of cities, and out of those limits, so far as the necessity of proving a title is concerned. They knew that this is not the first country acquired by the United States, which was previously governed by Spanish law. They knew that New Orleans was a Spanish city, from 1763 to 1800; and that the Supreme Court of Louisiana rejected the title of that old Spanish *city* even to its very quay. No member of the bar, or judge of the court, there pretended, that it could have any title to any land anywhere to which *it coud not prove* a title. The only difference of opinion that existed, was, whether the city (like any other city) might not *prove* a title to a well described piece of land, *by proving* its actual dedication to public use by the government, and its actual and long continued use *for a street or quay*. But there is no pretense that the tracts of thousands of acres of lands here involved, were a street or a quay. Nor is there one iota of evidence to prove, that these lands were actually and by law or legal authority, set apart and dedicated to public use, and so held and used. And the evidence to prove a title by dedication to public use, is just as indispensable, and must be just as legal, precise and conclusive, as to prove a title by any other mode. And had there been an actual dedication to public use by law, it would be ridiculous to say a constable or sheriff could deprive the public of the use, and defeat or change the public use, by their sales! A dedication of property to public use, is, of course, what its very language implies, and it is not held as private property, nor could it be liable for the debt of any private body or corporation, as a matter of course, unless it was the property of the debtor, of which he himself could dispose by a voluntary conveyance. Indeed, in every particular, as far as title to the ungranted lands are concerned, *every city, town and village, ever acquired by the United States from Spain, or ever previously governed by Spanish law, have been found no more entitled to the lands about them, than our own towns are.* And in all of them, from Florida and the Gulf to St. Louis, *with no exception whatever*, it was found, sooner or later, that the legal title had continued in the former government, and must come from the United States. I have discussed this subject in full, and endeavored to show that it could not be otherwise. In closing, I only refer to some instances, proving the notoriety of these truths in our own country only one age ago. Look at the case of Vincennes, where the United States disposed of its lands, some of which the United States itself had expressly "appropriated as a common," by an Act of Congress of March 3d, 1791. [3 U. S. Laws, 468, Act of April 20th, 1818.] In 1832 Congress passed a law to dispose of the title of the United States, acquired in the lots and "commons" of a full Spanish pueblo, which had been built by Spaniards one hundred and thirty-three years before the passage of the law by Congress, for disposing of its lands on its very streets, and reserving some of its very buildings for government use; as was done in California by the Mexican authorities, as we have already fully explained. I refer to the city of Pensacola, Florida, which was a regular Spanish pueblo for one hundred and twenty years before the United States acquired that country. And the United States did the same thing concerning the lots and "*the commons*" *of the oldest city within the United States;* and required lands to be disposed of, as the *public lands of the United States*, which had been and continued as "*the commons*" of a complete *Spanish pueblo for two hundred and sixty-seven years prior to the passage of the law, to make disposition of it to private owners.* [See 4 Laws U. S. p, 550, Act of June 28, 1832.]

It may be imagined by an indifferent reader, that the exceptions in the proviso of the 2d Section of this Act of Congress, renders the law meaningless. But to except lots of land "which have been *by the laws* of Spain or of the United States, *vested in the corporations* of said towns," etc., etc., does not except lands which were not so vested *by law.* And as we have abundantly shown the law does not, and *cannot* vest a title to lands in any individual or corporation, except where it can be shown and proved by law.

Again: It is to be remembered that from the time these lands were first settled on by our people to the present moment, not only they, but this Court itself, has remained utterly incapable of determining with positive certainty who held or will hold the legal title, until the Mexican grants set up to the whole of them shall be finally disposed of. What greater injustice could be committed, than to eject, or attempt to eject, a whole community of peaceable possessors of lands, upon a new title created here, which we all know is not and cannot be the only true title; because it is not in the nature of things, that the title can originate here, nor be made to depend on false constructions of acts of Congress. And what a spectacle would be presented, if, after we were driven off by this Court, and the unprincipled speculators were placed in possession of the lands we have peacefully held for so many years, the Bolton & Barron, or some other grant still pending for confirmation, and confidently claimed by its owners to be genuine, should be confirmed! In such an event, the possibility of which must be admitted, what a bitter and just reproach would not this Court receive, and eternally merit. If this Court shall ever undertake to eject our people, upon the title made here by mere decisions of the Court itself, on the doctrine of *stare decisis*, is it not imperiously demanded by every consideration of propriety, that the attempt shall at least be postponed, until the titles held adversely to this pretended title shall be finally adjudicated and settled?

Indeed the truth and the law was upheld by this Court when these speculators originated their Peter Smith title. And never until 1857, in case of Welch vs. Sullivan, did this Court decide that such titles to uplands, were of the least validity.

All talk of evil consequences by not repeating and adhering to that decision, bears in its own terms the brand of untruth; because *it is not possible in the nature of things*, that truth and law, in these cases, can do injustice to any man. It is only by denying the law and denying the truth, in the tribunals appointed to maintain them, that confusion and instability will be brought about, and sweeping and downright wrong and injustice will inevitably be perpetrated.

OUR LAND

— AND —

LAND POLICY,

NATIONAL AND STATE.

I.

THE LANDS OF THE UNITED STATES.

Extent of the Public Domain.

According to the latest report of the Commissioner of the General Land Office, the public domain not yet disposed of amounted on the 30th of June, 1870, to 1,387,732,209 acres.

These figures are truly enormous, and paraded as they always are whenever land enough for a small empire is asked for by some new railroad company, or it is proposed to vote away a few million acres to encourage steamship building, it is no wonder that they have a dazzling effect, and that our public lands should really seem "practically inexhaustible." For this vast area is more than eleven times as large as the great State of California; more than six times as large as the united area of the thirteen original States; three times as large as all Europe outside of Russia. Thirteen hundred and eighty-seven millions of acres! Room for thirteen million good-sized American farms; for two hundred million such farms as the peasants of France and Belgium consider themselves rich to own; or for four hundred million such tracts as constituted the patrimony of an ancient Roman! Yet when we come to look closely at the homestead possibilities expressed by these figures, their grandeur begins to melt away. In the first place, in these 1,387,732,209 acres are included the lands which have been granted, but not yet patented, to railroad and other corporations, which, counting the grants made at the last session, amount to about 200,000,000 acres in round numbers; in the next place, we must deduct the 369,000,000 acres of Alaska, for in all human probability it will be some hundreds if not some thousands of years before that Territory will be of much avail for agricultural purposes; in the third place, we must deduct the water surface of all the land States and Territories (exclusive of Alaska), which, taking as a basis the 5,000,000 acres of water surface contained in California, cannot be less than 80,000,000 acres, and probably largely exceeds that amount. Still further, we must deduct the amount which will be given under existing laws to the States yet to be erected, and which has been

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granted, or reserved for other purposes, which in the aggregate cannot fall short of 100,000,000 acres; leaving a net area of 650,000,000 acres—less than half the gross amount of public land as given by the Commissioner.

When we come to consider what this land is, the magnificence of our first conception is subject to still further curtailment. For it includes that portion of the United States which is of the least value for agricultural purposes. It includes the three greatest mountain chains of the continent, the dry elevated plains of the eastern slope of the Rocky Mountains and the arid alkali-cursed stretches of the great interior basin; and it includes, too, a great deal of land in the older land States which has been passed by the settler as worthless. Colorado, Wyoming, Utah, Nevada, Idaho, Montana, New Mexico and Arizona, though having an abundance of natural wealth of another kind, probably contains less good land in proportion to their area than any other States or Territories of the Union, excepting Alaska. They contain numerous valleys which with irrigation will produce heavy crops, and vast areas of good grazing lands which will make this section the great stock range of the Union; but the proportion of available agricultural land which they contain is very small.

Taking everything into consideration, and remembering that by the necessities of their construction the railroads follow the water courses and pass through the lowest valleys, and therefore get the best land, and that it is fair to presume that other grants also take the best, it is not too high an estimate to assume that, out of the 650,000,000 acres which we have seen are left to the United States, there are at least 200,000,000 acres which for agricultural or even for grazing purposes are absolutely worthless, and which if ever reclaimed will not be reclaimed until the pressure of population upon our lands is greater than is the present pressure of population upon the lands of Great Britain.

And, thus, the 1,387,732,209 acres which make such a showing in the Land Office Reports come down in round numbers to but 450,000,000 acres out of which farms can be carved, and even of this a great proportion consists of land which can be cultivated only by means of irrigation, and of land which is only useful for grazing.

This estimate is a high one. Mr. E. T. Peters, of the Statistical Bureau, estimates the absolutely worthless land at 241,000,000 acres. Senator Stewart, in a recent speech, puts the land fit for homes at one-third of the whole—332,000,000 acres by his figuring, as he makes no deductions except for Alaska and the Texas Pacific grant. Assuming his proportion to be correct, and admitting that the railroads, etc., take their proportion of the bad as well as of the good land, we would have, after making the proper deductions, but 216,000,000 acres of arable land yet left to the United States.

But taking it at 450,000,000 acres. Our present population is in round numbers 40,000,000, and thus our "limitless domain," of which Congressmen talk so much when about to vote a few million acres of it away, after all amounts to but twelve acres per head of our present population.

Our Coming Population.

But let us look at those who are coming. The amount of our public land is but one factor; the number of those for whose use it will be needed is the other. Our population, as shown by the census of last year, is 38,307,399. In 1860 it was 31,443,321, giving an increase for the decade of 6,864,078, or of a fraction less than 22 per cent. Previous to this, each decade had shown a steady increase at the rate of 35 per cent., and this may be considered the rate of our normal growth. The war, with its losses and burdens, and the political, financial and industrial perturbations to which it gave rise, checked our growth during the last decade, but in that on which we have now entered, there is little doubt that the growth of the nation will resume its normal rate, to go on without retardation, unless by some such disturbing influence as that of our great civil war, until the pressure of population begins to approximate to the pressure of population in the older countries.

Taking, then, this normal rate as the basis of our calculation, let us see what the increase of our population for the next fifty years will be:

In **1880** our population will be	**51,714,989,**	an increase in that decade of	**13,407,590**
.. **1890**	**69,815,235,**	....	**18,100,246**
.. **1900**	**94,250,567,**	....	**24,435,332**
.. **1910**	**127,238,267,**	....	**32,987,700**
.. **1920**	**171,771,610,**	....	**44,533,593**

This estimate is a low one. The best estimates heretofore made give us a population of from 100,000,000 to 115,000,000 in 1900, and from 185,000,000 to 200,000,000 in 1920, and there is little doubt that the Census of 1870, on which the calculation is based, does not show the true numbers of our people. But it is best to be on the safe side, and the figures given are sufficiently imposing. In truth, it is difficult to appreciate, certainly impossible to over-estimate, the tremendous significance of these figures when applied to the matter we are considering.

By **1880**, the end of the present decade, our population will be thirteen millions and a half more than in 1870—that is to say, we shall have an addition to our population of more than twice as many people as are now living in all the States and Territories west of the Mississippi (including the whole of Louisiana), an addition in ten years of as many people as there were in the whole of the United States in 1832.

By **1890** we shall have added to our present population thirty-one and a half millions, an addition equal to the present population of the whole of Great Britain.

By the year **1900**—twenty-nine years off—we shall have an addition of fifty-six millions of people ; that is, we shall have doubled, and have increased eighteen millions beside.

By **1910**, the end of the fourth decade, our increase over the population of 1870 will be *eighty-nine millions*, and by **1920** the increase will be nearly *one hundred and thirty-four millions;* that is to say, at the end of a half century from 1870 we shall have multiplied four and a half times, and the United States will then contain their present population plus another population half as large as the present population of the whole of Europe.

What becomes of our accustomed idea of the immensity of our public domain in the light of these sober facts? Does our 450,000,000 acres of available public land seem "practically inexhaustible" when we turn our faces towards the future, and hear in imagination in the years that are almost on us, the steady tramp of the tens of millions, and of the hundreds of millions, who are coming?

Vast as this area is, it amounts to but 33 acres per head to the increased population which we will gain in the present decade; to but 14 acres per head to the new population which we will have in twenty years; to but four acres per head to the additional population which we will have by the close of the century!

We need not carry the calculation any further. Our public domain will not last so long. In fact, if we go ahead, disposing of it at the rate we are now doing, it will not begin to last so long, and we may even count upon our ten fingers the years beyond which our public lands will be hardly worth speaking of.

Between the years 1800 and 1870 our population increased about thirty-three millions. During this increase of population, besides the disposal of vast tracts of wild lands held by the original States, the Government has disposed of some 650,000,000 acres of the public domain. We have now some 450,000,000 acres of available land left, which, in the aggregate, is not of near as good a quality as that previously disposed of. The increase of population will amount to thirty-two millions in the next twenty years! Evidently, if we get rid of our remaining public land at the rate which we have been getting rid of it since the organization of the General Land Office, it will be all gone some time before the year 1890, and no child born this year or last year, or even three years before that, can possibly get himself a homestead out of Uncle Sam's farm, unless he is willing to take a mountain-top or alkali patch, or to emigrate to Alaska.

But the rate at which we are disposing of our public lands is increasing more rapidly than the rate at which our population grows. Over 200,000,000 acres have been granted during the last ten years to railroads alone, while bills are now pending in Congress which call for about all there is left. And as our population increases, the public domain becomes less and less, and the prospective value of land greater and greater, so will the desire of speculators to get hold of land increase, and unless there is a radical change in our land policy, we may expect to see the public domain passing into private hands at a constantly increasing rate. When a thing is plenty, nobody wants it; when it begins to get scarce, there is a general rush for it.

It will be said: Even if the public domain does pass into private hands, there will be as much unoccupied land as there otherwise would be, and let our population increase as rapidly as it may, it will be a long time before there can be any real scarcity of land in the United States. This is very true. Before we become as populous as France or England, we must have a population, not of one hundred millions or two hundred millions, or even five hundred millions; but of *one thousand millions*, and even then, if it is properly divided and properly cultivated, we shall not have reached the limit of our land to support population. That limit is far, far off—so far in fact that we need give ourselves no more trouble about it than about the exhaustion of our coal measures. The danger that we have to fear, is not the overcrowding, but the monopolization of our land—not that there will not be land enough to support all, but that land will be so high that the poor man cannot buy it. That time is not very far distant.

The Prospective Value of Land.

Some years ago an Ohio Senator* asserted that by the close of the century there would not be an acre of average land in the United States that would not be worth $50 in gold.

Supposing that our present land policy is to be continued, if he was mistaken at all, it was in setting the time too far off.

Between the years 1810 and 1870, the increase in the population of the United States was no greater than it will be between the years 1870 and 1890. Coincident with this increase of population we have seen the value of land go up from nothing to from $20 to $150 per acre over a much larger area than our public domain now includes of good agricultural land.

And as soon as the public domain becomes nearly monopolized, land will go up with a rush. The Government, with its millions of acres of public land, has been the great bear in the land market. When it withdraws, the bulls will have it their own way. That there is land to be had for $2 50 per acre in Dacotah lessens the value of New York farms. Because there is yet cheap land to be had in some parts of the State, land in the Santa Clara and Alameda Valleys is not worth as much.

And in considering the prospective value of land in the United States, there are two other things to be kept in mind: First, that with our shiftless farming we are exhausting our land. That is, that year by year we require not only more land for an increased population, but more land for the same population. And, second, that the tendency of cheapened processes of manufacture is to increase the value of land.

Land Policy of the United States.

The best commentary upon our national land policy is the fact, stated by Senator Stewart, that of the 447,000,000 acres disposed of by the Government, not 100,000,000 have passed directly into the hands of cultivators. If we add to this amount the lands which have been granted, but not delivered, we have an aggregate of 650,000,000 acres disposed of to but 100,000,000 acres directly to cultivators—that is to say, six-sevenths of the land has been put into the hands of people who did not want to use it themselves, but to make a profit (that is, to exact a tax) from those who do use it.

A generation hence our children will look with astonishment at the recklessness with which the public domain has been squandered. It will seem to them that we must have been mad. For certainly our whole land policy, with here and there a gleam of common sense shooting through it, seems to have been dictated by the desire to get rid of our lands as fast as possible. As the Commissioner of the General Land Office puts it, seemingly without consciousness of the sarcasm involved, "It has ever been the anxious desire of the Government to transmute its title to the soil into private ownership by the most speedy processes that could be devised."

In one sense our land dealings have been liberal enough. The Government has made nothing to speak of from its lands, for the receipts from sales has been not much more than sufficient to pay the cost of acquisition or extinguishment of Indian title, and the expenses of surveying and of the land office. But our liberality has been that of a prince who gives away a dukedom to gratify a whim, or lets at a nominal rent to a favored Farmer-General the collection of taxes for a province. We have been liberal, very liberal, to everybody but those who have a right to our liberality, and to every importunate beggar to whom we would have refused money we have given land—that is, we have given to him or to them the privilege of taxing the people who alone would put this land to any use.

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* Ben Wade.

So far as the Indians, on the one hand, and the English proprietaries of Crown grants, on the other, were concerned, the founders of the American Republic were clearly of the opinion that the land belongs to him who will use it; but further than this they did not seem to inquire. In the early days of the Government the sale of wild lands was looked upon as a source from which abundant revenue might be drawn. Sales were at first made in tracts of not less than a quarter township, or nine square miles, to the highest bidder, at a minimum of $2 per acre, on long credits. It was not until 1820 that the minimum price was reduced to $1.25 cash, and the Government condescended to retail in tracts of 160 acres. And it was not until 1841, sixty-five years after the Declaration of Independence, that the right of pre-emption was given to settlers upon surveyed land. In 1862 this right was extended to unsurveyed land. And in the same year, 1862, the right of every citizen to land, upon the sole condition of cultivating it, was first recognized by the passage of the Homestead law, which gives to the settler, after five years occupancy and the payment of $22 in fees, 160 acres of minimum ($1.25) or 80 acres of double-minimum ($2.50) land.

Still further in the right direction did the zeal of Congress for the newly enfranchised slaves carry it in 1866, when all the public lands in the five Southern land States—Alabama, Mississippi, Louisiana, Florida and Arkansas—were reserved for homestead entry.*

But this growing liberality to the settler has been accompanied by a still more rapidly growing liberality to speculators and corporations, and since the pre-emption and homestead laws were passed, land monopolization has gone on at a faster rate than ever. Without dwelling on the special means, such as the exercise of the treaty-making power, by which large tracts of land in some of the Western States have been given to railroad corporations and individuals for a few cents per acre, let us look at the general methods by which the monopolization of Government land has been and is being accomplished.

Public Sale and Private Entry.

The first method adopted for the disposal of public lands was their sale to the highest bidder. This theory has never been abandoned. After lands have been surveyed, they may, at any time, be ordered to be offered at public sale. This public sale is only a matter of form, purchasers at more than the minimum price seldom or never appearing. But the offering makes an important difference in the disposition of the lands. Before being offered at public sale they are open only to pre-emption and homestead entry—that is, to actual settlers, in tracts not exceeding 160 acres. After being offered, they are open to private entry—that is, they may be purchased by any one in any amount, at the minimum price, $1.25 per acre.

Whether by the misrepresentations of speculators or the inadvertence of the authorities, public sales, as a general thing, have been ordered before the line of settlement had fairly reached the land, and thus the speculator has been able to keep in advance, picking out the choice lands in quantities to retail at a largely advanced price, or to hold back from improvement for years.

By means of cabins built on wheels or at the intersection of quarter section lines, and false affidavits, a good deal of land grabbing has also been done under the pre-emption and homestead laws. More, however, in the Mississippi Valley States than elsewhere.

Donations of Public Lands.

Thus land monopolization has gone on in the ordinary course of our land dealings. But the extraordinary means which have done most to hasten it, have been the donations of land in immense bodies.

It is a trite saying that men are always disposed to be liberal with that which is not their own—a saying which has had exemplifications enough in the history of all our legislative bodies. But there is a check to the appropriation of money, in the taxation involved, which, if not felt by those who vote the money away, is felt by their constituents. Not so with appropriations of land. No extra taxation is caused, and the people at whose expense the appropriations are made—the settlers upon the land—have not yet appeared. And so Congress has always been extremely liberal in giving away the public lands on all pretexts, and its liberality has generally been sanctioned, or at least never seriously questioned by public opinion.

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* This reservation has been broken through by the passage of the Southern Pacific Railroad bill, which gives 5,000,000 acres to a branch road in Louisiana, which would be sure to be constructed without any aid.

The donations of land by Congress have been to individuals, to States, and to corporations.

The Bounty Land Grants.

The grants to individuals consist chiefly of bounties to soldiers and sailors of the war of 1812 and the Mexican War, and amount to about 73,000,000 acres, for which transferable warrants were issued. Nearly all of this scrip passed into the hands of speculators, not one warrant in five hundred having been located by or for the original holder. It has been estimated that, on an average, the warrants did not yield the donees 25 cents per acre. But taking 50 cents as a basis, we are able to form an idea of the disproportion between the cost of the gift to the nation and the benefit to the soldiers. Leaving out of the calculation the few that have taken the land given them, we find that the Government gave up a revenue of $91,067,500, which it would have received from the sale of the land at $1.25 per acre, in order to give the soldiers $36,427,000, or, in other words, every dollar the soldiers got cost the nation $2.50! Nor does this tell the whole story. Though some of this scrip was located by settlers who purchased it from brokers at an advance on the price paid soldiers, most of it has been located by speculators who, with the same capital, have been enabled to monopolize much more land than they could otherwise have monopolized, and to monopolize land even before it was offered at public sale. If we estimate the advance which settlers have had to pay in consequence of this speculation at $2 per acre for the amount of transferred scrip, we have a tax upon settlers of $145,708,000, which added to the loss of the Government, gives a total of $236,775,500, given by the Government and exacted from settlers in order to give the soldiers $36,427,000! And yet the story is not told. To get at the true cost of this comparatively insignificant gift, we should also have to estimate the loss caused by dispersion—by the widening of the distance between producer and consumer—which the land speculation, resulting from the issue of bounty warrants, has caused. But here figures fail us.

Grants to States.

The donations of land by the General Government to individual States have been large. Besides special donations to particular States, the general donations are 500,000 acres for internal improvements, ten sections for public buildings, seventy-two sections for seminaries, two sections in each township (or 1-18th) for common schools, and all the swamp and overflowed lands, for purposes of reclamation. These grants have been made to the States which contain public land, of land within their borders. In addition, all the States have been given 30,000 acres for each of their Senators and Representatives, for the establishment of agricultural colleges.

If land is to be sold, it is certainly more just that the proceeds should go to the States in which it is located than to the General Government, and the purposes for which these grants have been made are of the best. Yet judging from the standpoint of a right land policy, which would give the settler his land at the mere cost of surveying and book-keeping, even in theory, they are bad. For why should the cost of public buildings, or even of public education, be saddled upon the men who are just making themselves farms, who, as a class, have the least capital, and to whom their capital is of the most importance?

But whether right or wrong in theory, in practice, like the military bounties, these grants have proved of but little benefit to the States in comparison with their cost to the nation and to settlers. As a general rule they have been squandered by the States, and their principal effect has been to aid in the monopolization of land. How true this is will be seen more clearly when we come to look at the land policy of the State of California.

The Agricultural College Grant.

The Agricultural College grant was made in 1862, and has since been extended as the Representatives of other States have been admitted. It aggregates 9,510,000 acres, and if extended to the Territories as they come in, will take at least 11,000,000 acres. This grant differs from the other State grants in this: that it is given to all States, whether they contain public land or not; those in which there is no public land being permitted to take their land in other States which do contain it. This feature makes this grant, in theory at least, the very worst of the grants, for it throws upon the settlers in new and poor States the burden of supporting colleges not merely for their own State but for other and far richer States.

For instance, the State of New York, the most populous and wealthy member of the Union, receives 990,000 acres, which must all be located in the poor far-Western States. Thus to this old and rich State is given the power of taxing the settlers upon nearly a million acres in far-off and poor States for the maintenance of a college which she is far more able to support than they are. If New York has located this land well, and retains it (as I believe is the intention), in a very few years she will be able to rent it for one-fourth or even one-third of the crop. That is, for the support of one of her own institutions, New York will be privileged to tax 50,000 people, fifteen hundred or two thousand miles away, to the amount of one-fourth or one-third of their gross earnings. And as time passes, and population becomes denser, and land more valuable, the number of people thus taxed will increase and the tax become larger. The Cornell University, to which the New York grant has been made over, is a noble and beneficent institution; but will any one say that it is just to throw the burden of its support upon the laboring classes of far-off States?

The same thing is true of all the old and rich States which are thus given the right to tax the producers of new and poorer States. That most of these States have sold this right to speculators at rates ranging from 37½ to 80 cents per acre, only makes the matter worse.

But perhaps this injustice is even more evident in the case of those Southern States which do contain public land. The public land of Texas (of which there are some 80,000,000 acres left) belongs to the State; that in the other Southern land States was reserved for homestead entry by the Act of 1866. These States get the same amount of land under this grant as the others; but none of it is taken from their own lands, and their college scrip is now being plastered over the public lands in California and the Northwest, much of it being located here.

California gets 150,000 acres under the Act. Yet, besides this, there have been located here up to June of last year more than 750,000 acres of the land scrip of other States, and large amounts have since been located or are here ready for location as soon as immigration sets in. This scrip brought to the States to which it was issued an average of probably, 50 cents per acre. What the giving of this paltry donation has cost us we know too well. A great deal of the land thus located at a cost to the speculator of 50 cents per acre has been sold to settlers at prices ranging from $5 to $10 per acre, much of it is held for higher prices than can now be obtained; and a great deal of it is being rented for one-fourth of the gross produce, the renter supplying all the labor and furnishing all the seed; while the land monopolization of which this agricultural scrip has been one of the causes, has turned back immigration from California, has made business of all kinds dull, and kept idle thousands of mechanics and producers who would gladly have been adding to the general wealth.

Badly as California has suffered, other States have suffered worse. Wisconsin is entitled to 210,000 acres; yet, up to June, 1870, 1,111,385 acres had been located in that State with agricultural scrip. Nebraska gets only 90,000 acres, yet the agricultural scrip locations in Nebraska up to the same time were nearly a million acres.

Railroad Grants.

Some four millions of acres have been donated for the construction of various wagon roads, and some four millions and a half for the construction of canals; but by far the largest grants have been to railroads—the amount given to these companies within the last ten years aggregating nearly one-half as much as all the public lands disposed of in other ways since the formation of the Government. This policy was not commenced until 1850, when six sections per mile, or in all 2,595,053 acres, were granted for the construction of the Illinois Central road. This donation was made to the State, and by it assigned to the company on condition of the payment to the State of seven per cent of its gross receipts in lieu of taxation. This grant, which now seems so insignificant, was then regarded as princely, and so it was, as it has more than paid for the building and equipment of the road. The example being set, other grants of course followed. In 1862, a long leap ahead in the rapidity of the disposal of the public lands was taken in the passage of the first Pacific Railroad bill, giving directly, without the intervention of States, to the Union, Central and Kansas companies ten sections of land per mile, (at that time the largest amount ever granted) and $16,000 per mile in bonds. In 1864 this grant was doubled, making it twenty sections or 12,800 acres per mile, and at the same time the bonded subsidy was trebled for the mountain districts and doubled for the interior basin while the Government first mortgage for the payment of the bonds was changed into a second mortgage.

But the disposition to give away lands kept on increasing, and the Northern and Southern Pacific getting no bonds, the land grant to them was again doubled—making it forty sections or 25,600 acres per mile, or, to speak exactly, twenty sections in the States and forty sections in the Territories. To these three Pacific roads alone have been given 150,000,000 acres in round numbers—more than is contained in all Germany, Holland and Belgium, with their population of over fifty millions—more land than that of any single European State except Russia. The largest single grant—and it is a grant unparalleled in the history of the world—is that to the Northern Pacific, which aggregates 58,000,000 acres. And besides this these roads get 400 feet right of way (which in the case of the Northern Pacific amounts to 100,000 acres), what land they want for depots, stations, etc., and the privilege of taking material from Government land, which means that they may cut all the timber they wish off Government sections, reserving that on their own. With these later grants has also been inaugurated the plan of setting aside a tract on each side of the grant in which the companies may make up any deficiency within the original limits by reason of settlement. Thus the grant to the Southern Pacific withdraws from settlement a belt of land sixty miles wide in California and one hundred miles wide in the Territories, and that to the Northern Pacific withdraws a belt one hundred and twenty miles wide from the western boundary of Minnesota to Puget Sound and the Columbia River.

Since the day when Esau sold his birthright for a mess of pottage we may search history in vain for any parallel to such concessions. Munificence, we call it! Why, our common use of words leave no term in the English tongue strong enough to express such reckless prodigality. Just think of it! 25,600 acres of land for the building of one mile of railroad—land enough to make 256 good sized American farms; land enough to make 4,400 such farms as in Belgium support a family each in independence and comfort. And this given to a corporation, not for building a railroad for the Government or for the people, but for building a railroad for themselves; a railroad which they will own as absolutely as they will own the land—a railroad for the use of which both Government and people must pay as much as though they had given nothing for its construction.

The Value of These Grants.

If we look but a few years ahead, to the time when we shall begin to feel the pressure of a population of one hundred millions, the value of these enormous grants is simply incalculable. But their immediate value is greatly underestimated. Land was given to the first Pacific roads as though it had not and never would have any value. Money enough to build the roads and leave princely fortunes besides was placed in the hands of the companies and the land was thrown in as a liberal grocer might throw an extra lump of sugar into the already falling scale. Yet it is already apparent that by far the most valuable part of these franchises are these land grants. The timber which the Central Pacific gets in the Sierra will of itself yield more than the cost of the whole road. In addition, it has large amounts of good agricultural lands in California and along the Nevada river-bottoms, and millions of acres of the best grazing lands in the sage brush plains of Nevada and Utah, while there are thousands of acres of its lands which will have enormous value from the coal, salt, iron, lead, copper and other minerals they contain. The Union Pacific lands in the Platte Valley have, so far as sold, yielded it an average of $5 per acre; and though it gets no timber to speak of, it has millions of acres which will soon be valuable for grazing, and for a long distance its route passes through the greatest coal and iron deposits of the Continent, where much of its 12,600 acres per mile will in time be valued at thousands of dollars per acre.

Twenty years ago, when the Illinois Central received its grant, its lands were worth no more than those now given the Northern Pacific. Yet the lands sold by the Illinois Central have averaged over $12 per acre, and those yet remaining on hand are held at a still higher price. Counting at the Company's price what is held, the grant has yielded over $30,000,000—much more than the cost of the road. If *six* sections per mile will do this in twenty years, what should *forty* sections per mile do?

The Directors of the Northern Pacific have themselves estimated their grant to be worth $10 per acre on the completion of the road. I think they rather under than over estimated it, and for an obvious reason. A true statement of the real value of the grant would tend to discredit the whole affair in the eyes of the cautious foreign capitalists, from whom the Company seeks to borrow money, for they would not believe that any Government could be extravagant enough to make such a donation. But it must be remembered that the line of the Northern Pacific passes for nearly its whole length through as fine an agricultural country as that of Illinois; that its grant consists, in large part, of immensely valuable timber and mineral land, and that it will build up town after town, one of them at least, a great commercial city, on its own soil.

Furthermore, for reasons before stated, the increase in the value of land during the next twenty years must be much greater than it has been in the last twenty years. Taking these things into consideration, is it too much to say that in twenty years from now the lands of the Company will have sold for or will be worth an average of at least $20 per acre? At this rate the grant amounts to over *half a million dollars per mile*, or in the aggregate to the enormous sum of $1,160,000,000—a sum more than half the National debt. This donated absolutely to one corporation. And for what? For building a road which cannot cost more than eighty millions, and for building it for themselves!

No keener satire upon our land grant policy could be written than that which is to be found in the published advertisement of this Northern Pacific Company. The Directors show that if they get an average of but $2 per acre for their land, they can pay the whole cost of building and equipping the road and have a surplus of some $20,000,000 left. That is to say, the Government might have built the road by merely raising the average price of the lands $1 per acre, and have made a profit by the operation, while it would then own the road, and could give or lease it to the Company which would agree to charge the lowest rates. As it is, the Government has raised the price to settlers on one-half the land $1.25 per acre; the other half it has given to the Company to charge settlers just what it pleases; and then on this railroad which it has made the settlers pay for over and over again both Government and settlers must pay for transportation just as though the road had been built by private means.

The Argument for Railroad Grants.

So plausible and so ably urged are the arguments for these grants, such general acceptance have they gained, and so seldom are they challenged (for the opposition which has been made has been rather against the extravagance than the theory of the grants) that it is worth while to consider them with some care.

The plea for railroad land grants is about this: By giving land to secure the building of railroads, we develop the country without expense, or at least at the expense of those who largely profit by the operation. The land which we give is useless as it is; the railroad makes it useful and valuable. The Government giving really nothing of present value, does not even deprive itself of that which it might receive in the future, for it is reimbursed for the selling price of the land it gives by doubling the price of the land it retains. The Government in fact acts like a sagacious individual, who having an unsalable estate, gives half of it away to secure improvements which will enable him to sell the other half for as much as he at first asked for the whole. The settler is also the gainer, for land at $2.50 per acre with a railroad is worth more to him than land at $1.25 per acre without a railroad, and vast stretches of territory are opened to him to which he could not otherwise go for lack of means to transport his produce to market; while the country at large is greatly the gainer by the enormous wealth which railroads always create.

"Here are thousands of square miles of fertile land," cries an eloquent Senator, "the haunt of the bear, the buffalo and the wandering savage, but of no use whatever to civilized man, for there is no railroad to furnish cheap and quick communication with the rest of the world. Give away a few millions of these acres for the building of a railroad and all this land may be used. People will go there to settle, farms will be tilled and towns will arise, and these square miles, now worth nothing, will have a market and a taxable value, while their productions will stream across the continent, making your existing cities still greater and their people still richer; giving freight to your ships and work to your mills."

All this sounds very eloquent to the land grant man who stands in the lobby waiting for the little bill to go through which is make him a millionaire, and really convinces him that he is a benefactor of humanity, the Joshua of the hardy settler and the

Moses of the down-trodden immigrant. And backed up, as it is, by columns of figures showing the saving in railroad over wagon transportation, the rapidity of settlement where land grants have been already made, and the increase in the value of real estate, it sounds very plausible to those who have not anything like the reason to be as easily convinced as has the land grant man. But will it bear the test of examination? Let us see:

In the first place it must be observed that the consideration for which we make these grants is purely one of time—to get railroads built before they would otherwise be built. No one will seriously pretend that without land grants railroads would never be built; all that can be claimed is that without grants they would not be built so soon—that is, until the prospective business would warrant the outlay. This is what we get, or rather expect to get, for we do not always get it. What do we give? We give land. That is, we give the company, in addition to the power of charging (practically what it pleases) for the carrying it does, the unlimited power of charging the people who are to settle upon one-half the land for the privilege of settling there. If the Government loses nothing, it is because the settlers on one-half of the land must pay double price to reimburse it, while the settlers on the other half must pay just what the company chooses to ask them.

Now, in the course of the settlement of this land there comes a time when there are enough settlers, together with the prospective increase of settlers, to warrant the building of a railroad without a land grant. Admitting that the settlers who come upon the land before that time are gainers by the land grant in getting a railroad before they otherwise would,* it is evident that the settlers after that time are losers by the amount of the additional price which they must pay for their land, for *they* would have had a railroad anyhow.

And this point where the gain of settlers ceases, and the loss of settlers commences, is very much nearer the beginning of settlement—that is to say, there are fewer gainers and more losers, than might at first glance be supposed. For if there were no land grants at all, the land would be open to settlers as homesteads, or at $1.25 per acre, and therefore the number of actual settlers which would justify the construction of a non-land grant railroad would be very much smaller than that which would suffice to furnish a land grant railroad with a paying business, as the prospective increase during and upon the completion of the road would be very much greater.

So therefore, when, by giving a land grant, we get a railroad to precede settlement, if the first settlers gain at all, the others lose. The gain of the first is lessened by their having to pay double price for their lands; the loss of the others is mitigated by no gain. So that, as far as settlers are concerned, we are sacrificing the future for the present; we are taxing the many for the very questionable benefit of the few. And even in the case of the gainers, their first advantage in having a railroad before its natural time, is offset by the subsequent retardation of settlement in their neighborhood which the land grant causes.

For if the first effect of the land grant is to hasten settlement by getting a railroad built, its second effect is to retard it by enhancing the price of lands. Illinois, where the first railroad land grant was made, may in a year or two after, have had more people, but for years back her population has certainly been less because of it. For nearly half a million acres—one-fifth of this grant—remained unoccupied in 1870, the company holding it at an average price of $13 per acre. If this land could have been had for $1.25 per acre, it would have been occupied years ago. This is the case wherever land grants have been made, and long before the Territories in which we are now giving away 25,000 acres per mile for the building of railroads, are one-tenth settled, we will be asked to give away like amounts of other unappropriated territory (if there is any by that time left) in order to furnish "cheap homes to the settlers!"

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*But as to this it must be remembered, that the gain to the settler is not to be measured by the increased advantage which the railroad gives to the new land through which it is built, but by the difference in advantage which that land offers over the land on which he would otherwise have settled. Thus we cannot estimate the gain from the building of the Northern Pacific road to the people now settling along its route in Minnesota and Decotah by the saving in the cost of transportation of the produce of that land; for had the road not been projected, they would not have settled there. but would have settled in Iowa or Nebraska, where railroads are already built; and thus the gain they derive from the building of the Northern Pacific is not to be measured by the increased advantage which the railroad gives for the cultivation of the land on which they are settling, but by the advantage which the railroad gives that land over land in Iowa or Nebraska, on which they would otherwise have settled.

At first look, it would appear that all the people who go where a new railroad is built must gain something that they could not gain elsewhere, as otherwise they would not go there. This is doubtless true as regards such gain as inures to the individual without regard to other individuals, but not always true as regards such individual gain as is also a gain to the community. For some part of the population which accompanies the building of a railroad through an unsettled country, comes to minister to the needs and desires of those who build it, and is merely to be regarded as an appendage of the building force, and with many of the others the expectation of advantage is prospective and speculative. They settle in the new country which the road is opening up, not because their labor will yield them a larger return than in other places to which they might go, but because they can get choice locations or a larger amount of land, which population afterwards to come will make valuable. That, is the gain which they expect is not from the increased productiveness of their own labor, but from the appropriation of some portion of other people's labor—and is not a gain to the community, though it may be a loss.

Considering *all* the people who are to come upon our now unoccupied lands, weighing the near future with the present, is it not evident that the policy of land grants is a most ruinous one even in theory—even when we get by it that which we bargain to get? Let us see how it affects the community at large in the present.

Where a land grant is necessary to induce the building of a road, it is because the enterprise itself will not pay—that is to say, at least, that it will not yield as large a return for the investment as the same amount of capital would yield if invested somewhere else. The land grant is a subsidy which we give to the investers to make up this loss.

Is it not too plain for argument, that where capital is invested in a less remunerative enterprise than it otherwise would be, there is a loss to the whole community? Whether that loss is made up to the individuals by a subsidy or not, only affects the distribution of the loss among individuals—the loss to the community, which includes all its individuals, is the same.

But it will be said: Though this may be true so far as the direct returns of the railroad are concerned, there are other advantages from railroad building besides the receipts from fares and freights. The owners of the land through which the road passes, the producer and the consumer of the freight which it carries, and the passenger who rides upon it, are all benefited to an amount far exceeding the sums paid as fares and freights. When we give a land grant, we merely give the railroad company a share in these *diffused* profits, which will make up to it the loss which would accrue were it confined to its legitimate share. Thus: Here is a railroad, the business of which would not pay for building it for five years yet. The loss to the unsubsidized company which would build it now and run it for five years, would be $10,000,000. But the gain to land owners and others would be $100,000,000. Now, if by a land grant or otherwise, we secure to the railroad company a share of this collateral gain, amounting to $20,000,000, the railroad company will make a profit of $10,000,000, instead of a loss of $10,000,000, by building the road, and others would make a profit of $80,000,000.

But it must be remembered that every productive enterprise, besides its return to those who undertake it, yields collateral advantages to others. It is the law of the universe—each for all, and all for each. If a man only plant a fruit tree, *his* gain is that he gathers its fruit in its time and its season. But in addition to his gain, there is a gain to the whole community in the increased supply of fruit, and in the beneficial effect of the tree upon the climate. If he build a factory, besides his own profit he furnishes others with employment and with profit; he adds to the value of surrounding property. And if he builds a railroad, whether it be here or there, there are diffused benefits, besides the direct benefit to himself from its receipts.

Now, as a general rule, is it not safe to assume that the direct profits of any enterprise are the test of its *diffused* profits? For instance: It will pay to put up an ice-making machine rather in New Orleans than in Bangor. Why? *Because* there are more people in New Orleans who need ice, and they need it more than in Bangor. The individual profit will be greater, *because* the general profit will be greater. It will pay capitalists better to build a railroad between San Francisco and Santa Cruz than it will to build a like railroad in Washington Territory. Why? Because there are more people who will ride, and more freight to be carried, on the one than on the other. And as the diffused benefit of a railroad can only inure from the carrying of passengers and freight, is it not evident that the diffused benefit is greater in the one case than in the other, just in proportion as the direct benefit is greater?

In the second place, in any particular case in which we have to offer a subsidy to get a railroad built, the question is not, shall we have this railroad or nothing?—but, shall we have this road in preference to something else?—for the investment of capital in one enterprise prevents its investment in another. No legislative Act, no issue of bonds, no grant of lands, can create capital. Capital, so to speak, is stored-up labor, and only labor can create it. The available capital of the United States at any given time is but a given quantity. It may be invested here or it may be invested there, but it is only here *or* there that it can be invested. Nor is there any illimitable supply abroad to borrow from. The amount of foreign capital seeking investment in the United States is about so much each year; and if by increasing our offers we get any more, we must pay more, not merely for the increased amount which we get, but for all which we get.

To recur, now, to our former example: Here is a railroad through an unsettled country, which to build now would, relying upon its direct receipts, entail a loss of $10,000,000, the diffused benefits of which may be estimated at $100,000,000. Here is another railroad which it would take the same capital to build, which, in the same time, would yield a direct profit of $5,000,000, and the diffused benefits of which it is fair to presume might be expressed by $300,000,000. Now if we offer to the builders of the first road a land grant which will enable them to obtain one-fifth of the diffused benefits of the road, we could induce them to build that road rather than the other, for they would make twice as much by doing so. But what would be the net result to the community? Clearly a loss of $215,000,000. That is to say: By offering a land grant we could induce capitalists to build a road in Washington Territory, rather than between San Francisco and Santa Cruz. But if we did do so, the people between San Francisco and Santa Cruz would lose far more than the capitalists and the Washington Territory settlers would gain; the people of the Pacific Coast, as a whole, and the United States, as a whole, would be poorer than if we had left capital free to seek the investments which would of themselves return to it the largest profits.

The comparison between an individual and the nation is fallacious. The one is a part, the other is the whole. The individual lives but a few years, the lifetime of the nation is counted by centuries. It may profit an individual to induce people to settle or capital to be invested in certain places; the nation can only profit by having its population and its capital so located and invested that the largest returns will be realized. It may profit an individual to sacrifice the near future to the present, but it cannot profit a nation.

As concerns the statistics by which the benefits of land grant railroads are attempted to be shown, it must be remembered, first, that the population of the United States is growing at the rate of a million per year, and next, that increase in the value of land is not increase in wealth. That whatever population railroads have brought to new States and Territories is dispersion, not increase, is proven by the fact that the population of the United States is not increasing faster than it did before railroad building commenced, while the slightest consideration of economic laws shows that whatever gain has resulted from their building is at the expense of a greater gain which would have resulted from the investment of the same capital where it was more needed—in fact, that there is no gain, but a loss. We have been supposing that land grants secure the consideration for which they are given—the building of roads before they would otherwise be built; but this is far from being always the case. With the exception, perhaps, of the little Stockton and Copperopolis road, the California grants have not hastened the building of railroads, but have actually retarded it, by retarding settlement. The fact is, that in nearly all cases these land grants are made to men who do not propose, and who have not the means, to build the road. They keep them (procuring extensions of time, when necessary*) until they can sell out to others who wish to build, and who, on their part, generally delay until they can see a profit in the regular business.

To sum up: When we give a land grant for the building of a railroad, we either get a railroad built before it would be built by private enterprise, or we do not.

If we do not, our land is given for nothing; if we do, capital is diverted from more to less productive investments, and we are the poorer for the operation.

In either case the land grant tends to disperse population; in either case it causes the monopolization of land; in either case it makes the many poorer, and a few the richer.

I have devoted this much space to answering directly the argument for railroad land grants, because they are constantly urged, and are seldom squarely met, and because so long as we admit that we may profit by thus granting away land in "reasonable amounts," we shall certainly find our lands going in "unreasonable amounts." But surely it requires no argument to show that this thing of giving away from twelve to twenty-five thousand acres per mile of road in order to get people to build a railroad for themselves, is a wicked extravagance for which no satisfactory excuse can be made. This land, now so worthless that we give it away by the million acres without a thought, is only worthless because the people who are to cultivate it have not yet arrived. They are coming fast—we have seen how fast. While there is plenty of uncultivated land in the older States we are giving away the land in the Territories under the plea of hastening settlement, and when the time comes that these lands are really needed for cultivation, they will all be monopolized, and the settler, go where he will, must pay largely for the privilege of cultivating soil which since the dawn of creation has been waiting his coming. We need not trouble ourselves about railroads; settlement will go on without them—as it went on in Ohio and Indiana, as it has gone on since our Aryan forefathers left the Asiatic cradle of the race on their long westward journey. Without any giving away of the land, railroads with every other appliance of civilization will come in their own good time. Of all people, the American people need no paternal Government to direct their enterprise. All they ask is fair play, as between man and man; all the best Government can do for them is to preserve order and administer justice.

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* Congress, in 1870, actually passed a bill extending the time for the completion of the first 20 miles of Western road to which a land grant was made in 1853.

There may be cases in which political or other non-economic reasons may make the giving of a subsidy for the building of a road advisable. In such cases, a money subsidy is the best, a land subsidy the worst. But if the policy of selling our lands is continued, and it is desirable to make the payment of the subsidy contingent upon the sale of the land, then the proceeds of the land, not the land itself, should be granted.

There is one argument for railroad land grants which I have neglected to notice. Senator Stewart pleads that these grants have kept the land from passing into the hands of speculators, who would have taken more than the railroad companies, and have treated the settlers less liberally than the companies. Perhaps he is right; there is certainly some truth in his plea. But if he is right, what does that prove? Not the goodness of railroad grants; but the badness of the laws which allow speculation in the public lands.

II.

THE LANDS OF CALIFORNIA.

How Far Land Monopolization has already Gone.

In all the new States of the Union land monopolization has gone on at an alarming rate, but in none of them so fast as in California, and in none of them, perhaps, are its evil effects so manifest.

California is the greatest land State in the Union, both in extent (for Texas owns her own land) and in the amount of land still credited to the Government in Department reports. With an area of 188,981 square miles, or, in round numbers, 121,000,000 acres, she has a population of less than 600,000—that is to say, with an area twenty-four times as large as Massachusetts, she has a population not half as great. Of this population not one-third is engaged in agriculture, and the amount of land under cultivation does not exceed 2,500,000 acres. Surely land should here be cheap, and the immigrant should come with the certainty of getting a homestead at Government price! But this is not so. Of the 100,000,000 acres of public land which, according to the last report of the Department, yet remain in California (which of course includes all the mountains and sterile plains), some 20,000,000 acres are withheld from settlement by railroad reservations, and millions of acres more are held under unsettled Mexican grants, or by individuals under the possessory laws of the State, without color of title. Though here or there, if he knew where to find it, there may be a little piece of Government land left, the notorious fact is that the immigrant coming to the State to-day must, as a general thing, pay their price to the middlemen before he can begin to cultivate the soil. Although the population of California, all told—miners, city residents, Chinamen and Diggers—does not amount to three to the square mile; although the arable land of the State has hardly been scratched (and with all her mountains and dry plains California has an arable surface greater than the entire area of Ohio), it is already so far monopolized that a large part of the farming is done by renters, or by men who cultivate their thousands of acres in a single field. For the land of California is already to a great extent monopolized by a few individuals, who hold thousands and hundreds of thousands of acres apiece. Across many of these vast estates a strong horse cannot gallop in a day, and one may travel for miles and miles over fertile ground where no plow has ever struck, but which is all owned, and on which no settler can come to make himself a home, unless he pay such tribute as the lord of the domain chooses to exact.

Nor is there any State in the Union in which settlers in good faith have been so persecuted, so robbed, as in California. Men have grown rich, and men still make a regular business of blackmailing settlers upon public land, or of appropriating their homes, and this by the power of the law and in the name of justice. Land grabbers have had it pretty much their own way in California—they have moulded the policy of the General Government; have dictated the legislation of the State; have run the land offices and used the Courts.

Let us look briefly at the modes by which this land monopolization has been carried on.

The Mexican Grants.

California has had one curse which the other States have not had*—the Mexican grants. The Mexican land policy was a good one for a sparsely settled pastoral country, such as California before the American occupation. To every citizen who would settle on it, a town lot was given; to every citizen who wanted it, a cattle range was granted. By the terms of the cession of California to the United States it was provided that these rights should be recognized.

It would have been better, far better, if the American Government had agreed to permit these grant-holders to retain a certain definite amount of land around their improvements, and compounded for the rest the grants called for, by the payment of a certain sum per acre, turning it into the public domain. This would have been best, not onlyfor the future population of California, but for the grant-holders themselves as the event has proved.

Or, if means had been taken for a summary and definite settlement of these claims, the evils entailed by them would have been infinitesimal compared with what have resulted. For it is not the extent of the grants (and all told the *bona fide* ones call for probably nine or ten million acres of the best land of California) which has wrought the mischief, so much as their unsettled condition—not the treaty with Mexico, but our own subsequent policy.

It is difficult in a brief space to give anything like an adequate idea of the villainies for which these grants have been made the cover. If the history of the Mexican grants of California is ever written, it will be a history of greed, of perjury, of corruption, of spoliation and high-handed robbery, for which it will be difficult to find a parallel.

The Mexican grants were vague, running merely for so many leagues within certain natural boundaries, or between other grants, though they were generally marked out in rough fashion. It is this indefiniteness which has given such an opportunity for rascality, and has made them such a curse to California, and which, at the same time, has prevented in nearly all cases their original owners from reaping from them any commensurate benefit. Between the Commission which first passed upon the validity of the grants and final patent, a thousand places were found where the grant could be tied up, and where, indeed, after twenty-three years of litigation the majority of them still rest. Ignorant of the language, of the customs, of the laws of the new rulers of their country, without the slightest idea of technical subtleties and legal delays, mere children as to business—the native grant-holders were completely at the mercy of shrewd lawyers and sharp speculators, and at a very early day nearly all the grants passed into other hands.

How the Grants Float.

As soon as settlers began to cultivate farms and make improvements, the grants began to float. The grant-holders watched the farmers coming into their neighborhood, much as a robber chief of the Middle Ages might have watched a rich Jew taking up his abode within striking distance of his castle. The settler may have been absolutely certain that he was on Government land, and may even have been so assured by the grant-holder himself; but so soon as he had built his house and fenced his land and planted his orchard, he would wake up some morning to find that the grant had been floated upon him, and that his land and improvements were claimed by some land shark who had gouged a native Californian out of his claim to a cattle run, or wanting an opportunity to do this, had set up a fraudulent grant, supported by forged papers and suborned witnesses. Then he must either pay the blackmailer's price, abandon the results of his hard labor, or fight the claim before Surveyor-

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*The Territory of New Mexico is afflicted in the same way.

General, Courts, Commissioner, Secretary, and Congress itself, while his own property parceled out into contingent fees, furnished the means for carrying the case from one tribunal to another, for buying witnesses and bribing corrupt officials. And then, frequently, after one set of settlers had been thus robbed, new testimony would be discovered, a new survey would be ordered, and the grant would stretch out in another direction over another body of settlers, who would then suffer in the same way, while in many cases, as soon as one grant had been bought off or beaten away, another grant would come, and there are pieces of land in California for which four or five different titles have been purchased.

The ruling of the Courts has been, that so long as the grants had not been finally located, their owners might hold possession within their exterior boundaries and eject settlers. Thus, if a grant is for one league, within certain natural boundaries which include fifty, the claimant can put settlers off any part of the fifty leagues.

Whenever any valuable mine or spring is discovered in the neighborhood of any of these grants, then the grant jumps. If they prove worthless, then it floats back again. Thus the celebrated Mariposa claim, after two or three locations in the valley, was finally carried up into the mountains, where it had as much business as it would have had in Massachusetts or Ohio, and stretched out into the shape of a boot, to cover a rich mining district. Among the property given to John Charles Fremont and his partners, by this location, was the Ophir mine and mill, upon which an English Company had spent over $100,000, after assurances from the Mariposa people that the mine was outside their claim. In the southern half of California, where these grants run, there has been hardly a valuable spring or mine discovered that was not pounced upon by a grant. One of the latest instances, was the attempt to float the Cuyamaca grant over the new San Diego mining district, and to include some sixty-five mines—one of them, the Pioneer, on which $200,000 has been expended. Another was the attempt to float a grant over the noted Geyser Springs, in Sonoma county. In both these cases the attempt was defeated, General Hardenburgh refusing to approve the surveys. In the latter case, however, it was dog eat dog, the great scrip locator, W. S. Chapman, having plastered a Sioux warrant over the wonderful springs. He has since obtained a patent, though I understand that somebody else laid a school land warrant on the springs before Chapman.

How the Grants are Stretched Out.

Hardly any attention seems to have been paid to the amount of land granted by the Mexican authorities. Though, under the colonization laws, eleven leagues (a Mexican league contains 4,438 acres) constituted the largest amount that could be granted, many of these grants have been confirmed and patented for much more (in the teeth of a decision of the United States Supreme Court) and under others yet unsettled, much larger amounts are still held. Grants for one league have been confirmed for eleven. Claims rejected by the Commission have been confirmed by the District Courts, and claims rejected by other decisions of the Supreme Court have been got through by the connivance of law officers of the Government who would suffer the time for appeal to lapse or take it so that it would be thrown out on a technicality.

As for the surveys they might almost as well have been made by the grant holders themselves, and seem, as a general thing, to have run about as the grant holders wished. The grants have been extended here, contracted there, made to assume all sorts of fantastic shapes, for the purpose of covering the improvements of settlers and taking in the best land. There is one of them that on the map looks for all the world like a tarantula—a fit emblem of the whole class. In numbers of cases the names of which might be recited, grants of four leagues have been stretched in the survey to eight; grants of two leagues to six; grants of five to ten; and in one case it has been attempted to stretch one league to forty. In one case, the Saucal Redondo, where a two-league grant had been confirmed to five, and a survey of 22,190 acres made, a new survey was ordered by a clerk of the Surveyor-General, and a survey taking in 25,000 acres more of United States land covered by settlers *was made and fixed up in the office;* and it was not until after some years litigation before the Department that this fact was discovered. In some cases speculators who were "on the inside" would buy from a Spanish grantee the use of the name of his claim, and get a new survey which would take in for them thousands of acres more. The original claimant of Rancho la Laguna asked for three leagues, or 13,314 acres; the survey was made and confirmed for 18,000. Afterwards it was set aside, on the pretense that the Santa Barbara paper, in which the advertisement of survey had been published, was printed for part of the time in San Francisco, and a survey taking in 48,703 acres made, which, after being rejected by Commissioner Edwards, was patented by Commissioner Wilson. The Rancho Guadaloupe, a grant of 21,520 acres, was surveyed for 32,408 acres in 1860, the survey approved, a patent issued, and the ranch sold. Now the new owner, supported by an affidavit from the surveyor that objection was made to the 32,000-acre survey in 1860 by the two Mexican owners (one of whom died in 1858) is trying to get a new survey confirmed which takes in 11,000 acres more. The survey of Los Nogales was made in 1861, under a decree for one league and no more, and now an application for a new survey which will include 11,000 acres more is being pushed. The land is covered by settlers.

The Big Grape Vine Rancho.

Perhaps the most daring attempt to grab lands and rob settlers under pretense of a Mexican grant—so daring that it has almost a touch of the comic, is the case of Los Prietos y Najalayegua, which was shown up first in a little pamphlet by James F. Stuart, of San Francisco, and afterwards in Congress by Mr. Julian, to whom the settlers of California are indebted for many signal services. In Santa Barbara county there is living an old Mexican, named José Dominguez, on whose little ranch grows an immense grape-vine. In the old times Dominguez had petitioned for another tract of land of about a league and a half, but he neglected to comply with the conditions, and sold it for the sum of one dollar. In fact he seems to have sold it twice. Finally the claim passed into the hands of Thomas A. Scott, the Pennsylvania railroad king, and Edward J. Pringle, of San Francisco. It had never been presented to the United States Commission, and was consequently barred. But in 1866 a bill confirming the grant, and accompanied by a memorial purporting to be from Dominguez, but which Dominguez swears he never saw, was introduced by Mr. Conness, and slipped quietly through, under pretense of giving the old man with his sixty children and grand-children, the big grape-vine which his mother had planted.

The bill was assisted in the House by the reading of a letter from Mr. Levi Parsons, in which a visit to the Mexican Patriarch and his great grape-vine, the only support of a greater family, was most touchingly described, and the intervention of Congress asked as a matter of justice and humanity. Then came the survey; and the speculators, emboldened by their success with Congress, went in for a big grab, taking in the modest amount of 208,742 acres*—a pretty good dollar's worth of land, considering that it included many valuable farms and vineyards. They asked too much, for an outcry was made and a resurvey was ordered, which is now pending.

Bogus Grants.

The real grants have been bad enough, the bogus grants have been worse. Their manufacture commenced early—the signatures of living ex-Mexican officials being sometimes procured. Of this class was the famous Limantour claim to a great portion of San Francisco. It was finally defeated, but not until a large amount had been paid to its holders, and enormous expenses incurred in fighting it. Many of these claims have been pressed to final patent, and settlers driven from their homes by Sheriff's posses or the bayonets of the United States troops. Others have only been used for purposes of blackmail, the owners of threatened property being compelled to remove the shadow from their title when obliged to borrow or to sell, and finding it cheaper to pay the sums asked than to incur the expense of long and tedious litigation, many steps in which had to be taken in Washington.

Thanks to the possessory law of the State, as interpreted by State Courts, where the holders of a bogus claim secure possession they have been all right as long as they could delay final action. After the action of the District Court five years are allowed for appeal to the Supreme Court, and then a smart attorney can easily keep the case hanging from year to year. In one case where a modest demand for some forty leagues was rejected, because in forging the Mexican seal on the grant, the head of the cactus-mounted eagle had been carelessly put where his tail ought to be, the appeal has been kept at the foot of the docket for years, while the claimants are enjoying the land just as fully as if they had paid the Government for it, and are actually selling it to settlers who know the claim to be fraudulent, at from $2 to

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*The survey was not strictly official, though made by a United States Deputy, he having reported that the calls were uncertain, and the grantees asking a survey according to their views.

$10 per acre. If the Supreme Court ever does reach the case, the appeal will be dismissed. A new motion will then be made, and finally, when all the law's delay are exhausted, the settlers will have to pay the Government $1.25 per acre for the land. In the meantime they cannot get it without paying his price to the holder of this notoriously fraudulent claim.

It has at all times been within the power of Congress to end this uncertainty as to land titles, and settle these Mexican claims. There has been a great deal of legislation on the subject, but somehow or other it has always turned out for the benefit of the land grabbers. Modes of procedure have been changed; cases have been thrown from the Courts into the Land Offices; from the Land Offices back to the Courts, and then from the Courts back to the Land Offices again. Always some excuse for delay; always some loophole in the law, through which the land grabber could easily pass, but in which the settler would be crushed. The majority of these Mexican grants are yet unsettled. Their owners do not want them settled so long as they can hold thousands of acres more than they have a shadow of claim to, and delay as much as possible. These are cases where the last step to secure patent can be taken at any time, by the making of a motion or the payment of a fee; but which are suffered to remain in that condition, while in the meantime the claim holders are selling quitclaim deeds to settlers, for land which their patents would show they do not own.

The Pueblo of San Francisco.

For the injuries which these Mexican grants have done to California, the Mexican land policy is not responsible. That merely furnished the pretext under cover of which *our* policy has fostered land monopolization. What of the Mexican policy was bad under our different conditions, we have made infinitely worse; what would still have been good, we have discarded. The same colonization laws under which these great grants were made gave four square leagues to each town in which to provide homes for its inhabitants, the only conditions being good character and occupancy. The American city of San Francisco, as the successor of the Mexican pueblo, came into a heritage such as no great city of modern times has enjoyed—land enough for a city as large as London, dedicated to the purpose of providing every family with a free homestead. Here was an opportunity to build up a great city, in which tenement houses and blind alleys would be unknown; in which there would be less poverty, suffering, crime and social and political corruption than in any city of our time, of equal numbers. This magnificent opportunity has been thrown away, and with the exception of a great sand bank, the worst that could be found, reserved for a park, and a few squares reserved for public buildings, the heritage of *all* the people of San Francisco been divided among a few hundred. Of the successive steps, culminating in the United States law of 1866, by which this was accomplished, of the battles of land grabbers to take and to keep, and of the municipal corruption engendered, it is not worth while here to speak. The deed is done. We have made a few millionaires, and now the citizen of San Francisco who needs a home must pay a large sum for permission to build it on land dedicated to his use ere the American flag had been raised in California.

The Railroad Grants of California.

The grants made to railroads of public lands in the State of California are: The grant to the Western Pacific and Central Pacific, of ten alternate sections on each side per mile, (12,800 acres,) made to half that amount in 1862, and doubled in 1864; the grants to the Southern Pacific and to the California and Oregon, of ten alternate sections on each side, with ten miles on each side in which to make up deficiencies, made in 1866; the grant to the Stockton and Copperopolis, of five alternate sections on each side, with twenty miles on each side in which to make up deficiencies, made in 1867; the grants to the Texas Pacific* and to the connecting branch of the Southern Pacific, of ten alternate sections on each side, with ten miles for deficiencies, made in 1871. A grant was also made in 1866 to the Sacramento and Placerville road, but the idea of building the road was abandoned, and the grant has lapsed.

Upon the map of California, opposite page 1, the reservations for these grants are marked in red. This marking does not show the *exact* limits of the reservations, as they follow the rectilinear section lines, which it is, of course, impossible to show on so small a scale—nor are the routes of the roads *precisely* drawn. But it gives a perfectly correct idea of the extent and general course of these reservations. The exhibit is absolutely startling—a commentary on the railroad land grant policy of Congress to the force of which no words can add. Observe the proportion which these reservations bear to the total area of the State, and observe at the same time the topography of California—how the railroad reservations cover nearly all the great central valleys, and leave but the mountains, and you may get an idea of how these reservations are cursing the State.

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*Between the line of the road and the Mexican boundary this Company gets all the public land.

It is true that the companies do not get all of the land included in these reservations, nor even half of it; but for the present, at least, so far as the greater part of it is concerned, they might as well get it all. Pre-emption, or homestead settlers may still go upon the even sections, but the trouble is to find them. The greater part of this land is unsurveyed, or having been once surveyed, the *vaqueros*, who share in the prejudices of their employers against settlers, have pulled up the stakes, and the settler cannot tell whether he gets on Government or on railroad land. If on Government land, he is all right, and can get 80 acres for $22, as a homestead; or 160 acres for $400 by pre-emption. But it is an even chance that he is on railroad land, and if so, he is at the mercy of a corporation which will make with him no terms, in advance. Settlers will not take such chances.

These railroad grants have worked nothing but evil to California. Though given under pretext of aiding settlement, they have really retarded it. Of all the roads ever subsidized in the United States, the Central Pacific is the one to which the giving of a subsidy is the most defensible. But so large was the subsidy, in money and bonds, that the road could have been built, and would have been built, just as soon without the land grant. The Western Pacific land grant became the property of a single individual, who did nothing towards building the road—the Company that did build the road (the Central), buying the franchise minus the land grant. The Southern Pacific land grant has actually postponed the building of a road southward through California, and had the grant never been made, it is certain that an unsubsidized road would already have been running further into Southern California than the land grant road yet does. Of the California and Oregon land grant, the same thing may be said. The Stockton and Copperopolis grant was made in 1867, but the building of the road has only been commenced this year. And it is exceedingly probable that had this land been open to settlers, the business, actual and prospective, would by this time have offered sufficient inducements for the building of the road.

All these land grants with the exception perhaps, of that from the Eastern boundary to San Diego, and with the exception of the Western Pacific grant, are owned by a single firm, who also own all the railroads in California, having bought what they did not build.

It is generally argued when land grants are made, that it is to the interest of the companies to sell their lands cheaply, because settlement will bring them business. But the land grant companies of California seem in no hurry to sell their lands, preferring to wait for the greater promise of the future. Neither the Southern Pacific nor the California and Oregon will make any terms with settlers until their lands are surveyed and listed over to them. It is, of course, to their interest to have the Government sections settled first, and to reserve their own land for higher prices after the Government land is gone. The Central Pacific advertises to sell good farming land for $2.50 per acre; but when one goes to buy good farming land for that price, he finds that it has been sold to the Sacramento Land Company, a convenient corporation, which stands to the Company in its land business just as the Contract and Finance Company did in the building of the road.

Private Entry and Scrip Locations.

Large bodies of the public lands of California were offered at public sale long before there was any demand for them. When the failure of placer mining directed industry towards agriculture, and the beginnings of the railroad system led to hopes of a large immigration, these lands were gobbled up by a few large speculators, by the hundred thousand acres. The larger part of the available portion of the great San Joaquin Valley went in this way, and the process has gone on from Siskiyou on the north to San Diego on the south.

According to common report, the speculators have received every facility in the Land Offices. While the poor settler who wanted a farm would have to trudge off to look at the land himself, the speculator or his agent had all the information which could be furnished. Land which had never been sold or applied for, would be marked on the maps as taken, in order to keep it from settlers and reserve it for speculators;

and in some cases, it is even said that settlers selecting land and going to the Land Office to apply for it, would be put off for a few minutes while the land they wanted would be taken up in behalf of the speculator, and then they would be referred to him, if they desired to purchase.

A great deal of this land has been located with the Agricultural College scrip of Eastern States, bought by the speculators at an average of about fifty cents per acre, in greenbacks, when greenbacks were low, and sold or held at prices varying from $4 to $20 per acre, in gold. Whole townships have been taken up at once in this way; but the law was amended in 1867, so that only three sections in the same township can now be located with this scrip. The Agricultural scrip of California has been sold at about $5 per acre, having special privileges.

The Act of last year, making this California scrip locatable on unsurveyed land, within railroad reservations, etc., is a good sample of the recklessness of Congressional legislation on land matters. It is so loosely drawn that by the purchase of forty acres a speculator can tie up a whole township. The Land Agent of the University has only to give notice to the United States Register that he has an application for land (without specifying amount or locality) in a certain township, and the Register must hold the plats of survey for sixty days after their return. Should a pre-emptor go on before this time, there is nothing to prevent the speculator from swooping down upon him and asserting that *his* farm is the particular piece of ground he wanted. Happily, nearly all this scrip will be used for locating timber land, for which the scrip of other States is not available, as it can only be located on surveyed land, and the surveyed timber land has long since been taken up.

Besides the Agricultural scrip, a large amount of Half Breed scrip has been located by speculators. This scrip was issued to Indians in lieu of their lands, and was made by law locatable only by the Indians themselves, and though the speculators pretended to locate as the attorneys of the Indians, the location was illegal. However, it was made, and patents have been issued.

In this way millions of acres in California have been monopolized by a handfull of men. The chief of these speculators now holds some 350,000 acres, while thousands and thousands of acres which he located with scrip or paid $1.25 per acre for, have been sold to settlers at rates varying from $5 to $20 per acre, the settlers paying cash enough to clear him and leave a balance, and then giving a mortgage for and paying interest on the remainder; and a large quantity of his land is rented—cultivators furnishing everything and paying the landlord one-fourth of their crop.

And as has been the case in all the methods of land monopolization in California, these scrip locations have been used not only to grab unoccupied lands, but to rob actual settlers of their improved farms. In one instance a large scrip speculator got a tool of his appointed to make the survey of a tract of land in one of the southern counties which had been long occupied by actual settlers. This Deputy Surveyor persuaded the settlers that it would be cheaper for them to get a State title to their lands than to file pre-emption claims, and they accordingly proceeded to do this. But as the clock struck nine, and the doors of the Land Office in San Francisco were thrown open on the morning the plats were filed, another agent of the speculator entered with an armful of scrip which he proceeded to plaster over the settlers' farms.

Management of the California State Lands.

We have seen what Federal legislation have done to inflict the curse of land monopoly upon California. Let us now see what has been done by the State herself. We shall find that reckless as have been the dealings of the General Government with our lands, the dealings of the State have been even worse.

And here let it be remarked that for most of these wrong acts of the Federal Government, the people of California are themselves largely responsible. For the manifestation public of a strong sentiment here could not have failed to exert great influence upon Congress. But, for instance, instead of objecting to railroad grants, we have, for the most part, hailed them as an evidence of Congressional liberality; and when the Southern Pacific had once forfeited its grant, the California Legislature asked Congress to give it back without suggesting a single restriction on the sale or management of the lands. In 1870, a bill actually passed the House reserving the public lands of California for homestead entry, as the lands of the Southern States had been reserved, but it went over in the Senate on the objection of Senator Nye, of Nevada. There is little doubt that the manifestation of a strong desire on our part, would, at any time, secure the passage of such a bill.

The specific grants made to California, in common with other land States, which have been before enumerated, amount to an aggregate of 7,421,804 acres—an area almost as large as that of Massachusetts and Connecticut combined. Besides these grants, all the swamp lands are given to the State for purposes of reclamation, of which 3,381,691 acres have already been sold—about all there is.

These large donations have proved an evil rather than a benefit to the people of California; for in disposing of them, the State has given even greater facilities for monopoly than has the Federal Government, and the practical effect of the creation of two sources of title to public land has been to harass settlers and to give opportunity for a great deal of robbery and rascality.

The land policy of the State of California must be traced through some thirty-five or forty Acts, in whose changes and technicalities the non-expert will soon become bewildered. It is only necessary here to give its salient features.

It must be understood in the first place that the only grant of specific pieces of land is that of the 16th and 36th sections of each township. When these are occupied or otherwise disposed of, other sections are given in lieu of them. These lieu lands, as well as the lands granted in specific amounts, the State has had the privilege of taking from any unappropriated Government land, the ownership of the swamp lands being decided by the nature of the land itself. With this large floating grant, as it may be termed, the general policy of the State has been, not to select the lands and then to sell them, but in effect to sell to individuals its right of selection.

Now, under the general laws of the United States, until land is offered at public sale, there is no way of getting title to it save by actual settlement, and then in tracts of not over 160 acres to each individual. And though since 1862 the pre-emption right has applied to unsurveyed lands, yet until land is surveyed and the plats filed, the settler can make no record of his pre-emption.

To this land thus reserved by the general laws for the small farms of actual settlers, the State grants gave an opportunity of obtaining title without regard to settlement or amount—an opportunity which speculators have well improved. In defiance of the laws of the United States, and even of the Act admitting California into the Union, the State at first sold even unsurveyed land, a policy which continued until the Courts declared it illegal in 1863. In 1852, to dispose of the 500,000-acre grant (which the Constitution of the State gave to the School Fund) warrants were issued purchasable at $2 per acre in depreciated scrip, and locatable on any unoccupied Government land, surveyed or unsurveyed. These warrants, however, were not saleable to any one person in amounts of more than 640 acres, and the buyer had to make affidavit that he intended to make permanent settlement on the land. But as the warrants were assignable, and affidavits cheap, these restrictions were of but little avail. Passing for the most part into the hands of speculators, the warrants enabled them to forestall the settler and even in many cases to take his farm from him; for though by the terms of the law the warrants could only be laid on unoccupied land, yet when once laid, they were *prima facie* evidence of title, and the difficulty could be got over by collusion with county officers and false affidavits. These school land warrants have been a terror to the California settler, and many a man who has made himself a home, relying upon the general laws of the Federal Government, has seen the results of his years of toil and privation pass into the hands of some soulless cormorant, who, without his knowledge, had plastered over his farm with school land warrants. The law under which the warrants were issued was repealed in 1858, and the policy adopted of selling the State title to applicants for land, in amounts not to exceed 320 acres to each individual, at the rate of $1.25 per acre, payable either in cash, or twenty per cent. in cash, and the balance on credit with interest at 10 per cent. The 16th and 36th sections, or the lands in lieu of them, were at first given to the respective townships, to be sold for the benefit of the Township School Fund; but were afterwards made saleable as other lands for the benefit of the General Fund.

The swamp lands were from the first made salable in tracts not exceeding 320 acres to each person, for $1 per acre, cash or credit, the proceeds to be applied to the reclamation of the land, under regulations varied by different laws, from time to time. This was virtually giving them away—the true policy; but the trouble is that for the most part they have been given to a few men.

Up to 1868, the State had always, in words at least, recognized the principle that one man should not be permitted to take more than a certain amount of land; but by the Act of March 28th, of that year, which repealed all previous laws, and is still, with some trifling amendments, the land law of the State, all restrictions of amount, except as to the 16th and 36th sections proper, were swept away; and with reference to those lands, the form of affidavit was so changed that the applicant was not required to swear that he wanted the land for settlement, or wanted it for himself. This Act, has some good features; but from enacting clause to repealing section, its central idea seems to be the making easy of land monopolization, and the favoring of speculators at the expense of settlers. In addition to sweeping away the restrictions as to amount and to use, it provided that the settlers upon the 16th and 36th sections should only be protected in their occupancy for six months after the passage of the Act, after which the protection should only be for sixty days, and changed the affidavit previously required, from a denial of other settlement to a denial of valid adverse claim. Under this provision a regular business has been driven in robbing settlers of their homes. Unless a new law is very generally discussed in the newspapers (and land laws seldom are), it takes a long time for the people to become acquainted with it; and there were many settlers on State land who knew nothing of the limitation until they received notification that somebody else had possession of a clear title to their farms. Did space permit, numbers of cases of this kind of robbery might be cited—some of them of widows and orphans, whose all was ruthlessly taken from them; but I will confine myself to one case of recent occurrence, where the looked for plunder is unusually large.

The town of Amador, and the very valuable Keystone Mine, are situated on the east half of a 36th section. The survey which developed this fact was only made in the early part of the present year. The Deputy Surveyor, who was evidently in the plot, returned to the United States Land Office the plat of the township, with the mine and the town marked in the west half. Application was at the same time made to the State Surveyor-General, in the name of Henry Casey, for the east half. In regular course, the Surveyor-General sent the application to the United States Land Office, whence it was returned, with a certificate that the land was free; whereupon, the Surveyor-General approved the application, and twenty-five cents per acre was paid the State. And thus for $80 cash, and $32 per annum interest, a little knot of speculators have secured title to the Keystone Mine, worth at least a million dollars, and the whole town of Amador, besides.

And as further evidence of the recklessness of California land legislation, and of the lengths to which the land grabbers are prepared to go, two facts may be cited: The last Legislature, instead of repealing or removing the objectionable features from this Green law, actually passed a special bill legalizing all applications for State lands, even where the affidavits by which they were supported did not conform to the requirements of the law, *either in form or in substance*. After this had been passed, on the last day of the session a bill was got through and was signed by the Governor, designed to restrict applicants for lieu lands to 320 acres. But after the Legislature had adjourned, when the Act came to be copied in the Secretary of State's office, lo, and behold! it was discovered that the engrossed and signed copy did not contain this provision.

Yet, to understand fully what a premium the State has offered for the monopolization of her school lands, there is another thing to be explained. To purchase land of the State, an application must be filed in the State Land Office, describing the land by range, township and section, and stating under what grant the title is asked. This application must be accompanied by a fee of five dollars. The Surveyor-General then issues a certificate to the applicant, and sends the application to the United States Land Office, for certification that the land is free, before he approves the application and demands payment for the land. If there be no record in his office, of pre-emption, homestead or other occupation, the United States Register thereupon marks the land off on his map, but he does not certify to the State Surveyor-General until he gets his fee. The State Surveyor-General has no appropriation to pay the fee, although the present incumbent asked for one in his first report; and so the payment of the fee and the return of the United States certificate depend upon the applicant, whose interest it is, of course, not to get it until he wishes to pay for his land. And thus, by the payment of five dollars, a whole section of United States land can be shut up from the settler. There are 1,244,696 acres monopolized in California to-day in this way. For thousands and thousands of the acres which are offered for sale on California and Montgomery streets there is no other title than the payment of this five dollars. When the immigrant buys of the speculator for two, five, ten or twenty dollars an acre, as the case may be, then the speculator goes to the United States Land Office, pays the Register's fee, gets his certificate and the State Surveyor-General's approval, and pays the State $1.25 per acre; or, if with the immigrant he has made a bargain of that kind, he pays twenty-five cents per acre, and leaves his purchaser to pay the dollar at some future time, with interest at ten per cent.

Swamp Land Grabbing.

And as the speculator has had a far better opportunity in dealing with the State than with the United States, there has been every inducement to get as much land as possible under the jurisdiction of the State, by declaring it swamp land. The certificate of United States officers as to the character of the land has not been waited for; but the State has sold to every purchaser who would get the County Surveyor to segregate the land he wanted, and procure a couple of affidavits as to its swampy character. Probably one-half of the land sold (or rather given, as the money is returned) by the State as swamp, is not swamp at all, but good dry land, that has been sworn to as swamp, in order to take it out of the control of the pre-emption laws of the United States. The State has been made the catspaw of speculators, and her name used as the cover under which the richest lands in California might be monopolized and settlers robbed. The seizure of these lands of the State (or rather by speculators in the name of the State) is for the most part entirely illegal; but by the Act of 1866, previous seizures were confirmed, and the land grabbers of California, though Mr. Julian occasionally makes them some trouble, have powerful friends in Washington, and unless energetic remonstrance is made, generally get what they ask. This swamp land grant has not yielded a cent to the State, but it has enabled speculators to monopolize hundreds of thousands of acres of the most valuable lands in California, and, of course, to rob settlers. For the settler, though he has a right under United States laws, can get no record nor evidence of title until his land is surveyed and the plats filed. In the mean time, if the speculator comes along and can get a couple of affidavits as to the swampy character of the settler's farm, he has been able to buy the title of the State. Lands thousands of feet above the level of the sea have been purchased as swamp; lands over which a heavily loaded wagon can be driven in the month of May; and even lands which cannot be cultivated without irrigation.

Sierra Valley is in Plumas County, in the very heart of the mountains. Standing on its edge, you may at your option toss a biscuit into a stream which finally sinks in the great Nevada Basin, or into waters which join the Pacific. When the snow melts in the early spring, the mountain streams which run through the valley overflow and spread over a portion of the land; but after a freshet has passed, water has to be turned in through irrigating ditches to enable the lands to produce their most valuable crop, hay. The valley is filled with pre-emption and homestead settlers, who, besides their own homes and improvements, have built two churches and seven school-houses. Many of their farms are worth $20 per acre. The swamp land robbers cast their eyes on this pretty little valley and its thrifty settlement, and the first thing the settlers knew their farms had been bought of the State as swamp lands, and the United States was asked to list them over. Energetic remonstrance was made, and the matter was referred by the Department to the United States Surveyor-General to take testimony. His investigation has just been concluded, and the attempted grab has probably failed. But in hundreds of cases, similar ones on a smaller scale have succeeded.

Another recent attempt has been made to get hold of 46,000 acres adjoining Sacramento. This land was formerly overshadowed by the rejected Sutter grant, and for some time has been all pre-empted. Something like a year ago it was surveyed and the plats returned to the United States Land Office, with this land marked as swamp; applications being at the same time made to the State for the land. The ex-Surveyor-General, Sherman Day, signed the plats, and the land had actually been listed over by the Department, when a protest was made and forwarded to Washington, accompanied by his own personal testimony, by the new Surveyor-General, Hardenburgh, who, having been long a resident of Sacramento, knew the character of the land. This forced the suspension of the lists, very much, it seems, to the indignation of the Acting Commissioner of the General Land Office, W. W. Curtis, who wrote a letter to the Surveyor-General, which has been published in the newspapers, (which is a curiosity of official impudence,) and which betrays a very suspicious anger with what the Acting Commissioner seems to consider the interference of the Surveyor-General.

Mr. Julian, in his speech entitled "Swamp Land Swindles," has detailed how a party of speculators, one of whom was ex-State Surveyor-General Houghton, and another the son of the then United States Surveyor-General Upson, got hold of sixteen thousand acres in Colusa (as to the dry character of which he gives affidavits), under the swamp land laws, by having the survey of two townships made and approved in a few days, just before the map of the California and Oregon Railroad Company was filed. These swamp land speculators are in many cases attempting to shelter themselves behind the growing feeling against railroad grants; but bad as the railroad grants are, the operations of these speculators are worse. The railroad companies can only take half the lands; the speculators take it all. The railroad companies cannot easily disturb previous settlers; but the speculators take the settler's home from under his feet.

Who Have Got Our Lands.

The State Surveyor-General ought to give in his next report (and if he does not the Legislature ought to call for it) a list of the amounts of State lands laken in large quantities by single individuals (with their names) under the Act of 1868. Such a list would go far to open the eyes of the people of California to the extent their State Government has been used to foster the land monopoly of which they are beginning to complain. Yet such a list would not fully show what has been done, as a great (for others, are W. S. Chapman, George W. Roberts, ex-Surveyor-General Houghton, deal of land has been taken by means of dummies. Of the 16th and 36th sections proper, to which even now one individual cannot apply for more than 320 acres, one speculator has secured 8,000 acres in Colusa County alone. Among those who have secured the largest amount from the State, either in their own names or as attorneys John Mullan, Will S. Green, H. C. Logan, George H. Thompson, B. F. Maulden, I. N. Chapman, Leander Ransom, N. N. Clay, E. H. Miller and James W. Shanklin. The larger amounts secured by single individuals range from 20,000 acres to over 100,000.

What Should Have Been Done.

The true course in regard to State lands is that urged upon the Legislature by the present Surveyor General in his first annual report—to issue title only to the actual settler who has resided on the land three years, and who has shown his intention to make it his home by placing upon it at least $500 worth of improvements.* Had this course been adopted from the start, California would to-day have had thousands more of people and millions more of property. Had it even been adopted when urged by General Bost, over half a million acres of land would have been saved to settlers —that is to say, *four thousand* families might have found homesteads in California at nominal rates—at rates so much lower than that which they must now pay that the difference would more than have sufficed for all the expenses of their transportation from the East.

To amend our policy in regard to sales of State land now, is a good deal like locking the stable door after the horse is stolen. Still it should be done. Our swamp lands are all gone, and the most available of the school lands have gone also. Yet there may be a million of acres of good land left. These we cannot guard with too jealous care.

The Possessory Law.

But the catalogue of what the State of California has done towards the monopolization of her land does not end with a recital of her acts as trustee of the land donated her by the General Government. Besides giving these lands for the most part to monopolists, she has, by her legislation, made possible the monopolization of other vast bodies of the the public lands. Under her possessory laws before alluded to, millions of acres are shut out from settlement, without their holders having the least shadow of title. It is Government land, but unsurveyed. The only way of getting title to it is to go upon it and live; but the laws of California say that no one can go upon it until he has a better title than the holder—that of possession. Tracts of from two to ten thousand acres thus held are common, and in one case at least (in Lake county) a single firm have 28,000 acres of Government land, open by the laws of the United States to pre-emption settlers, enclosed by a board fence, and held under the State laws. It is these laws that enable the Mexican grant owners to hold all the land they can possibly shadow with their claims, and that offer them a premium to delay the adjustment of their titles, in order that they may continue to hold, and in many cases, to sell, far more than their grants call for.

How a Large Quantity of Public Land may be Freed.

A large appropriation for the survey of the public lands in California, managed by a Surveyor-General who really wished to do his duty,* would open to settlers millions of acres from which they are now excluded by railroad reservations or the monopolization of individuals. If our Representatives in Congress desire to really benefit their State, they will neglect the works at Mare Island, the erection of public buildings in San Francisco, and the appropriations for useless fortifications, until they can get this. And one of the first acts of the next Legislature should be to limit the possessory law to 160 acres, which would be a quick method of breaking up possessory monopolizations. In the mean time there is a remedy, though a slower and more cumberous one. At the last session of Congress an Act was passed (introduced by Mr. Sargent) authorizing the credit to settlers, on payments for their lands, of money advanced for surveying them. Here is a means by which, with combined effort, a large amount of public land may be freed. Let a number of settlers, sufficient to bear the expense, go upon one of these large possessory claims. If ejected, let them deposit the money for a survey with the United States Surveyor-General, and the moment the lines are run and the plats are filed they have a sure title to the land.

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* In his biennial message to the same Legislature (the last) Governor Haight speaks in the same strain. He says: "Our land system seems to be mainly framed to facilitate the acquisition of large bodies of land by capitalists and corporations, either as donations or at nominal prices. It is to be regretted that the land granted by Congress to railroad corporations had not been subject to continued pre-emption by settlers, giving to the corporation the proceeds at some fixed price, and it would have been much better for the State and country if the public lands had never been disposed of except to actual settlers under the pre-emption law."

More Monopolization Threatened—Wood and Water.

There is little doubt that one of the greatest attempts at monopolization yet made in California would have followed the passage of Sargent's bill for the sale of the Pacific Coast timber lands, which was rushed through the House at the last session, but was passed over by the Senate, and which has been re-introduced. These timber lands are of incalculable value, for from them must come the timber supply, not of the Pacific States alone, but of the whole Interior Basin, and nearly all the Southern Coast. The present value of these lands when they can be got at, may be judged by the fact that there are single trees upon the railroad lands which yield at present prices over $500 worth of lumber. Under this bill, these lands would have been salable at $2.50 per acre. The limitation of each purchaser to 640 acres would of course amount to nothing, and within a short time after the passage of the bill, the available timber lands would have passed into the hands of a small ring of large capitalists, who would then have put the price of lumber at what figure they pleased. The amount of capital required to do this would be by no means large when compared with the returns, which would be enormous, for though some estimates of the timber lands of California go as high as 30,000,000 acres, the means of transportation as yet make but a small portion of this available. And it would be only necessary to buy the land as it is opened, to virtually control the whole of it. There is, however, a good deal to be said in favor of the sale of these lands, and some legislation is needed, as there is a great deal of land of no use but for its timber, but upon which individuals cannot cut, except as tresspassers, while the railroad company in the Sierra, having been given the privilege of taking timber off Government land for construction, has a monopoly there, and is clearing Government land in preference to its own. If waste could be prevented, it would perhaps be best to leave the timber free to all who chose to cut, on the principle that all the gifts of nature, whenever possible, should be free. This is problematical, perhaps impossible. If so, the plan proposed by Hon. Will S. Green, of Colusa, seems to be the best of those yet brought forward; that is, to sell the lands only to the builders of saw mills, in amounts proportioned to the capacity of the mill. At all events, almost anything would be better than the creation of such a monstrous monopoly as would at once have sprung up under the Sargent bill—a monopoly which would have taxed the people of California millions annually, and would have raised the price of timber on the whole coast.

It is not only the land and the timber, but even the water of California that is threatened with monopoly, as by virtue of laws designed to encourage the construction of mining and irrigation ditches, the mountain streams and natural reservoirs are being made private property, and already we are told that all the water of a large section of the State is the property of a corporation of San Francisco capitalists.

The Effect of Land Monopolization in California.

It is not we, of this generation, but our children of the next, who will fully realize the evils of the land monopolization which we have permitted and encouraged; for those evils do not begin to fully show themselves until population becomes dense.

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* And we seem to have secured one in the present Surveyor-General.

But already, while our great State, with an area larger than that of France or Spain or Turkey—with an area equal to that of all of Great Britain, Holland, Belgium, Denmark and Greece, combined—does not contain the population of a third class modern city; already, ere we have commenced to manure our lands or to more than prospect the treasures of our hills, the evils of land monopolization are showing themselves in such unmistakable signs that he who runs may read. This is the blight that has fallen upon California, stunting her growth and mocking her golden promise, offsetting to the immigrant the richness of her soil and the beneficence of her climate.

It has already impressed its mark upon the character of our agriculture—more shiftless, perhaps, than that of any State in the Union where slavery has not reigned. For California is not a country of farms, but a country of plantations and estates. Agriculture is a speculation. The farm houses, as a class, are unpainted frame shanties, without garden or flower or tree. The farmer raises wheat; he buys his meat, his flour, his butter, his vegetables, and frequently, even his eggs. He has too much land to spare time for such little things, or for beautifying his home, or he is merely a renter, or an occupant of land menaced by some adverse title, and his interest is but to get for this season the greatest crop that can be made to grow with the least labor. He hires labor for his planting and his reaping, and his hands shift for themselves at other seasons of the year. His plow he leaves standing in the furrow, when the year's plowing is done; his mustangs he turns upon the hills, to be lassoed when again needed. He buys on credit at the nearest store, and when his crop is gathered must sell it to the Grain King's agent, at the Grain King's prices.

And there is another type of California farmer. He boards at the San Francisco hotels, and drives a spanking team over the Cliff House road; or, perhaps, he spends his time in the gayer capitals of the East or Europe. His land is rented for one-third or one-fourth of the crop, or is covered by scraggy cattle, which need to look after them only a few half-civilized *vaqueros;* or his great wheat fields, of from ten to twenty thousand acres, are plowed and sown and reaped by contract. And over our ill-kept, shadeless, dusty roads, where a house is an unwonted land-mark, and which run frequently for miles through the same man's land, plod the tramps, with blankets on back—the laborers of the California farmer—looking for work, in its seasons, or toiling back to the city when the plowing is ended or the wheat crop is gathered. I do not say that this picture is a universal one, but it is a characteristic one. *

It is not only in agriculture, but in all other avocations, and in all the manifestations of social life, that the effect of land monopoly may be seen—in the knotting up of business into the control of little rings, in the concentration of capital into a few hands, in the reduction of wages in the mechanical trades, in the gradual decadence of that independent personal habit both of thought and action which gave to California life its greatest charm, in the palpable differentiation of our people into the classes of rich and poor. Of the "general stagnation" of which we of California have been so long complaining, this is the most efficient cause. Had the unused land of California been free, at Government terms, to those who would cultivate it, instead of this "general stagnation" of the past two years, we should have seen a growth unexampled in the history of even the American States. For with all our hyperbole, it is almost impossible to overestimate the advantages with which nature has so lavishly endowed this Empire State of ours. "God's Country," the returning prospectors used to call it, and the strong expression loses half of its irreverence as, coming over sage brush plains, from the still frost-bound East, the traveler winds, in the early Spring, down the slope of the Sierra, through interminable ranks of evergreen giants, past laughing rills and banks of wild flowers, and sees under their cloudless sky the vast fertile valleys stretching out to the dark blue Coast Range in the distance. But while nature has done her best to invite new comers, our land policy has done its best to repel them. We have said to the immigrant: "It is a fair country which God has made between the Sierra and the sea, but before you settle in it and begin to reap His bounty, you must pay a forestaller roundly for *his* permission." And the immigrant having far to come and but scanty capital, has as a general thing stayed away.

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*An old Californian, a gentleman of high intelligence, who has recently traveled extensively through the State upon official business, which compelled him to pay particular attention to the material condition of the people, writes: "The whole country is poverty-stricken; the farmers shiftless, and crazy on wheat. I have seen farms cropped for eighteen years with wheat, and not a vine, tree, shrub or flower on the place. The roads are too wide, and are unworked, and a nest for noxious weeds. The effect of going through California is to make you wish to leave it, if you are poor and want to farm."

The Landed Aristocracy of California.

Though California is a young State; though she is a poor State, and though a few years ago she was a State in which there was less class distinction than in any State in the Union, she can already boast of an aristocracy based on the surest foundation—that of land ownership.

I have been at some trouble to secure a list of the large land owners of California, but find exact and reliable information on that point difficult to obtain. The property of most of the largest land owners is scattered through various counties of the State, and a comparison of the books of the various Assessors would be the only means of forming even an approximate list. These returns, however, are far from reliable. It has not been the custom to list land held by mere possessory title, and the practice of most of the Assessors has been to favor large land holders. The Board of Equalization have ferreted out many interesting facts in this regard, which will probably be set forth in their coming report. Some remarkable discrepancies, of which the proportion is frequently as one to ten, are shown between the Assessors' lists and the inventories of deceased land owners. In San Luis Obispo, one of the largest land owners and land speculators in the State returns to the Assessor a total of 4,366 acres. Reference to the United States Land Offices, shows that he holds in that county, of United States land, 43,266 acres.

The largest land owners in California are probably the members of the great Central-Southern Pacific Railroad Corporation. Were the company land divided, it would give them something like two million acres apiece; and in addition to their company land, most of the individual members own considerable tracts in their own name.

McLaughlin, who got the Western Pacific land grant, has some three or four hundred thousand acres. Outside of these railroad grants, the largest single holder is, probably, Wm. S. Chapman, of San Francisco, the "pioneer" scrip-speculator, who has some 350,000 acres; though ex-State Surveyor-General Houghton is said by some to own still more. Ex-United States Surveyor-General Beals has some three hundred thousand acres. Across his estate one may ride for seventy-five miles. Miller & Lux, San Francisco wholesale butchers, have 450,000 acres. Around one of their patches of ground there are 160 miles of fence. Another San Francisco firm, Bixby, Flint & Co., have between 150,000 and 200,000 acres. George W. Roberts & Co. own some 120,000 acres of swamp land. Isaac Friedlander, San Francisco grain merchant, has about 100,000 acres. Throckmorton, of Mendocino, some 146,000; the Murphy family of Santa Clara, about 150,000; John Foster of Los Angeles, 120,000; Thomas Fowler, of Fresno, Tulare and Kern, about 200,000. Abel Stearns, of Los Angeles, had some 200,000 acres, but has sold a good deal. A firm in Santa Barbara advertises for sale 200,000 acres, owned by Philadelphia capitalists.

As for the poorer members of our California peerage—the Marquises, Counts, Viscounts, Lords and Barons—who hold but from 80,000 to 20,000 acres, they are so numerous, that, though I have a long list, I am afraid to name them for fear of making invidious distinctions, while the simple country squires, who hold but from five to twenty thousand acres, are more numerous still.

These men are the lords of California—lords as truly as ever were ribboned Dukes or belted Barons in any country under the sun. We have discarded the titles of an earlier age; but we have preserved the substance, and, though instead of "your grace," or "my lord," we may style them simple "Mr.," the difference is only in a name. They are our Land Lords just as truly. If they do not exert the same influence and wield the same power, and enjoy the same wealth, it is merely because our population is but six hundred thousand, and their tenantry have not yet arrived. Of the millions of acres of our virgin soil which their vast domains enclose, they are absolute masters, and upon it no human creature can come, save by their permission and upon their terms.* From the zenith above, to the center of the earth below (so our laws run), the universe is theirs.

It must not be imagined that these large land holders are merely speculators—that they have got hold of land for the purpose of quickly selling it again. On the contrary, as a class, they have a far better appreciation of the future value of land and the power which its ownership gives, than have the people at large who have thoughtlessly permitted this monopolization to go on. Many of the largest land holders do not desire to sell, and will not sell for anything like current prices ; but on the contrary are continually adding to their domains. Among these, is one Irish family, who have seen at home what the ownership of the soil of a country means. They *rent* their land; they will not sell it; and this is true of many others. Sometimes this indisposition to sell is merely the result of considerations of present interest. As for instance: An agent of a society of settlers recently went to a large land holder in a southern county, and offered him a good price for enough land to provide about two hundred people with small farms. The land holder refused the offer, and the agent proceeded to call his attention to the increase in the value of his remaining land which this settlement would cause. "It may be," said the land holder, "but I should lose money. If you bring two hundred settlers here, they will begin agitating for a repeal of the fence law, and will soon compel it by their votes. Then I will be obliged to spend two or three hundred thousand dollars to fence in the rest of my ranch, and as fences do not fatten cattle, it will be worth no more to me than now."

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* They are coming. According to Government statisticians, California will, in 1890, contain a population of 3,500,000.

Let me not be understood as reproaching the men who have *honestly* acquired large tracts of land. As the world goes, they are not to be blamed. If the people put saddles on their backs, they must expect somebody to jump astride to ride. If we must have an aristocracy, I would prefer that my children should be members of it, rather than of the common herd. While as for the men who have resorted to dishonest means, the probabilities are that most of them enjoy more of the respect of their fellows, and its fruits, than if they had been honest and got less land.

The division of our land into these vast estates, derives additional significance from the threatening wave of Asiatic immigration whose first ripples are already breaking upon our shores. What the barbarians enslaved by foreign wars were to the great land lords of Ancient Italy, what the blacks of the African coast were to the great land lords of the Southern States, the Chinese coolies may be, in fact are already beginning to be, to the great land lords of our Pacific slope.

III.

LAND AND LABOR.

What Land Is.

Land, for our purpose, may be defined as that part of the globe's surface habitable by man—not merely his habitation, but the storehouse upon which he must draw for all his needs, and the material to which his labor must be applied for the supply of all his desires, for even the products of the sea cannot be taken, or any of the forces of nature utilized without the aid of land or its products. On the land we are born, from it we live, to it we return again—children of the soil as truly as is the blade of grass or the flower of the field.

Of the Value of Land.

Though land is the basis of all that we have, yet neither land nor its natural products constitute wealth. Wealth is the product—or to speak more precisely, the equivalent of labor. That which may be had without labor has no value, for the value of any object is measured by the labor for which it will exchange.* And when in speaking of "natural wealth," we mean anything else than the general possibilities which nature offers to labor, we mean such peculiar natural advantages as will yield to labor a larger return than the ordinary, and which are thus equivalent to the amount of labor dispensed with—that is, such natural objects or advantages as are scarce as well as desirable. If I find a diamond, I may not have expended much labor, but I am rich because I have something which it usually takes an immense amount of labor to obtain. If I own a coal mine which is valuable, it is because other people have not coal mines, and cannot obtain fuel with as little expenditure of labor as I can, and will therefore give me the equivalent of more labor for my coal than I have to bestow to get it. If diamonds were as plenty as pebbles, they would be worth by the cart-load just the cost of loading and hauling. If coal could everywhere be had by digging a hole in the ground, the possession of a coal mine would make nobody rich.

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* I use the word value throughout in the sense in which it is used by the writers on political economy—that of exchangeable power, not of utility.

And so it is with land. It is only valuable as it is scarce. Land (of the average quality) is not naturally scarce, but abundant, and it may be doubted whether there is any country, even the most populous, where the soil could not easily support in comfort all the people, though the law of diminishing return, as laid down by the English economists, is doubtless true. But the density of population permits other economies which go far to make up for, and which, probably, in a right social state would fully make up for, any increase in the amount of labor necessarily devoted to agricultural production.

But land is a fixed quantity, which man can neither increase nor diminish, and is therefore very easily made artificially scarce by monopolization. And artificial scarcity arising from unequal division produces the same effect as real scarcity in giving land a value. There is no scarcity of building lots in San Francisco, for there is room yet within the settled limits for ten thousand more houses. But if I want to put up a house I must pay for the privilege, just as if there were more people wanting to put up houses than there is room to put them upon.

And the value of land is, the power which its ownership gives of appropriating the labor of those who have it not; and in proportion as those who own are few, and those who do not own are many, so does this power which is expressed by the selling price of land increase. We speak of railroads raising the value of land by reducing the time and cost of transportation. But if we analyze the operation by imagining the construction of a railroad through a country in which there are few settlers and land can be had for the taking, we will see that the direct effect of the railroad or other improvement which increases the value of the product of land is to increase the value of labor—or to speak more precisely, of the value of labor and capital, in the relative proportions determined by the circumstances which fix the shares of each—and that it is only when the land is so far monopolized as to enable the land owners to appropriate to themselves this benefit that the value of land is increased. No matter how few people there might be, if the land were all in private hands the owners might appropriate to themselves the whole benefit. This is the result in a country like England, but in a new country, those owners having more land than they can work or desire to work, will, in selling or renting their lands, yield some of the new advantage in order to induce people to take their surplus land. It will be said: If the value of land is the power which its ownership gives of appropriating the labor of others, so is the value of everything else, from a twenty-dollar piece to a keg of nails. But in this is the distinction: The twenty-dollar piece or the keg of nails are themselves the result of labor, and when given for labor the transaction is an exchange. Land is not the result of labor, but is the creation of God, and when labor must be given for it the transaction is an appropriation. In the one case labor is given for labor; in the other, labor is given for something that existed before labor was.

Of the Value of Land and the Common Wealth.

And thus we see that the value of land, being intrinsically merely the power which its ownership gives to appropriate the fruits of labor, is not an element of the wealth of a community. This principle is as self-evident as that two and two make four, yet we seem to have lost sight of it altogether. All over the country the increase in the value of land is cited as an increase of wealth. Year after year we add up the increased price which land will bring, and exclaim, Behold how rapidly the United States is growing rich! Yet we might with equal propriety count the debts which men owe each other, in estimating the assets of a community. The increased price of his land may be increased wealth to the owner, because it enables him to obtain a larger share in the distribution of its products, but it is not increased wealth to the community, because the shares of other people are at the same time cut down. The wealth of a community depends upon the product of the community. But the productive powers of land are precisely the same whether its price is low or high. In other words, the price of land indicates the distribution of wealth, not the production. The manner of distribution certainly reacts on production, and so the price of land indirectly and gradually affects the wealth of the community; but this effect is the reverse of what seems generally imagined. High prices for land tend to decrease instead of adding to the wealth of a community. For high priced land means luxury on the one side, and low wages on the other. Luxury means waste, and low wages mean, unintelligent and inefficient labor.

Of The Value of Land and the Value of Labor.

The value of land and of labor must bear to each other an inverse ratio. These two are the "terms" of production, and while production remains the same, to give more to the one is to give less to the other. The value of land is the power which its ownership gives to appropriate the product of labor, and, as a sequence, where rents (the share of the land owner) are high, wages (the share of the laborer) are low. And thus we see it all over the world, in the countries where land is high, wages are low, and where land is low, wages are high. In a new country the value of labor is at first at its maximum, the value of land at its minimum. As population grows and land becomes monopolized and increases in value, the value of labor steadily decreases. And the higher land and the lower wages, the stronger the tendency towards still lower wages, until this tendency is met by the very necessities of existence. For the higher land and the lower wages, the more difficult is it for the man who starts with nothing but his labor to become his own employer, and the more he is at the mercy of the land owner and the capitalist.

Of Speculation in Land.

The old prejudice against speculators in food and other articles of necessity is passing away, for more exact habits of thought have shown that where speculators do not control all the sources and means of production (which is impossible as to most things in this age of the world*), and speculation does not become monopoly, instead of causing scarcity, it tends to alleviate it; and this, on the one side, by giving notice of the impending scarcity, and thus inducing economy, and on the other by stimulating production.

But land not being a thing of human production, speculation in land cannot have this result. A country may export people, but it cannot import land. Whatever be the price put upon it, the number of acres in any given place is just so many, with just such capabilities. And though high prices for land may lessen the demand by driving people further away, this is not economy, but waste, as the labor of a diffused population cannot be so productive as that of a more concentrated population, combined action cannot be so effective and economical, and exchanges must be much more difficult and at a greater cost. It is sometimes said (and the English landlords piously believe that in raising their rents to the highest figure they are doing their best for their fellow men) that the increase in the price of land leads to increased thoroughness of cultivation, yet how can that be when the increase in the price of land must take from the means of the cultivator, either by reducing his capital when he buys, or by reducing his earnings when he rents.† That the two things go together is undoubtedly true; but it seems to me that the increased thoroughness of cultivation is due to the increased pressure of population—to higher prices for produce and lower prices for labor rather than directly to the increased price of land.

There is another attribute in which land differs from things of human production. It is imperishable. The speculator in grain must sell quickly, not merely because he knows another crop will soon come in, but because his grain will spoil by keeping; the speculator in a manufactured article must also sell quickly, not merely because the mills are at work, but because the articles in which he is speculating will spoil or go out of fashion. Not so with land. The speculator in land can wait; his land will still be there as good as ever. If he dies before he reaps the benefit, the land will be there for his children.

Thus land, being a thing of limited quantity, of imperishable nature and of unchanging demand, is a thing in which there are more inducements for speculation than in anything else. And being, not the result of human labor, but the field for human labor, the increased price caused by speculation is a tax for which there can be no beneficial return. Speculation in land is, in fact, but a shutting out from the land of those who want to use it, until they agree to pay the price demanded—the land speculator is a true "dog in the manger." He does not want to use the land himself, but he finds his profit in preventing other people from using it. The speculator knows that more people are coming, and that they must have land, and he gets hold of the land which they will want to use, in order that he may force them to pay him a price for which he gives them no return—that is, that he may appropriate a portion of their labor. Our emigrating race may be likened to a caravan crossing the desert, and the land speculator to one of their number who rides a little in advance, taking possession of the springs as they are reached and exacting a price from his comrades for the water which nature furnishes without price.

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*Possible as to some things. The Rothschilds and the Bank of California control the quicksilver production of the world, and sell quicksilver in China cheaper than in California, where it is produced.

†It may be said (and it is probably to some extent true in new countries), that where land is low a man will buy as much as he can; where land is higher, and he must take less for the same money, he will cultivate it better. But if a man takes more than he can well use, this in itself is speculation, and another remedy should be looked for than the increase of speculation. Whereas, if by high prices a man is driven to bestow the same labor on a smaller piece of ground than he would with greater profit expend on a larger piece—the increased thoroughness of cultivation reduces production instead of increasing it—is an evil, not a benefit.

Of Prospective Value as Affecting the Present Value of Land.

According to the doctrine of rent advanced by Ricardo and Malthus, and generally accepted by the best authorities on political economy, the value of land should be determined by the advantages which it possesses over the least advantageous land in use. This would be true, though subject to the modifications arising from custom and the inertia of population, were it not for the influence which prospective value exercises upon present value. Where speculation in land is permitted—more so. where it is encouraged, as it is with us—the prospective value of land (the incentive to speculation) must exercise a very great influence upon the present value of land, and the value of land be determined, not by its actual advantages over the poorest land in use, but by its advantages, prospective as well as actual, over land which offers just sufficient prospective advantage to make its possession desirable. The prices of land in the United States to-day are not warranted by our present population, but are sustained by speculation founded upon the certainty of the greater population which is coming. Every promise, every hope, is discounted by land speculation. And land being indestructible and costing less to keep than anything else (for the taxes on unimproved land are generally lighter than on anything else), and being limited in amount (so that no increase in price brings about increase in supply), these anticipations form a firm basis for price. Land has no intrinsic value. It is not like a keg of nails, which costs about so much to produce, and the price of which cannot, therefore, go much above or fall much below that point. It is worth just what can be had for it. If a man must have land where speculative prices rule, he must pay the price asked, and the price he pays is the guage by which all the surrounding holders measure the value and assess the price of their lands. One rise encourages another rise, and the course of prices is up and up, so long as there is expectation of future demand. And whenever a temporary panic comes, the land prices recover as quickly as it is natural for hope to reassert itself in the human breast. A great singer buys a lot in a little Illinois town and real estate advances fifty per cent; a train of cars comes to Oakland, and for miles around land cannot be bought for less than a thousand dollars an acre; a few men in San Francisco say to each other that the city is sure to be the second on the continent, and straightway the hill-tops for long distances are being bought and sold at rates which would be exorbitant if San Francisco really contained a million people, and he who wants a piece of land to use must pay the speculative price. We are thus compelled to pay in the present, prices based on what people will be compelled to pay in the future.

Of Speculation in Land, and the Supply of Capital.

We frequently hear it said: "Times are hard because land speculation has locked up so much capital." Now it is evident that no amount of buying and selling in a community can lock up capital, and the direct effect of a rise in land values, is to alter the distribution of wealth, not to affect its amount. But to some extent the same effect is produced as would be by the locking up of capital. When a rise in land values takes place, certain men find themselves much richer, without any addition to the capital of the community having been made. Some of these will employ part of their new wealth in unproductive uses—in building finer houses, buying diamonds for their wives, or traveling in the East, or in Europe. This reduces the supply of productive capital. At the same time the profits of land speculation, and the new security which the rise in values gives, will increase the number of borrowers, and competition between them will have a tendency to keep up rates of interest. But a fall in land prices does not at once increase the available supply of capital, as capitalists are made timid, and there is a tendency to hoard rather than lend.

Of the Necessary Value of Land.

Where the monopolization of land is not permitted, where a man can only take land which he wants to use, unused land can have no value—at least, nono above the price fixed by the State for the privilege of occupying it. But as land becomes occupied, most of it would acquire a value—either from the possession of natural advantages superior to that still unoccupied, or from its more central position as respects population. This we may call the *necessary* or real value of land, in contradistinction to the *unnecessary* or fictitious value of land which results from monopolization. To illustrate: If, on the outskirts of San Francisco, any one who wished to build a house might take a lot from the unused ground, outside land would be worth nothing, but Montgomery or Kearny street property would still be very valuable, as, being in the heart of the city, it is more convenient for residences or more useful for business purposes. The difference, however, between this *necessary* value of the land of the United States and the aggregate value at which it is held must be most enormous, and the difference represents the unnecessary tax which land monopolization levies upon labor.

Of Property in Land.

The right of every human being to himself is the foundation of the right of property. That which a man produces is rightfully his own, to keep, to sell, to give, or to bequeath, and upon this sure title alone can ownership of anything rightfully rest. But man has also another right, declared by the fact of his existence—the right to the use of so much of the free gifts of nature as may be necessary to supply all the wants of that existence, and as he may use without interfering with the equal rights of any one else, and to this he has a title as against all the world.

This right is natural; it cannot be alienated. It is the free gift of his Creator to every man that comes into the world—a right as sacred, as indefeasible as his right to life itself.

Land being the creation of God and the natural habitation of man, the reservoir from which man must draw the means of maintaining his life and satisfying his wants; the material to which it was pre-ordained that his labor should be applied, it follows that every man born into this world has a natural right to as much land as is necessary for his own uses, and that no man has a right to any more. To deny this is to deny the right of man to himself, to assert the atrocious doctrine that the Almighty has created some men to be the slaves of others.

For, to permit one man to monopolize the land from which the support of others is to be drawn, is to permit him to appropriate their labor, and, in so far as he is permitted to do this, to appropriate them. It is to institute slavery.

For whether a man owns the bodies of his fellow beings, or owns only the land from which they must obtain a subsistence, makes but little difference to him or to them. In the one case it is slavery just as much as the other. And of the two forms of slavery, that which pretends to the ownership of flesh and blood seems to me, on the whole, far the more preferable. For in England, where the monopolization of land has reached a point which gives to the mere laborer a share of the product of his labor just sufficient to maintain his existence, the land owner gets from the laborer all that any master can get from his slave, while he is not affected by the selfish interest which prompts the master to look out for the well-being of his slave, and is not influenced by those warmer feelings which any ordinarily well disposed man feels towards any living thing of which he claims the ownership, be it even a dog. For in free, rich England of the Nineteenth Century—England, whose boast it is that no slave can breathe her air—England, that has spent millions of pounds for the abolition of slavery in far off lands, and that sends abroad annually hundreds of thousands of pounds for the conversion of the heathen—the condition of the agricultural laborer is to-day harder, more hopeless and more brutalizing than that of the average slave under any system of slavery which has prevailed in modern times. And, going even further, I do not believe that the cold-blooded horrors brought to light by the various Parliamentary Commissions which have investigated the condition of the laboring poor of England, can be matched even by the records of ancient slavery, under which system slaves were sometimes fed to fishes, or tortured for sport, or even by the annals of Spanish conquest in the New World. Certain it is that the condition of the slaves upon our Southern plantations was not half so bad as that of the land monopoly slaves of England. Legrees there may have been in plenty, but I have yet to hear of the Legree who worked children to physical and moral death in his fields, or ground them, body and soul, in his mills.

There is in nature no such thing as a fee simple in land. The Almighty, who created the earth for man and man for the earth, has entailed it upon all the generations of the children of men by a decree written upon the constitution of all things—a decree which no human action can bar and no prescription determine. Let the parchments be ever so many, or possession ever so long, in the Courts of Natural Justice there can be but one title to land recognized—the using of it to satisfy reasonable wants.

Now, from this, it by no means follows that there should be no such thing as property in land, but merely that there should be no monopolization—no standing between the man who is willing to work and the field which nature offers for his labor. For while it is true that the land of a country is a free gift of the Creator to all the people of that country, to the enjoyment of which each has an equal natural right, it is also true that the recognition of private ownership in land is necessary to its proper use—is, in fact, a condition of civilization. When the millennium comes, and the old savage, selfish instincts have died out of men, land may perhaps be held in common; but not till then. In our present state, at least, the "magic of property which turns even sand into gold" must be applied to our lands if we would reap the largest benefits they are capable of yielding—must be retained if we would keep from relapsing into barbarism.

And a full appreciation of the value of land ownership tends to the same practical conclusion as the considerations I have been presenting. If the worker upon land is a better worker and a better man because he owns the land, it should be our effort to make this stimulus felt by all—to make, as far as possible, all land-users also land-owners.

Nor is there any difficulty in combining a full recognition of private property in land with a recognition of the right of all to the benefits conferred by the Creator, as I will hereafter attempt to show.

We are not called upon to guarantee to all men equal conditions, and could not if we would, any more than we could guarantee to them equal intelligence, equal industry or equal prudence; but we *are* called upon to give to all men an equal chance. If we do not, our republicanism is a snare and a delusion, our clatter about the rights of man the veriest buncombe in which a people ever indulged.

IV.

THE TENDENCY OF OUR PRESENT LAND POLICY.

What Our Land Policy is.

Is our land policy calculated to give to all men an equal chance? We have seen what it is—how we are enabling speculators to rob settlers; how we are by every means enhancing the tax which the many must pay to the few; how we are making away with the heritage of our children, and putting in immense bodies into the hands of a few individuals the soil from which the coming millions of our people *must* draw their support. If we continue this policy a few years, the public domain will all be gone; the homestead law and the pre-emption law will remain upon the statute books but to remind the poor man of the good time past, and we shall find ourselves embarrassed by all the difficulties which beset the statesmen of Europe—the social disease of England; the seething discontent of France.

Was there ever national blunder so great—ever national crime so tremendous as ours in dealing with our land? It is not in the heat and flush of conquest that we are thus doing what has been done in every country under the sun where a ruling class has been built up and the masses condemned to hopeless toil; it is not in ignorance of true political principles and in the conscientious belief that the God-appointed order of things is that the many should serve the few. We are monopolizing our land deliberately—*our* land, not the land of a conquered nation, and we are doing it while prating of the equal rights of the citizen and of the brotherhood of men.

The Value of Our Public Domain.

This public domain that we are getting rid of as recklessly as though we esteemed its possession a curse, can never be replaced, nor are there other limitless bodies of land which we may subdue. Of the whole continent, we now occupy nearly the whole of the zone in which all the real progressive life of the world has been lived. North of us are the cold high latitudes, south of us the tropical heats. The table lands of Mexico and the valleys of the Saskachewan and Red rivers, which comprise almost all of the temperate portions of the continent yet unoccupied by our race, are of very small extent when compared with the vast country we have already overrun, and when our emigration is compelled to set upon them will be filled as we now populate a new State.

It is not pleasant to think of the time when the public domain will all be gone. "This will be a great country," we say, "when it is all fenced in." Great it will be—great it must be, in arts and arms, in population and in wealth. But will it be as great in all that constitutes true greatness? Will it be such a good country for the poor man? Will there be such an average of comfort and independence and virtue among the masses. And which to me is the important fact—that I am one of a nation of so many more millions, or that I can buy my children shoes when they need them? "The greatest glory of America," says Carlyle, "is that there every bootblack may have a turkey in his pot." We shall be credited with no such glory when the country is all "fenced in" as we are now rapidly fencing it.

From this public domain of ours have sprung and still spring subtle influences which strengthen our national character and tinge all our thought. This vast background of unfenced land has given a consciousness of freedom even to the dweller in crowded cities, and has been a well-spring of hope even to those who never thought of taking refuge upon it. The child of the people as he grows to manhood in Europe finds every seat at the banquet of life marked "taken," and must struggle with his fellows for the crumbs that fall, without one chance in a thousand of forcing or sneaking his way to a seat. In America, whatever be his condition, there is always more or less clearly and vividly, the consciousness that the public domain is behind him; that there is a new country where all the places are not yet taken, where opportunities are still open, and the knowledge of this fact, acting and reacting, penetrates our whole national life, giving to it generosity and independence, elasticity and ambition.

Why should we seek so diligently to get rid of this public domain as if for the mere pleasure of getting rid of it? What have the buffaloes done to us that we should sacrifice the heritage of our children to see the last of them extirpated before we die? Are the operatives of New England, the farmers of Ohio, the mechanics of San Francisco better off for the progress of this thing which we call national development—this scattering of a thousand people over the land which would suffice for a million; this fencing in for a dozen of the soil to which tens of millions must before long look for subsistence?

All that we are proud of in the American, character all that makes our condition and institutions better than those of the older countries, we may trace to the fact that land has been cheap in the United States; and yet we are doing our utmost to make it dear, and actually seem pleased to see it become dear, looking upon the lien which the few are taking upon the labor of the many as an actual increase in the wealth of all.

No Tendency to Equalization.

Nor can we flatter ourselves that the inequality in condition which we are creating will right itself by easy and and peaceful means. It is not merely present inequality which we are creating, but a tendency to further inequality. When we allow one man to take the land which should belong to a hundred, and give to a corporation the soil from which a million must shortly draw their subsistence, we are not only giving in the present wealth to the few by taking it from the many, but we are putting it in the power of the few to levy a constant and an increasing tax upon the many, and we are increasing the tendency to the concentration of wealth not merely upon the land which is thus monopolized, but all over the United States.

Even if the large bodies of land which we are giving away for nothing, or selling to speculators for a nominal price, are subdivided and sold for small farms, the mischief we have done is not at an end. The capital of the settlers has been taken from them, and put in large masses into the hands of the speculators or railroad kings.

The many are thereafter the poorer; the few thereafter the richer. We have concentrated wealth; that is, we have concentrated the power of getting wealth. We have set in operation the law of attraction—the law that "unto him that hath shall it be given," and never in any age of the world has this law worked so powerfully as now.

It must not be thought that because we have no laws of entail and primogeniture the vast estates which we are creating will in time break up of themselves. There were no laws of entail and primogeniture in ancient Rome where the monopolization of land and the concentration of wealth went so far that the empire, and even civilation itself, perished of the social diseases engendered. It is not the laws of entail and primogeniture that have produced the concentration of wealth in England which makes the richest country in the world the abode of the most hopeless poverty. In spite of entail and primogeniture, wealth is constantly changing from hand to hand, but always in large masses. The richest families of a few centuries back are extinct, the blood of the noblest of a comparatively recent time flows in the veins of people who live in garrets and toil inki tchens. And the same causes which have reduced the 374,000 landholders of England in the middle of the last century to 30,000 now are working in this country as powerfully as they are working there. Wealth is concentrating in a few hands as rapidly in New York as in London; the condition of the laboring classes of New England is steadily approximating to that of Old England.

Nor, if we are to have a very rich class and a very poor class, is there any particular advantage in the fact that one is constantly being recruited from the other, though there are people who seem to think that the fact that most of our millionaires were poor boys is a sufficient answer to anything that may be said of the evils of a concentration of wealth. As wealth concentrates, the chances for any particular individual to escape from one class to another becomes less and less, until practically worth nothing, while there is nothing in human nature to cause us to believe, and nothing in history to show that members of a privileged class are less grasping because they once belonged to an unprivileged class. Nor, after wealth has become concentrated, is there any tendency in this changing of the individuals who hold it to diffuse it again. The social structure is like the flame of a gas-burner, which retains its form though the particles which compose it are constantly changing.

The Tendency to Concentration.

There is no tendency yet to the breaking up of large landholdings in the United States; but the reverse is rather the case. The railroad lands are not being sold anything like as fast as they are being granted, and large private estates are increasing instead of diminishing. It is true that tracts bought for speculation are frequenty cut up and sold, but it will generally be found that others are at the same time secured further ahead, though not always by the same parties. And as wealth concentrates, population becomes denser, and the advantages of land ownership greater, the tendency on the part of the rich to invest in land increases, and the same cause which has so largely reduced the number of land-owners in Great Britain is put in operation. Already the custom of renting land is unmistakably gaining ground, and the concentration of land-ownership seems to be going on in our older States almost as fast as the monopolization of new land goes on in the younger ones.* And at last the steam plow and the steam wagon have appeared—to develope, perhaps, in agriculture the same tendencies to concentration which the power loom and the trip hammer have developed in manufacturing.

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* "Our farms in older States instead of being divided and subdivided as they ought to be, are growing larger and more unwieldly. The tendency of the times is unquestionably towards immense estates, each with a manorial mansion in the center and a dependent tenantry crouching in the shadow."—*North American Review*, 1859.

"A non-resident proprietary like that of Ireland is getting to be the characteristic of large farming districts in New England, adding yearly to the nominal value of leasehold farms, advancing yearly the rent demanded, and steadily degrading the character of the tenantry, until, in the place of the boasted intelligence of rural New England, a competent authority can to-day write: 'The general educational condition of the farm laborer is very low, even below that of the factory operative; a large percentage of them can neither read nor write.'" —*New York World, May*, 1871, *in an article on the returns for New England of the Census of* 1870.

"The part of the report, [Massachusetts Bureau of Labor Statistics] however, which of all is, in our opinion, the most remarkable, is that relating to agriculture in Massachusetts. It may be summed up in two words: rapid decay. Increased nominal value of land, higher rents, fewer farms occupied by owners; diminished product, general decline of prosperity, lower wages; a more ignorant population, increasing number of women employed at hard outdoor labor (surest sign of a declining civilization), and steady deterioration in the style of farming—these are the conditions described by a cumulative mass of evidence that is perfectly irresistible, and that is unfortunately only too strongly confirmed by such details of census statistics as have been so far made public."—*New York Nation, June*, 1871.

We are not only putting large bodies of our new lands in the hands of the few; but we are doing our best to keep them there, and to cause the absorption of small farms into large estates. The whole pressure of our revenue system, National and State, tends to the concentration of wealth and the monopolization of land. A hundred thousand dollars in the hands of one man pays but a slight proportion of the taxes which are paid by the same sum in the hands of fifty; a hundred thousand acres owned by a single landholder is assessed but for a fraction of the amount assessed upon the hundred thousand acres of six hundred farms. Especially is this true of the State of California, where the large handholders are frequently assessed at the rate of one dollar per acre on land for which they are charging settlers twenty or thirty, and where the small farmer sometimes pays taxes at a rate one hundred fold greater than his neighbor of the eleven league ranch. Our whole policy is of a piece —everything is tending with irresistible force to make us a nation of landlords and tenants—of great capitalists and their poverty-stricken employés.

The life of all the older nations shows the bitterness of the curse of land monopolization; we cannot turn a page of their history without finding the blood stains and the tear marks it has left. But never since commerce and manufactures grew up, and men began to engage largely in other occupations than those connected directly with the soil, has it been so important to prevent land monopolization as now. The tendency of all the improved means and forms of production and exchange—of the greater and greater subdivision of labor, of the enslavement of steam, of the utilization of electricity, of the ten thousand great labor-saving appliances which modern invention has brought forth, is strongly and more strongly to extend the dominion of capital and to make of labor its abject slave. Once to set up in the business of making cloth required only the purchase of a hand-loom and a little yarn, the means for which any journeyman could soon save from his earnings; now it requires a great factory, costly machinery, large stocks and credits, and to go into business on his own account one must be a millionaire. So it is in all branches of manufacture; so, too, it is in trade. Concentration is the law of the time. The great city is swallowing up the little towns; the great merchant is driving his poorer rivals out of business; a thousand little dealers become the clerks and shopmen of the proprietor of the marble-fronted palace; a thousand master workmen, the employés of one rich manufacturer, and the gigantic corporations, the alarming product of the new social forces which Watt and Stephenson introduced to the world, are themselves being welded into still more titanic corporations. From present appearances, ten years from now we will have but three, possibly but one railroad company in the United States, yet our young men remember the time when these giants were such feeble infants that we deemed it charity to shelter them from the cold, and feed them, as it were, with a spoon. In the new condition of things what chance will there be for a poor man if our land also is monopolized?

Of the political tendency of our land policy, it is hardly necessary to speak. To say that the land of a country shall be owned by a small class, is to say that that class shall rule it; to say—which is the same thing—that the people of a country shall consist of the very rich and the very poor, is to say that republicanism is impossible. Its forms may be preserved; but the real government which clothes itself with these forms, as if in mockery, will be many degrees worse than an avowed and intelligent despotism.

V.

WHAT OUR LAND POLICY SHOULD BE.

How We Should Dispose of Our New Land.

When we reflect what land is; when we consider the relations between it and labor; when we remember that to own the land upon which a man *must* gain his subsistence is to all intents and purposes to own the man himself, we cannot remain in doubt as to what should be our policy in disposing of our public lands.

We have no right to dispose of them except to *actual settlers*—to the men who really want to use them; no right to sell them to speculators, to give them to railroad companies or to grant them for agricultural colleges; no more right to do so than we have to sell or to grant the labor of the people who must some day live upon them.

And to actual settlers we should *give* them. *Give,* not sell. For we have no right to step between the man who wants to use land and land which is as yet unused, and to demand of him a price for our permission to avail himself of his Creator's bounty. The cost of surveying and the cost of administering the Land Office may be proper charges; but even these it were juster and wiser to charge as general expenses, to be borne by the surplus wealth of the country, by the property which settlement will make more valuable. We can better afford to bear the necessary expenses of the Land Office than we can the expense of keeping useless men-of-war at sea or idle troops in garrison posts. When we can give a few rich bankers twenty or thirty millions a year we can afford to pay a few millions in order to make our public lands perfectly free. Let the settler keep all of his little capital; it is his seed wheat. When he has gathered his crop, then we may take our toll, with usury if need be.

And we should give but in limited quantities. For while every man has a right to as much land as he can properly use, no man has a right to any more, and when others do or will want it, cannot take any more without infringing on *their* rights. One hundred and sixty acres is too much to give one person; it is more than he can cultivate; and our great object should be to give every one an opportunity of employing his own labor, and to give no opportunity to any one to appropriate the labor of others. We cannot afford to give so much in view of the extent of the public domain and the demand for homes yet to be made upon it. While we are calling upon all the world to come in and take our land, let us save a little for our own children. Nor can we afford to give so much in view of the economic loss consequent upon the dispersion of population. Four families to the square mile are not enough to secure the greatest return to labor and the least waste in exchanges. Eighty acres is quite enough for any one, and I am inclined to think forty acres still nearer the proper amount.

There should be but this one way of disposing of the agricultural lands. None at all should be given to the States, except such as was actually needed for sites of public buildings; none at all for school funds or agricultural colleges. The earnings of a self-employing, independent people, upon which the State may at any time draw, constitute the best school fund; to diffuse wealth so that the masses may enjoy the luxury of learning is the best way to provide for colleges.

Some Objections.

It will be said: If the public land is to be morseled out in this way, what is to be done for stock ranches and sheep farms? There will be the unused land, the public commons. Let the large herds and flocks keep upon that, moving further along as it is needed for settlement. But there would be plenty of stock kept on eighty-acre or even forty-acre farms. In Belgium each six-acre farmer has his cow or two of the best breed, and kept in the best condition.

And it may be said: There is some land which requires extensive work for its reclamation. Capital cannot be induced to undertake this work if the land be given away in small pieces. But if capital cannot, labor can. The most difficult reclamation in the world—that of turning the shifting sands of the French sea coast into gardens has been done by ten and twelve-acre farmers. Observe that it is proposed to give the lands only to actual settlers. Is there any of our land which requires for its reclamation greater capital than that involved in the labor of sixteen men to the square mile, working to make themselves homes? The cost of reclaiming the swamp lands of California, which has been made an excuse for giving them away by the hundred thousand acres, does not in most cases equal the cost of the fencing required on the uplands. Let men be sure that they are working for themselves; give them a little stake in the general prosperity, and labor will combine intelligently and economically enough.

How Settlement Would Go On.

Under such a policy as this, settlement would go on regularly and thoroughly. Population would not in the same time spread over as much ground as under the present policy; but what it did spread over would be well settled and well cultivated. There would be no necessity for building costly railroads to connect settlers with a market. The market would accompany settlement. No one would go out into the wilderness, to brave all the hardships and discomforts of the solitary frontier life; but with the foremost line of settlement would go church and school-house and lecture-room. The ill-paid overworked mechanic of the city could find a home on the soil, where he would not have to abandon all the comforts of civilization, but where there would be society enough to make life attractive, and where the wants of his neighbors would give a market for his surplus labor until his land began to produce; and to tell those who complain of want of employment and low wages to make for themselves homes on the public domain would then be no idle taunt.

Consider, too, the general gain from this mode of settlement. How much of our labor is now given to transportation, and wasted in various ways, because of the scattering of our population which land grabbing has caused?

Something Still More Radical Needed.

But still the adoption of such a policy would effect only the land that is left us. It would be preventive, not remedial. It would still leave the great belts granted to railroads, the vast estates such as those with which California is cursed, and the large bodies of land which everywhere have been made the subject of speculation. It would leave, moreover, still in full force, the tendeney which is concentrating the ownership of the land in a few hands in the older settled States. And further than this, I hardly think, agitate as we may, that we can secure the adoption of such a preventive policy until we can do something to make the monopolization land unprofitable.

What we want, therefore, is something which shall destroy the tendency to the aggregation of land, which shall break up present monopolization, and which shall prevent (by doing away with the temptation) future monopolization. And as arbitrary and restrictive laws are always difficult to enforce, we want a measure which shall be equal, uniform and constant in its operation; a measure which will not restrict enterprise, which will not curtail production, and which will not offend the natural sense of justice.

When our 40,000,000 of people have to raise $800,000,000 per year for public purposes * we cannot have any difficulty in discovering such a remedy, in the adjustment of taxation.

A Lesson from the Past.

Let us turn for a moment from the glare of the Nineteenth Century to the darkness of mediæval times. The spirit of the Feudal System dealt far more wisely with the land than the system which has succeeded it, and rude outcome of a barbarous age though it was, we may, remembering the difference of times and conditions, go back to it for many valuable lessons. The Feudal System annexed duties to privileges. In theory, at least, protection was the corollary of allegiance, and honor brought with it the obligation to a good life and noble deeds, while the ownership of land involved the necessity of bearing the public expenses. One portion of the land, allotted to the Crown, defrayed the expenses of the State; out of the profits of another portion, alotted to the military tenants, the army was provided and maintained; the profits of a third portion, given to religious uses, supported the Church and relieved the sick, the indigent and the wayworn, while there was a fourth portion, the commons, of which no man was master, but which was free to all the people. The great debt, the grinding taxation, which now falls on the laboring classes of England, are but the results of a departure from this system. Before Henry VIII suppressed the monasteries and enclosed the commons there were no poor laws in England and no need for any; until the crown lands were got rid of there was no necessity for taxation for the support of the government; until the military tenants shirked the condition on which they had been originally permitted to reap the profits of land ownership, England could at any time put an army in the field without borrowing and with taxation; and a recent English writer has estimated that had the feudal tenures been continued, England would have now had at her command a completely appointed army of six hundred thousand men, without the cost of a penny to the public treasury or to the laboring classes. Had this system been continued the vast war expenses of England would have come from the surplus wealth of those who make war; the expenses of Government would have borne upon the classes who direct the government; and the deep gangrene of pauperism, which perplexes the statesman and baffles the philanthropist, would have had no existence. England would have been stronger, richer, happier. Why should *we* not go back to the old system, and charge the expenses of government upon our lands?

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* Estimate of Commissioner Wells.

If we do, we shall go far towards breaking up land monopoly and all its evils, and towards counteracting the causes now so rapidly concentrating wealth in a few hands. We shall raise our revenues by the most just and the most simple means, and with the least possible burden upon production.

Taxation of Land Falls only on its Owner.

There is one peculiarity in a land tax. With a few trifling exceptions of no practical importance it is the only tax which must be paid by the holder of the thing taxed. If we impose a tax upon money loaned, the lender will charge it to the borrower, and the borrower must pay it, otherwise the money will be sent out of the country for investment, and if the borrower uses it in his business he, in his turn, must charge it to his customers or his business becomes unprofitable. If we impose a tax upon buildings, those who use them must pay it, as otherwise the erection of buildings becomes unprofitable, and will cease until rents become high enough to pay the regular profit on the cost of building and the tax besides. But not so with land. Land is not an article of production. Its quantity is fixed. No matter how little you tax it there will be no more of it; no matter how much you tax it there will be no less. It can neither be removed nor made scarce by cessation of production. There is no possible way in which owners of land can shift the tax upon the user. And so while the effect of taxation upon all other things is to increase their value, and thus to make the consumer pay the tax--the effect of a tax upon land is to reduce its value--that is, its selling price, as it reduces the profit of its ownership without reducing its supply. It will not, however, reduce its renting price. The same amount of rent will be paid; but a portion of it will now go to the State instead of to the landlord. And were we to impose upon land a tax equal to the whole annual profit of its ownership, land would be worth nothing and might in many cases be abandoned by its owners. But the users would still have to pay as much as before--paying in taxes what they formerly paid as rent. And reversely, if we were to reduce or take off the taxes on land, the owner, not the user, would get the benefit. Rents would be no higher, but would leave more profit, and the value of land would be more.

Land Taxation the Best Taxation.

The best tax is that which comes nearest to filling the three following conditions:

That it bear as lightly as possible upon production.

That it can be easily and cheaply collected, and cost the people as little as possible in addition to what it yields the Government.

That it bear equally—that is according to the ability to pay.

The tax upon land better fulfills these conditions than any tax it is possible to impose.

1.—As we have seen, it does not bear at all upon production—it adds nothing to prices, and does not affect the cost of living.

2.—As it does not add to prices, it costs the people nothing in addition to what it yields the Government; while as land cannot be hid and cannot be moved, it can be collected with more ease and certainty, and with less expense than any other tax.

3.—A tax upon the value of land is the most equal of all taxes, not that it is paid by all in equal amounts, or even in equal amounts upon equal means, but because the value of land is something which belongs to all, and in taxing land values we are merely taking for the use of the community something which belongs to the community, but which by the necessities of our social organization we are obliged to permit individuals to hold.

Of course, in speaking of the value of land, I mean the value of the land itself, not the value of any improvement which has been made upon it—I mean what I believe is sometimes called in England the *unearned* value of land.

From its very nature it must be apparent that property in land differs essentially from other property, and if the principles I have endeavored to state in the third section of this paper are correct, it must be evident that it is not unjust to impose taxes upon land values which are not imposed on other property. But as the proposition may be somewhat startling, it may be worth while to dwell a little on this point.

Of the Justice of Taxing Land.

Here is a lot in the central part of San Francisco, which, irrespective of the building upon it is worth $100,000. What gives that value? Not what its owner has done,[*] but the fact that 150,000 people have settled around it. This lot yields its owner $10,000 annually. Where does this $10,000 come from? Evidently from the earnings of the workers of the community, for it can come from no where else.

Here is a lot on the outskirts. It is in the same condition in which nature left it. Intrinsically it is worth no more than when there were but a hundred people at Yerba Buena Cove. Then it was worth nothing. Now, that there are 150,000 people here and more coming, it is worth $3,000. That is, its owner can command $3,000 worth of the labor or of the wealth of the community. What does he give for this? Nothing; the land was there before he was.

Suppose a community like that of San Francisco, in which land though in individual hands as now, has no value. Suppose, then, that all at once the land was given a value of, say $150,000,000, which is about the present value of land in San Francisco. What would be the effect? That a tax, of which $150,000,000 is the capitalized value, would be levied upon the whole community for the benefit of a portion. There would no more wealth in the community than before, and no greater means of producing wealth. But of that wealth, beyond the share which they formerly had, the land-owners would now command $150,000,000. That is, there would be $150,000,000 less for other people who were not land-holders.

And does not this consideration of the nature and effect of land values go far to explain the puzzling fact that notwithstanding all the economies in production and distribution which a dense population admits, just as a community increases in population and wealth, so does the reward of the laborer decrease and poverty deepen.

One hundred men settle in a new place. Land has at first little or no value. The net result of their labor is divided pretty equally between them. Each one gets pretty nearly the full value of his contribution to the general stock. The community becomes 100,000. Land has become valuable, its value perhaps aggregating as much as the value of all other property. The production of the community may now be more per capita for each individual who works, but before the division is made, one-half of the product must go to the land-holders. How then can the laborer get so much as he could in the small community?

Now in this view of the matter—considering land values as an indication of the appropriation (though doubtless the necessary appropriation) of the wealth of all; considering land rentals as a tax upon the labor of the community, is not a tax upon land values the most just and the most equal tax that can be levied? Should we not take that which rightfully belongs to the whole before we take that which rightfully belongs to the individual? Should we not tax this tax upon labor before we tax productive labor itself?

That the value of our lands, even the "necessary value" which it would have when stripped of speculative value, would easily bear the whole burden of taxation, there can be no doubt. The statistics are too confused and too unreliable to enable us to judge accurately, of the value of land as compared with the value of other property; but we have high authority for the belief that the value of our land is equal to the value of all other property, including the improvements upon it. The New York Commissioners for the Revision of the Revenue Laws—David A. Wells, Edwin Dodge and George W. Cuyler, the first named of whom as United States Special Commissioner of the Revenue, has had better opportunities for studying all matters connected with taxation than any other man in the United States—say in their report, rendered this year: "A careful consideration and study of the nature and classification of property inclines the Commissioners to indorse the correctness of an opinion which appears to have been originally proposed by a financial writer of New York [George Opdyke] as far back as 1851, viz.: '*That universally the market value of the aggregate of land and that of the aggregate of productive capital are equal.*'"[†]

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[*] Though he may have done some part, as in grading, etc.

[†] By "productive capital" Opdyke means all property other than land. In his Treatise on Political Economy he says: "The statistics presented by assessments of property for the purposes of taxation invariably exhibit the estimated value of land and its meliorations under the head of 'real estate,' and the estimated value of all other productive capital under the head of 'personal estate.' Thus divided, we may readily infer that the value of real estate greatly exceeds that of personal estate, and so these statistics invariably indicate. But if we take the estimate for any given village, town or city, and from the gross value of the real estate deduct the value of the buildings, and add to it the personal estate, we shall then find them equal, provided the assessment has been correctly made, which by the way, very rarely occurs."

After citing examples from New York and Cincinnati, he goes on to say: "It is thus of all other

And it may be here remarked, that these New York Commissioners in their elaborate report recommend the total abolition of the tax on personal property on the ground (which has been proved in every State in the Union, and, in fact by every nation of ancient or modern times) that it is utterly impossible to collect it with any degree of fullness and anything like fairness, and that the attempt to do so results in injury both to the material and the moral interests of the community. They propose intstead of the tax on personal property, to tax every individual on an amount three times as great as the annual rental of the house or place of business he occupies, and present a strong array of reasons to show that this would be a much more equitable and productive mode of taxation. Better still, for the reasons I have given, to abandon the attempt to tax personal property or anything in lieu of it, and to put the bulk of taxation entirely on land values.

Nevertheless, after all that can be said, it must be confessed that there would be some slight injustice in doing so. I had ten thousand dollars, let us say, which I might have put out at high interest, or invested in my business. Supposing the existing policy would be continued, I bought land with it, calculating that in a few years, when population became greater, people would be glad to buy it of me for a much higher price, or give me one-fourth of the crop for the privilege of cultivating it. You now impose taxation, which will lower the value of my land. If you do this, you make my speculation less profitable than others I might have gone into, and thus do me injustice, for you gave me no notice.

This is true, and it is this consideration which makes men like John Stuart Mill shrink from the practical application of deductions from their own doctrines, and propose that in resuming their ownership of the land of England, the people of England shall pay its present proprietors not only its actual value, but also the present value of its prospective increase in value. But if we once do a public wrong, we can never right it without doing somebody injustice. England sought to right the wrong of slavery without injustice to the slaveholders who had invested their capital in human flesh and blood. She succeeded by making them pecuniary compensation ; but in doing this she did a worse injustice to her own white slaves on whom the burden of the payment has been imposed. And by shrinking from doing this slight injustice which would affect but very few people in the community, and those most able to stand it, we continue a ten thousand fold greater injustice ; and the longer we delay action, the greater will be the injustice which we must do.

Of some Exemptions, and some Additions.

For the purpose of making it still more sure that taxation should not bear heavily upon any one ; for the purpose of making still further counteracting the tendency to the concentration of wealth, and for the purpose of securing as far as possible to every citizen an interest in the soil, there should be a uniform exemption to a small amount made to each land-holder—perhaps a smaller amount in the cities, where land is only used for residences and business purposes, than in the country, where labor is directly applied to the land. Those whose land did not exceed in value this minimum would have no taxes to pay ; those whose land did, would pay upon the surplus. This would reverse the present effect of our revenue system, and tend to make the holding of land in large bodies less profitable than the holding of it in small bodies.

And while, perhaps, it might not be wise to attempt to limit the accumulations of any individual during his lifetime, or at any rate, it is not yet necessary to try the experiment, there should be a very heavy duty, amounting to a considerable part of the whole levied upon the estates of deceased persons, and in the case of intestates, the whole should escheat to the State, where there were no heirs of the first or second degree.

There is still another source from which a large revenue might be harmlessly drawn—license taxes upon such businesses as it is public policy to restrict and discourage, such as liquor selling, the keeping of gambling houses, (where this cannot be prevented,) etc. All other taxes of whatever kind or nature, whether National, State, County, or Municipal, might then be swept away.

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cities, towns and villages throughout the civilized world; and it is thus in all agricultural districts, but in these the land and its meliorations are so much more intimately blended that we cannot perceive the facts so readily. The truth is, the market value of land is merely the reflection of the value of the productive capital placed upon it and its immediate vicinity. It has no real value of its own; it costs nothing to produce; but since the laws have endowed it with the vital principle of wealth by subjecting it to individual ownership, it can no longer be obtained without giving in exchange for it an equivalent portion of the capital present and designed to concur with it in the production of wealth."

The Effects of Such a Change.

Consider the effects of the adoption of such a system:

The mere holder of land would be called on to pay just as much taxes as the user of land. The owner of a vacant city lot would have to pay as much for the privilege of keeping other people off it till he wanted to use it, as his neighbor who has a fine house upon his lot, and is either using or deriving rent from it. The monopolizer of agricultural land would be taxed as much as though his land were covered with improvements, with crops and with stock.

Land prices would fall; land speculation would receive its death-blow; land monopolization would no longer pay. Millions and millions of acres from which settlers are now shut out, would be abandoned by their present owners, or sold to settlers on nominal terms. It is only in rare cases that it would pay any one to get land before he wanted to use it, so that those who really wanted to use land would find it easy to get.

The whole weight of taxation would be lifted from productive industry. The million dollar manufactory, and the needle of the seamstress, the mechanic's cottage, and the grand hotel, the farmer's plow, and the ocean steamship, would be alike untaxed. All would be free to buy or sell, to make or save, unannoyed by the tax-gatherer.

Imagine this country with all taxes removed from production and exchange! How demand would spring up; how trade would increase; what a powerful stimulus would be applied to every branch of industry; what an enormous development of wealth would take place. Imagine this country free of taxation, with its unused land free to those who would use it! Would there be many industrious men walking our streets, or tramping over our roads in the vain search for employment? Would we hear much of stagnation in business, and of "over production" of the things that millions of us want? Consider the enormous gain which would result from leaving capital and labor, untrammeled by tax or restriction, to seek the most remunerative fields; the enormous saving which would result from the settling of people near each other, as they would settle, if any one could get enough unused land for his needs, and it would pay nobody to get any more.

Consider the effects of this policy on the distribution of wealth — directly, by reversing the effect of taxation—which is now to make the poor, poorer, and the rich, richer; indirectly, by freeing and cheapening land, and thus putting labor in a position to make better terms with capital. And consider how equalization in the distribution of wealth would react on production—how it would lessen the great army of involuntary idlers; how it would increase the vigor and industry and skill of workers; for poorly rewarded labor is poor labor all the world over, and the greater its reward, the greater the efficiency of labor. Consider, too, the moral effects: Sharp alternations of wealth and poverty, breed vice and crime, as surely as they breed misery. Personal independence is the foundation of all the virtues. Deep poverty brutalizes men. Where it exists, the preacher will preach in vain; and the philantrophist will toil in vain; they are dumping their good words and good deeds into such a Slough of Despond as Pilgrim saw.

Who would Gain and who would Lose.

That the policy proposed would be to the advantage of all who do not hold land is clear enough. But it must not be imagined that all who hold land would lose. On the contrary, the large majority of land-holders would be gainers. Whether a land-holder would gain or lose, would depend upon whether his interest as a land-holder, which would be adversely affected, was greater or less than his other interests, which would be beneficially affected. The man who owns a house and lot of equal value would have less taxes to pay if taxation were taken off of buildings and put on land, as the aggregate value of land is greater than that of buildings. His homestead would sell for less than before, but the money it sold for would buy just as good a house and lot as before; so that, if his intention is to always keep a homestead, he would not lose anything by the shrinkage in its value; or even if it was not, he would not have to keep it long before his gain on taxes would make up for the loss in value. While, if he was a mechanic, engaged in or connected with any of the building trades, he would gain in more constant work and better wages by the stimulus which the exemption of improvements from taxation, and the reduction in the value of land would give to building. Or if he kept a store, or was engaged in any business or profession, he would gain by the quickened growth and increased activity of the community.

And if taxes were removed from everything but land, (with the exceptions and exemptions I have before indicated) the gain would be largely greater. Let the farmer, the mechanic, the manufacturer, or the business man, who is also a land owner, calculate how much he pays of the taxes which enter into the cost of everything he buys, or in any way uses, and how much he loses by the restrictive effect which those taxes have upon all industry and business. Then let him set against this amount, which he now pays and loses, the additional amount which he would pay as taxes on land, or which he would lose by the reduction of its value, were all taxes placed upon land. Did they make this calculation, three out of every four of those who own land would see they would be gainers. For as yet the class whose other interests are subordinate to their interest in the high value of land is really small. And it must be remembered that were our whole revenue raised by a direct land tax, the amount taken from the people in order to give the same amount to the Government would be very much smaller than now, and that there would be a positive increase in wealth, a large share of which would go to the land-owners who would have additional taxes to pay.

What Can be Done at Once.

The more the matter is considered, the more, I think, it will appear that all our taxation, or at least the largest part of it, should be placed upon land values. By doing so we would substitute the best possible revenue system for our present cumbrous, unjust, wasteful and oppressive modes of taxation; we would, without resort to special and arbitrary laws, prevent and break up land monopolization, and we would, at the same time, and in the same simple, just way, do a great deal to counteract the alarming tendency to the concentration of wealth in a few hands, which is now so apparent.

Nevertheless, the application of this remedy is not yet practicable. We are so used to look upon land as upon other property, so accustomed to consider its enhancement in value as a public gain, that it will take some time to educate public opinion up to the proper point to permit this; and even then there will be constitutional difficulties to be removed.

But in the meantime, we can do something to check the progress of land monopolization, and even to break it up. So far as the General Government is concerned, we can insist that no more land grants be made on any pretext or for any purpose; but that all of the public domain still left to us shall be reserved for the small farms of actual settlers. We can go further, and demand that something be done to open to settlers the great belts which have been already handed over to railroad corporations. These grants in the first place, outraged natural justice, and Congress had no more right to make them, than Catherine of Russia had to give away her subjects to her paramours and courtiers, or than the Pope had to divide the Southern Hemisphere between the Spanish and the Portuguese. We should be perfectly justified in taking this land back, throwing it open to settlers upon Government terms, and paying the companies the Government price. Such an operation would largely increase our debt, but the money would be well expended. If this cannot be done, the land can at least be immediately surveyed, so that settlers can find the Government sections, and the right of the Companies to land reserved for them be declared subject to State taxation.

In this monopoly-cursed State of ours, we may at once do a great deal to free our land. By restricting possessory rights to the maximum amount allowed by the General Government to pre-emptors, and by demanding payment for the large tracts now held by speculators under five-dollar certificates, or the payment of twenty per cent. of the purchase money, the Legislature could, in the first week of its session, throw open to settlers some millions of acres now monopolized.* And millions of acres more would be forced into market if its holders were only compelled to pay upon their land the same rate of taxation levied upon other property. The Board of Equalization created by the last Legislature, is endeavoring to secure the proper assessment of these large tracts; but the law under which it works is defective, and the Constitutional requirement of the election of County Assessors is very much in the way of a thorough reform, perhaps makes it impossible. But as under our Constitution as interpreted by the Supreme Court, all property must be taxed equally, we can do no more than this to break up large estates until the Constitution is amended.

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*Under the decisions of the Department, land within the exterior limits of Spanish grants, and included in railroad reservations, does not go to the Railroad Company when the grant is confined to its real limits, or is rejected, but becomes open to settlement.

The Necessity of a Radical Remedy.

There are many who will think that if we do these things, or even if we merely do something to check the grosser abuses in the disposition of our new land, we shall have done all that is necessary. I wish to call the attention of those who thus think to a certain class of facts:

There is a problem which must present itself to every mind which dwells upon the industrial history of the present century; a problem into which all our great social, industrial, and even political questions run—which already perplexes us in the United States; which presses with still greater force in the older countries of Europe; which, in fact, menaces the whole civilized world, and seems like a very riddle of the Sphinx, which fate demands of modern civilization, and which not to answer, is to be destroyed—the problem of the proper distribution of wealth.

How is it that the increase of productive power, and the accumulation of wealth seem to bring no benefit, no relief to the working classes; that the condition of the laborer is better in the new and poor country, than in the old and rich country? That in a country like Great Britain, whose productive power has been so enormously increased, whose surplus wealth is lent to all the world, and whose surplus productions are sent to every market, pauperism is increasing in England, while one-third of the families of Scotland live in a single room each, and one-third more in two rooms each.* How is it that, though within the century steam machinery has added to the productive force of Great Britain a power greater than that of the manual labor of the whole human race, that the toil of mere infants is cruelly extorted—that cultivation in the richest districts is largely carried on by gangs of women and children, in which mere babies are worked under the lash; that little girls are to be found wielding sledge hammers, and little boys toiling night and day in the fearful heat of glass furnaces, or working to the extreme limit of human endurance in fetid garrets and damp cellars, at the most monotonous employments—children who work so early and work so hard that they know nothing of God, have never heard of the Bible, call a violet a pretty bird, and when shown a cow in a picture, think it must be a lion;† children whose natural protectors have been changed by brutalizing poverty and the want that knows no law, into the most cruel of taskmasters?

Why is it that in the older parts of the United States we are rapidly approximating to the same state of things? Why is it that, with all our labor-saving machinery, all the new methods of increasing production which our fertile genius is constantly discovering—with all our railroads, and steamships, and power looms, and sewing machines, our mechanics cannot secure a reduction of two hours in their daily toil; that the general condition of the working classes is becoming worse instead of better; and the employment of women and children at hard labor is extending; that though wealth is accumulating, and luxury increasing, it is becoming harder and harder for the poor man to live?

A very Sodom's apple seems this "progress" of ours to the classes that have the most need to progress. We have been "developing the country" fast enough. We have been building railroads, and peopling the wilderness, and extending our cities. But what is the gain? We count up more millions of people, and more hundreds of millons of taxable property; our great cities are larger, our millionaires are more numerous, and their wealth is more enormous; but are the masses of the people any better off? Is it not so notoriously true that we accept the statement without question, that just as population increases and wealth augments—just in proportion as we near the goal for which we strive so hard, that poverty extends and deepens, and it becomes harder and harder for a poor man to make a living?

That the startling change for the worse that has come over the condition of the masses of the United States in the last ten years is attributable in some part to the destruction caused by the war, and in much greater part to stupid, reckless, wicked legislation, there can be no doubt. The whole economic policy of the General Government—the management of the debt and of the currency, the imposition of a tariff which is oppressing all our industry, and actually killing many branches of it, the immense donations to corporations—has tended with irresistible force, as though devised for the purpose, to make a few the richer and the many the poorer; to swell the gains of a few rich capitalists, and make hundreds of thousands of willing workmen stand with idle hands.

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*Census of 1861. See Journal of Statistical Society, vol. 32.
†Report Children's Employment Commission.

But beneath and beyond these special causes, we may see, as could be seen before the war had given the money power an opportunity and excuse for wresting the the machinery of Government to its own selfish ends, the working of some general tendency, observable all over the world, and most obvious in the countries which have made the greatest advances in productive power and in wealth.

What is the cause or the causes of this tendency? If we say, as many of the economists say, that it is over population in England—that the working classes get married too early and have too many children—what is it in the United States? If we say that in the United States it is solely due to special conditions, what is it in Australia and other countries of widely differing circumstances?

Now, although there are undoubtedly other general causes, such as the tendency of modern processes to require greater capital and rarer administrative ability, to offer greater facilities for combination, and give more and more advantage to him who can work on a large scale; yet if the principles previously stated are correct, are we not led irresistibly to the conclusion that the main cause of this general tendency to the unequal division of wealth lies in the pursuance of a wrong policy in regard to land—in permitting a few to take and to keep that which belongs to all; in treating the power of appropriating labor as though it were in itself labor-produced wealth? Is not this mistake sufficient of itself to explain most of the perplexing phenomena to which I have alluded?

When land becomes fully monopolized as it is in England and Ireland—when the competition between land-users becomes greater than the competition between land-owners, whatever increase of wealth there is must go to the land-owner or to the capitalist, the laborer gets nothing but a subsistence. Amid lowing herds he never tastes meat, raising bounteous crops of the finest wheat, he lives on rye or potatoes; and where steam has multiplied by hundreds and by thousands manufacturing power, he is clad in rags, and sends his children to work while they are yet infants. No matter what be the increase in the fertility of the soil, no matter what the increase in product which beneficent inventions cause, no matter even if good laws succeed bad laws, as when free trade succeeds protection, as has been the case in Great Britain, all the advantage goes to the land-owner; none to the landless laborer, for the ownership of the land gives the power of taking all that labor upon it will produce, except enough to keep the laborer in condition to work, and anything more that is given is charity. And so increase in productive power is greater wealth to the land-owner—more splendor in his drawing rooms, more horses in his stables and hounds in his kennels, finer yachts, and pictures and books—more command of everything that makes life desirable; but to the laborer it is not an additional crust.

And where land monopolization has not gone so far, steadily with the increase of wealth goes on the increase of land values. Every successive increase represents so much which those who do not produce may take from the results of production, measures a new tax upon the whole community for the benefit of a portion. Every successive increase indicating no addition to wealth, but a greater difference in the division of wealth, making one class the richer, the others the poorer, and tending still further to increase the inequality in the distribution of wealth—on the one side, by making the aggregations of capital larger and its power thus greater, and on the other, by increasing the number of those who cannot buy land for themselves, but must labor for or pay rent to others, and while thus swelling the number of those who must make terms with capital for permission to work, at the same time reducing their ability to make fair terms in the bargain.

Need we go any further to find the root of the difficulty? to discover the point at which we must commence the reform which will make other reforms possible? And while, on the one hand, the recognition of the main cause of the inequality in the distribution of wealth which is becoming a disease of our civilization, condemns the wild dreams of impracticable socialisms, and the impossible theories of governmental interference to restrict accumulation and competition and to limit the productive power of capital, by discovering a just and an easy remedy; on the other hand, the spread of such theories should admonish those who consider the remedy of a common sense policy in regard to land as too radical of the necessity of making some attempt at reform. This great problem of the more equal distribiuton of wealth must in some way be solved, if our civilization, like those that went before it, is not to breed the seeds of its own destruction, In one way or another the attempt must be made—if not in one way, then in another. The spread of education, the growth of democratic sentiment, the weakening of the influences which lead men to accept the existing condition of things as divinely appointed, insure that, and the general uneasiness of labor, the growth of trade-unionism, the spread of such societies as the International prove it! The terrible struggle of the Paris commune was but such an attempt.[*] And in the light of burning Paris we may see how it may be that this very civilization of ours, this second Tower of Babel, which some deem reaches so far towards heaven that we can plainly see there is no God there, may yet crumble and perish. How prophetic, in view of those recent events, seem the words of Macauley, when, alluding to Gibbons' argument that modern civilization could not be overturned as was the ancient, he declared that in the very heart of our great cities, in the shadow of palaces, libraries and colleges, poverty and ignorance might produce a race of Huns fiercer than any who followed Atila, and of Vandals more destructive than those led by Genseric.

The Fast and the Future of the Nation.

Five years must yet pass before we can celebrate the hundreth anniversary of the Republic. A century ago, as the result of nearly two hundred years of colonization, the scarce three million people of the thirteen colonies but fringed the Atlantic seaboard with their settlements. Pittsburg was to them the Far West, and the Mississippi as little known as is now the great river that through a thousand miles of Arctic solitudes, rolls sluggishly to its mouth in our newly acquired Northern possessions.

Looking back over the history of the great nations from whom we derive our blood, our language, and our institutions, and a hundred years seems but a small span. A hundred years after the foundation of the city, and Rome had scarce begun her conquering mission; a hundred years after the Norman Invasion, and the England of the first Plantagenet differed but little from the England of the Bastard.

How wondrous seems our growth when compared with the past! So wondrous, so unprecedented, that when the slow lapse of years shall have shortened the perspective, and when in obedience to altered conditions, the rate of increase shall have slackened, it will seem as though in our time the very soil of America must have bred men.

We have subdued a Continent in a shorter time than many a palace and cathedral of the Old World was a building; in less than a century we have sprung to a first rank among the nations; our population is increasing in a steady ratio; and we are carrying westward the center of power and wealth, of luxury, learning and refinement, with more rapidity than it ever moved before.

We look with wonder upon the past. When we turn to the future, imagination fails, for sober reason with her cold deductions goes far beyond the highest flights that fancy can dare, and we turn dazzled and almost awe-struck from the picture that is mirrored. Judging from the past, in all human probability there will be on this continent, a century from now, four or five, perhaps five or six, hundred million English-speaking people, stretching from the isothermal line which marks the northern limit of the culture of wheat, to the southern limit of the semi-trophical clime. Four or five hundred million people, with the railroad, the telegraph, and all the arts and appliances that we now have, and with all the undreamed of inventions which another century such as the past will develope. Beside the great cities of such a people, the Paris of to-day will be a village, the London, a provincial town, and to the political power which will grow up, if these people remain under one government, the great nations of Europe will occupy such relative positions as the South American States now hold to the great Republic of the North.

Yet we should never forget that we have no exemption from the difficulties and dangers which have beset other peoples, though they may come to us in somewhat different guise. The very rapidity of our growth should admonish us that though we are still in our youth, our conditions are fast changing; the very possibilities of our future warn us that this is the appointed theatre upon which the questions that perplex the world, must be worked out, or fought out. What good, or what evil, we of this generation do, will appear in the next on an enormously magnified scale. The blunders that we are carelessly making, saying "these things will right themselves in time," will indeed right themselves; but how? How was the wrong of slavery righted in the United States? The whole history of mankind, with its story of fire and sword, of suffering and destruction, is but one continued example of how national blunders and crimes work themselves out. On the smaller scale of individual life and actions, the workings of Divine justice are sometimes never seen ; but sure, though not always swift, is the Nemesis that with tireless feet, follows every wrong doing of a people.

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[*] And this French struggle also shows the conservative influence of the diffusion of landed property. The Radicals of Paris were beaten by the small proprietors of the provinces. Had the lands of France been in the hands of a few, as the first revolution found it, the raising of the red flag on the Hotel de Ville would have been the signal for a Jacqeueire in every part of the country. So concious are the extreme Reds of the conservative influence of property in land that they have for a long time condemned as a fatal mistake the law of the first Republic which provided for the equal distribution of land among heirs, not because it has not improved the condition of the peasantry, but because the improvement in their condition and the interest which their possession of land gives them in the maintenance of order disposes them to oppose tthe violent remedies which the workmen of the cities think necessary.

The American people have had a better chance and a fairer field than any nation that has gone before. Coming to a new world with all the experiences of the old ; possessed of all the knowledge and the arts of the most advanced of the families of men, the temperate zone of an immense continent lay before them, where unembarrassed by previous mistakes, they might work out the problem of human happiness by the light of the history of two thousand years. Yet nobly and well as our fathers reared the edifice of civil and religious liberty, true ideas as to the treatment of land, the very foundation of all other institutions, seem never to have entered their minds. In a new country where nothing was so abundant as land, and where there was nothing to suggest its monpolization, the men who gave direction to our thought and shaped our polity, shook off the idea of the divine right of kings without shaking off that of the divine right of land-owners. They promulgated the grand truth that all men are born with equal rights to life, liberty, and the pursuit of happiness, without promulgating the doctrines in respect to land which alone could maintain those rights as a living reality ; they instituted a form of government, based on the theory of the independence and virtue of the masses of the people without imposing those restrictions upon land monopolization which alone can keep the masses virtuous and independent. They laid the foundations for a glorious house ; but they laid them in the sand.

Already we can see that the rains will come, the winds will blow. We see it in the increase of the renting system in agriculture; in the massing of men in the employ of great manufacturers; in the necessity under which thousands of our citizens lie of voting, and even of speaking on political matters, as their employers dictate;* in the marked differentiation of our people in older sections into the rich and the poor; in the evolution of "dangerous classes" in our large cities; in the growth of enormous individual fortunes; in the springing up of corporations which dwarf the States, and fairly grapple the General Government; in the increase of political corruption; in the ease with which a few great rings wrest the whole power of the nation to their aggrandizement.

Go to New York, the greatest of our American cities, the type of what many of them must soon be, the best example of the condition to which the whole country is tending—New York, where men build marble stables for their horses, and an army of women crowd the streets at night to sell their souls for the necessities which unremitting toil, such as no human being ought to endure, will not give them—where a hundred thousand men who ought to be at work are looking for employment, and a hundred thousand children who ought to be at school, are at work. Notice the great blocks of warehouses, the gorgeousness of Broadway, the costly palaces which line the avenues. Notice too, the miles of brothels which flank them, the tenement houses, where poverty festers and vice breeds, and the man from the free open West turns sick at heart ; notice in the depth of winter the barefooted, ragged children in the press of the liveried equipages, and you will understand how it is that republican government has broken down in New York ; how it is that republican government is impossible there ; and how it is that the crucial test of our institutions is yet to come. If you say that New York is a great seaport, with different conditions from the rest of the country, go to the manufacturing towns, to the other cities, and see the same characteristics developing just in proportion to their population and wealth.

And while we may see all this, we are doing our utmost to make land dear, giving away the public domain in tracts of millions of acres, drawing great belts across it upon which the settler cannot enter; offering a premium by our taxation for the concentration of land ownership, and pressing with the whole weight of our revenue system in favor of the concentration of wealth.

How a Great People Perished.

In all the history of the past there is but one nation with which the great nation now growing up on this continent can be compared : but one people which has occupied the position and exercised the influence, which for good or evil, the American people must occupy and exert. A nation which has left a deeper impress upon the life of the race than any other nation that ever existed; whose sway was co-extensive with the known world; whose heroes and poets, and sages and orators, are still familiar names to us; whose literature and art still furnish us models; whose language has enriched every modern tongue, and though long dead, is still the language of science and of religion, and whose jurisprudence is the great mine from which our modern systems are wrought. That a nation so powerful in arms, so advanced in the arts, should perish as Rome perished; that a civilization so widely diffused, should be buried as was the Roman civilization, is the greatest marvel which history presents. To the Roman citizen of the time of Augustus or the Antonines, it would have appeared as incredible, as utterly impossible that Rome could be overwhelmed by barbarians, as to the American citizen of to-day it would appear impossible that the great American Republic could be conquered by the Apaches, or the Chinooks, our arts forgotton, and our civilization lost.

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*See Reports Massachusetts Bureau Labor Statistics.

How did this once incredible thing happen? What were the hidden causes that sapped the strength and eat out the heart of this world-conquering power, so that it crumbled to pieces before the shock of barbarian hordes? A Roman historian himself has told us. "Great estates ruined Italy!" In the land policy of Rome may be traced the secret of her rise, the cause of her fall.

"To every citizen as much land as he himself may use; he is an enemy of the State who desires any more," was the spirit of the land policy which enabled Rome to assimilate so quickly the peoples that she conquered; that gave her a body of citizens whose arms were a bulwark against every assault, and who carried her standards in triumph in every direction. At first a single acre constituted the patrimony of an Roman; afterwards the amount was increased to three acres and a half. These were the heroic days of the Republic, when every citizen seemed animated by a public spirit and a public virtue which made the Roman name as famous as it made the Roman arms invincible; when Cincinnatus left his two acre-farm to become Dictator, and after the danger was over and the State was safe, returned to his plow; when Regulus, at the head of a conquering army in Africa, asked to be relieved, because his single slave had died, and there was no one to cultivate his little farm for his family.

But, as wealth poured in from foreign conquests, and the lust for riches grew, the old policy was set aside. The Senate granted away the public domain in large tracts, just as our Senate is doing now; and the fusion of the little farms into large estates by purchase, by force, and by fraud, went on, until whole provinces were owned by two or three proprietors, and chained slaves had taken the place of the sturdy peasantry of Italy. The small farmers who had given her strength to Rome were driven to the cities, to swell the ranks of the proletarians, and become clients of the great families, or abroad to perish in the wars. There came to be but two classes—the enormously rich and their dependants and slaves; society thus constituted bred its destroying monsters; the old virtues vanished, population declined, art sank, the old conquering race actually died out, and Rome perished, as a modern historian puts it, from the very failure of the crop of *men*.

Centuries ago this happened, but the laws of the universe are to-day what they were then.

I have endeavored in this paper to group together some facts which show with what rapidity, and by what methods, the monopolization of our land is going on; to answer some arguments which are advanced in its excuse; to state some principles which prove the matter to be of the deepest interest to all of us, whether we live directly by the soil or not; and to suggest some remedies.

That land monopolization when it reaches the point to which it has been carried in England and Ireland is productive of great evils we shall probably all agree. But popular opinion, even in so far as any attention has been paid to the subject, seems to regard the danger with us as remote. There are few who understand how rapidly our land is becoming monopolized; there are fewer still who seem to appreciate the evils which land monopolization is already inflicting upon us, or the nearness of the greater evils which it threatens.

And so as to the remedy. There are many who will concede that the reckless grants of public land should cease, and even that the public domain should be reserved for actual settlers; but who will be startled by the proposition to put the bulk of taxation on land exclusively? But the matter will bear thinking of. It is impossible to overestimate the importance of this land question. The longer it is considered, the broader does it seem to be and the deeper does it seem to go. It imperatively demands far more attention than it has received; it is worthy of all the attention that can be given to it.

To properly treat so large a subject in so brief a space is a most difficult matter. I have merely outlined it; but if I have done something towards calling attention to the recklessness of our present land policy, and towards suggesting earnest thought as to what that policy should be, I have accomplished all I proposed.

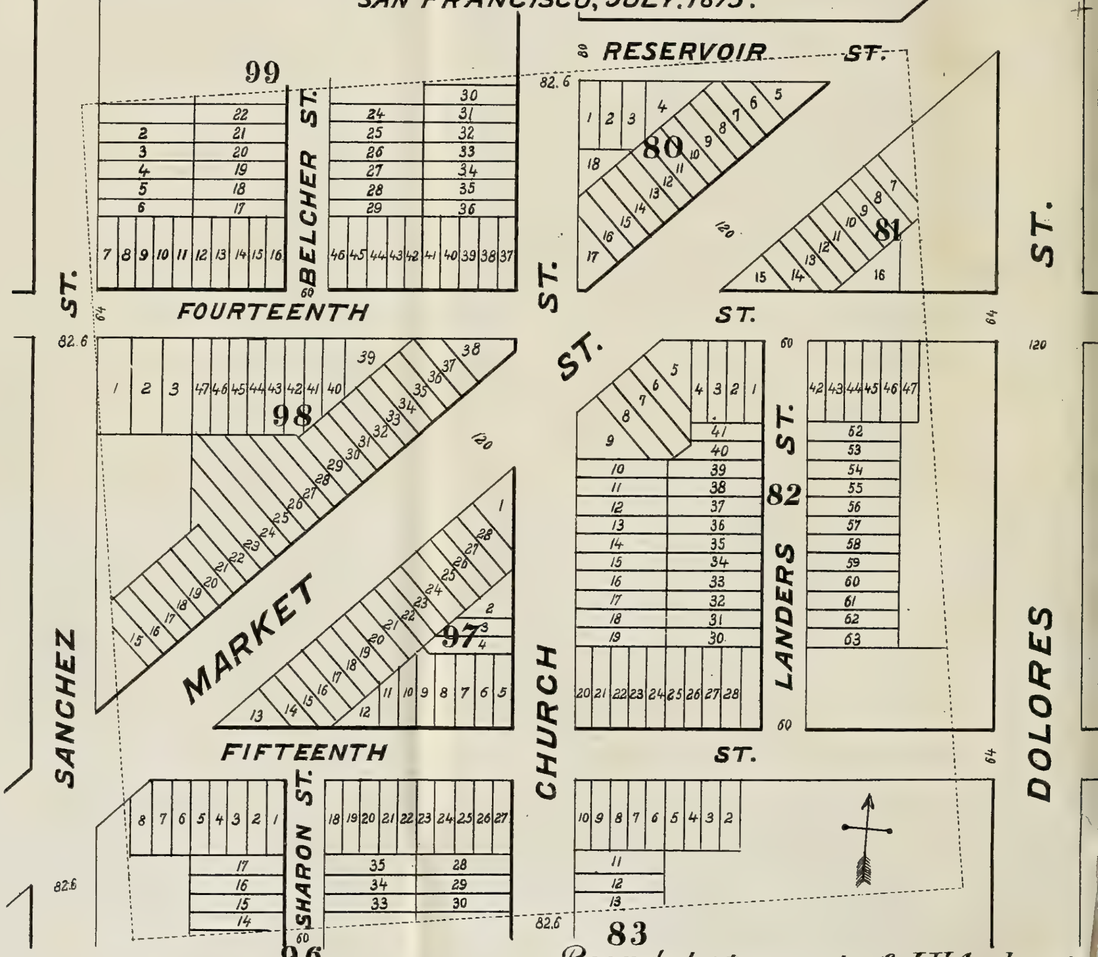
HENRY GEORGE.

San Francisco, July 27, 1871.

MAP OF MARKET & FOURTEENTH STS HOMESTEAD ASSOCIATION

AS PREPARED BY Wm P. HUMPHREYS, CITY & COUNTY SURVEYOR. S.F

SAN FRANCISCO, JULY. 1875.



Adopted by the Board of Trustees of the Market & Fourteenth Sts Homestead Association, August 7th 1875

Josiah H. Applegate.
Secretary.

G.T. BROWN & CO. LITH. S.F.

Recorded at request of J.H. Applegate
Sept. 23. 1875. at 4 P.M in Map Book 1.
page 156.

O.H. Frank.
County Recorder.
per E.R. Bermingham
Deputy.

ABSTRACT OF TITLE

TO THE

LANDS

OF THE

Market and Fourteenth Streets

HOMESTEAD ASSOCIATION,

AS SHOWN ON THE ACCOMPANYING DIAGRAM, AND SITUATED
IN THE CITY AND COUNTY OF SAN FRANCISCO,
STATE OF CALIFORNIA.

JOHN LANDERS, President. JOSIAH H. APPLEGATE, Secretary.

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The Guerrero Title.

THE GUERRERO TITLE.

FRANCISCO GUERRERO TO THE COMMANDANT GENERAL, ETC.

PETITION.

Seal Fourth, one Cuartilla.

Provisionally used by the administration of the Maritime Customs of Monterey, in Upper California, for the years 1834 and 1835.

CASTRO. ANGEL RAMIREZ.

Monterey, Nov. 4, 1836.

Take information from the administrator of the Mission of San Francisco, as to whether the land is vacant. The petitioner can then be favored.

GUTIERREZ.

Dolores, Nov. 9, 1836.

In conformity with the Superior degree, I will state that the land is now vacant, and, according to the order of General Figueroa, deceased, the lot can be granted to the party interested.

GUILLO. FLORES.

To the Commandant General and Political Chief of the Territory of Upper California.

Francis Guerrero, a Mexican by birth, comes before your Excellency in due form, and represents: That he is a member of the colony that came to this Territory, and that the most Excellent Commandant General, Don Jose Figueroa, stated to us that we might take up our residence wheresoever it might please us. I request of you the use of the power vested in you to grant to me four hundred varas square of land in a swamp that forms a plain at the north north-west of the Mission, from the place that the water starts from, from the north to the south-east and west, up to the road to Yerba Buena, according to the design accompanying this.

Should I receive this service from your Excellency, I shall make of use of said land, and shall receive, therefore, my welfare.

To your Excellency I request that you will duly grant my request, for which you will receive my thanks. Swearing the necessary, etc. San Francisco, October 28th, 1836.

FRANCO. GUERRERO.

GRANT.

MONTEREY, November 30, 1836.

Having seen the information from the Administrator of the Mission of Dolores, and the Superior order relating to Colonial Sessions, there is granted to the citizen, Francisco Guerrero, four hundred varas in the place solicited, according to the present request. To which effect he will present this document to the Territorial Government as soon as the Missions shall be regulated, so that the present document or decree can be respected.

NICOLAS GUTIERREZ.

ORDER.

Political Government of Upper California.

With this date I state to the Commissioner, M. Solano, the following:

Should Mr. Jose Maria Hijah, or any other individuals of the colony, conclude to move to any other point he will facilitate them with the necessary aid so that they can cross the bay, and will also transport their equipage, he advising me of those persons that do the same, also with their place of destiny to serve for my goverment.

I transmit this to you in case it may be necessary so that you can be prepared.

God and Liberty. San Francisco, March 5, 1835.

JOSE FIGUEROA,
S. Comisionado de S. Francisco de Asis.

Recorded in Spanish.

Liber B Spanish records, page 14. And Liber 1 Spanish Translations, pages 108 and 109.

Recorded in English.

Liber 1 Spanish Translations, pages 110 and 111.

Forming part of the record is a rough diagram or plan of a tract of land, including the lot granted.

FRANCISCO GUERRERO TO JOSEPH SUTTON AND RICHARD STEVENS.

LEASE.

Dated December 28th, 1849.

Of all those three rooms forming the south-west corner of the adobe house, now occupied by said Francisco Guerrero, in the Mission Dolores. Also, all the tract of land lying immediately west of said rooms, viz.:

Beginning at the south-west corner of said house and running west to a stake forming a boundary of said land on the west line, thence north to a line opposite to the back wall of said rooms, thence east to the wall of said house, thence along said wall south to the place of beginning.

For the term of one year from Dec. 28, 1849, with privilege of renewal for any number of years not exceeding seven, at $20 per month, or improving the property to that amount.

Not signed, acknowledged, nor certificate or date of record attached.

On the margin is the following: "This deed was recorded by copy, and upon comparing with the original some mistakes were detected, viz.: in second line from top the name of Henry was written instead of Richard."

Recorded in Mission Book, page 3.

PROBATE COURT OF THE CITY AND COUNTY OF SAN FRANCISCO —ESTATE OF FRANCISCO GUERRERO, DECEASED.

REGISTER I, CASE 155, PAGE 62.

July 31, 1851. Petition of Josefa De Haro Guerrero, shows that Francisco Guerrero departed this life on or about July 31, 1851, leaving him surviving your petitioner, his wife and two infant children, under the age of 10 years, and that he was seized and possessed at the time of his death of certain real and personal estate situated within the County of San Francisco, and that said decedent died intestate, to the best of petitioner's knowledge and belief.

Prays that Letters of Administration upon said estate may be granted to her jointly with Ramon de Zaldo, of San Francisco.

Dated July 29, 1851.

July 31, 1851. Ordered that August 15th be appointed for hearing above petition.

August 23. Josefa de Haro de Guerrero files request that Joseph P. Thompson be joined with her in the administration of the estate.

October 7. Mr. Thompson, being unable to act, prays that Henry F. Teschemacher may be joined with her in the administration of the estate.

October 25. Ordered that Josefa Guerrero and Henry F. Teschemacher be appointed administratrix and administrator of said estate, on filing bond, each in sum of $5,000.

Bond filed, ordered that letters issue.

November 13. Ordered that W. D. M. Howard, George Howard, and J. K. Rose be appointed appraisers.

January 31, 1852. Inventory and appraisement filed.

Real Estate.

Lot called Los Mansinitas (and other property).

January 31, 1852. Affidavit of publication of notice to creditors filed.

April 19, 1852. Joseph P. Thompson stating that he is going to be absent, prays to be released from the bond of Josefa Guerrero.

Ordered that May 1st be appointed for hearing above petition, and that notice be given to all interested.

(On the margin is written "notice given.")

H. F. Teschemacher files resignation as administrator.

Ordered that May 1st be appointed to show cause why above resignation should not be accepted.

April 19. H. F. Teschemacher files account.

May 1. Ordered that the widow of F. Guerrero be cited to appear and show cause why account of Teschemacher should not be accepted.

May 10. Affidavit of posting filed.

Resignation of H. F. Teschemacher accepted and bond canceled.

March 4, 1867. Petition of Augustin Guerrero for Letters of Administration shows that deceased, at the time of his death, was possessed of real estate in the City and County of San Francisco and the County of San Mateo of the value of about $15,000, and personal property of about $2,500.

That deceased left him surviving as his heirs-at-law, his widow, Josefa de Haro Guerrero, residing at the time in the City and County of San Francisco, now residing in the County of San Mateo, and three children, Augustin Guerrero, Victoriano Guerrero, residing in said city and county, and Francisco Guerrero, who died in the month of February, 1853, unmarried and without children.

That all of said heirs are of the age of majority, excepting Victoriano Guerrero, who is of the age of 17 years.

That on Oct. 25, 1851, and after due proceedings had letters of administration were duly issued herein to said widow of deceased and H. F. Teschemacher, who thereupon, duly qualified and entered upon the execution of their trust as such administrators.

That on ——, an order was duly made and entered herein directing notice to be given to the creditors of said estate, and thereafter on ——, an order and decree was duly made and entered herein.

That an inventory and appraisement has been filed. That said H. F. Teschemacher resigned his trust as administrator.

That said widow of deceased continued to discharge the duties of her trust as administratrix up to February 12, 1853, upon which day she intermarried with James G. Denniston, by which said marriage her authority as administratrix was extinguished.

That a portion of said estate is thus left unadministered upon.

That the value of said estate left unadministered upon is of the value of about $265,000, which is all common property, consisting of real estate in the City and County of San Francisco, and real estate in the County of San Mateo, and personal property.

That your petitioner is the son of said deceased and entitled to letters of administration upon the estate of deceased.

That the real estate in San Mateo County has heretofore been partitioned under the decree of the Twelfth District Court of the County of San Mateo, Jan. 26, 1867, among the parties entitled thereto.

Wherefore petitioner prays that letters of administration upon the estate left unadministered may be issued to him, that a day may be appointed for hearing this petition, and notice be given by posting, etc.

Ordered that March 20, 1867, be appointed a time for hearing above petition, and that notice be given by posting.

March 20. Proof of posting filed.

March 27. Order appointing Augustin Guerrero administrator of the estate left unadministered, upon taking oath and filing bond in the sum of $36,000.

August 19. Approved bond of Augustin Guerrero, in sum of $36,000, filed and recorded.

Letters of administration with oath annexed issued to Augustin Guerrero, recorded and duplicate filed.

Order of notice to creditors made, entered, and filed.

December 19. Affidavit of publication of notice to creditors made, entered, and filed.

April 13, 1868. Petition of Josefa de Haro Denniston, and James G. Denniston, her husband, Augustin Guerrero, and Victoriano, for partial distribution, filed.

Recites death of deceased, the appointment of Josefa de Haro Guerrero and H. F. Teschemacher as administrator and administratrix, the resignation of H. F. Teschemacher as such administrator, the appointment of Augustin Guerrero administrator of the estate left unadministered upon, and the filing of the inventory and appraisement, that due and legal notice has been given to creditors, and that there are no debts outstanding against the estate of deceased.

That there are no other persons interested in said estate other than or except petitioners.

That the real estate mentioned in inventory and appraisement as Los Mansinitas still remains subject to administration.

That on Nov. 1, 1867, letters of guardianship of the person and estate of Victoriano Guerrero, a minor, were duly issued to said Augustin Guerrero, which letters have not been revoked, but are still in full force and effect.

That under and by virtue of the authority conferred upon him as such guardian by an Act of the People of the State of California represented in Senate and Assembly, which became a law on Feb. 20, 1868, said Augustin Guerrero, as such guardian, sold at private sale to Alvinza Hayward all the right, title, and interest of said minor, being 8-27ths thereof in and to lot of land called "Las Manzanitas," situated in City and County of San Francisco, described as follows:

Commencing at a fence in the Mission Dolores (along side of an old ditch), on the north side of a lane at a block of China granite 40½ inches long, 7 inches wide, and 6 inches thick, marked S. D. 1, from which the south-west corner of Thompson's house bears north 34⅓ degs. east, the south gable end of the Hermitage Hotel bears north 21 degs. west, and Richard's nursery house bears north 47¼ degs. west, thence along said ditch with hedge of willows on north side of lane south 81¾ degs. west, 16.85½ chs. to willow tree 5 inches in diameter, marked S. D. 2, thence north 8¼ degs. west 16.85½ chs., to a sawed red-wood post, marked S. D. 3, from which north-east corner of brick house bears north 86½ degs. west 2.80 chs., thence north 81¾ degs., east 16.85½ chs. to sawed red-wood post marked S. D. 4, from which the south gable of Hermitage Hotel bears south 37½ degs. west, and Richard's nursery-house bears south 22 degs. west, thence south 8¼ degs. east, 16.85½ chs. to beginning; containing 28.41 acres more or less.

Being all that tract of land near the Mission Dolores, and known as the Manzanitas, 400-varas square, be the same more or less, including all the land contained in said inclosure.

That this Probate Court confirmed said sale April 7, 1868, and directed said guardian to execute a conveyance to purchaser.

That on April 9, 1868, said guardian did make, execute, and deliver to said Alvinza Hayward such conveyance, and that to make the same a good and sufficient conveyance of the interest of said minor it is necessary that the interest of said minor in said tract of land should be distributed to him and be discharged and released from the further administration of said estate of deceased.

That your petitioners, Josefa de Haro Denniston, and James G. Denniston, her husband, and Augustin Guerrero have sold their respective interests in said tract of land to Alvinza Hayward at the same rate as the interest of said minor was sold. That before the purchase money can be obtained, therefore, it is necessary that said interest of said Josefa and said Augustin, should be distributed to them and be discharged and released from further administration of said estate.

That your petitioners are entitled to share in the distribution of said tract in the following proportions: the said Josefa de Haro Denniston, 11-27ths; Augustin Guerrero, 8-27ths; Victoriano Guerrero, 8-27ths.

Wherefore your petitioners pray that an order may be made for the distribution to petitioners according to the above mentioned proportions of the above described land.

Order appointing April 17, 1868, a time for hearing above petition, and that notice be given by posting.

April 17. Proof of posting filed.

April 17. Decree of partial distribution made, entered, and filed.

Distributing the property in petition described in the proportions as prayed for, upon each filing bond in the sum of $1,000 to administrator.

April 21. Indemnity bonds of Victoriano, Augustin Guerrero, and Josefa de Haro Denniston, each $1,000 filed.

A certified copy of the decree of distribution is recorded in the Recorder's Office, April 21, 1868.

Liber U, Miscellaneous Records, page 305.

BEFORE THE HONORABLE COMMISSIONERS TO SETTLE PRIVATE LAND CLAIMS OF CALIFORNIA.

JOSEFA PALOMARES, WIDOW, JOSE AUGUSTUS PALOMARES, FRANCISCO PALOMARES, AND VICTORINO PALOMARES vs. THE UNITED STATES.

May 15, 1852. The petition of Josefa Palomares, widow, and Jose Augustus Palomares, Francisco Palomares, and Victorino Palomares, children of Francisco Guerrero Palomares, deceased, respectfully show that on the 30th November, 1836, Nicolas Gutierrez, Governor *ad interim* of California, granted to said Francisco Guerrero Palomares a suerte or lot of land near the Mission Dolores, County of San Francisco, 400 varas square, with the boundaries described in the title and map, a copy of which original title, papers, and map, is submitted herewith. Also submits a plot of the land as surveyed by the Deputy County Surveyor of San Francisco on 24th December, 1850. That said Francisco Guerrero died July 13, 1851, leaving the petitioners, his widow, and heirs. That said Guerrero for the year 1836 to the time of his death, and his widow and heirs since have been and are in the quiet and peaceful possession of said land. That they know of no conflicting claim, and pray for a confirmation.

May 15, 1852. Testimony ot Gomenceido Florez was taken proving the signatures of Gutierrez and Figueroa, and also the occupation and improvement of the land by Guerrero. Also testifies that Guerrero had but three children (those named).

The petition and grant, with the original diseño, and the survey made by Deputy County Surveyor Hoadley, are filed with the papers in the case.

DECREE OF CONFIRMATION.

In this case, hearing the proofs and allegations, it is adjudged by the Commissioners that the claim of the petitioners, Josefa Palomares, the widow, and the heirs at law of Francisco Guerrero, deceased, is valid, and the same is hereby confirmed to the widow and heirs of said deceased to hold the said premises in the proportions to which they were legally entitled as widow and heirs respectively at the time of the death of said deceased.

The land, of which confirmation is hereby made, is situated in San Francisco, near the Mission Dolores, being 400 varas square in a marshy place which forms a plain north-northwest of the Mission from the place where the water springs from the north to south, east and west to the road to Yerba Buena, according to the map of the same, attached to the original grant of said land to said Francisco Guerrero, which is on file in this case, the land hereby confirmed being the same which was occupied by said Guerrero from the year 1836 until his death, and by his family since his decease, and which was cleared and fenced in by him about the time last mentioned, and has been cultivated as a garden since that time.

The land hereby confirmed embraces only the premises thus enclosed and cultivated by said Guerrero, and is limited in its ulterior boundaries to the line of the fence erected by him at the time above specified.

Signed by the three commissioners, March 14, 1854.

THE UNITED STATES VS. JOSEFA PALOMARES, ET AL.

UNITED STATES DISTRICT COURT.

A lot at the Mission of Dolores. Case No. 131.

Nov. 2, 1854. Filed Transcript in United States Land Commission in case No. 229.

Feb. 20, 1855. Notice of appeal from Attorney General.

Nov. 12, 1855. Petition and answer.

March 24, 1856. Decree confirming claim.

April 2, 1857. Stipulation and order vacating appeal.

JAMES DENNISTON AND WIFE TO GESNOUEN & CO.

(Signed and acknowledged).

JAMES DENNISTON,
JOSEFA HARO DENNISTON,
L. GESNOUEN,
C. AGUILLON.

LEASE.

Dated June 21, 1858.

Recites that I, Gesnouen & Co., bind myself to lease to James Denniston and wife a tract of land in the Manzanitas bordering on one side with Thomas Bordenare, on another side with Messrs. Cruvreau and Didier, on another with Mr. Dupuis, and on the other with the fence that divides my land from that of Mr. Bolton, for the term of five years, commencing April 7, 1859, at the monthly rent of $50, binding himself to clear and enclose said land with a good fence.

Witness: ISAAC V. DENNISTON,
J. BTE. PELLISIER.

Execution proven Nov. 12, 1860, by Jean B. Pellissier, subscribing witness.

Before Geo. T. Knox, N. P.

Recorded Nov. 12, 1860.

Liber 9 of Leases, page 452.

JAMES G. DENNISTON AND HIS WIFE JOSEFA HARO DENNISTON TO J. BTE. PELLISSIER.

LEASE.

Dated Nov. 15, 1859.

Of L'Hermitage property with a piece of land 100 varas square, for five years from Dec. 1, 1859.

Recorded Sept. 11, 1860.

Liber 9 of Leases, page 322.

DEVOE BABCOCK vs. AUGUSTIN GUERRERO.

JUSTICE COURT, SECOND TOWNSHIP.

June 22, 1861. This Court renders judgment for the plaintiff and against the defendant for the sum of $50 damages, $2.50 percentage, and costs of this suit.

November 23, 1861. Execution issued to John S. Ellis, Sheriff.

January 17, 1862. Execution returned satisfied.

JULIEN PERRAULT vs. AUGUSTIN GUERRERO.

June 22, 1861. This Court renders judgment for the plaintiff and against the defendant for the sum of $150 damages, and $7.50 percentage, and costs of this suit.

November 23, 1861. Execution issued to John S. Ellis.

January 17, 1862. Execution returned satisfied.

JULIEN PERRAULT vs. AUGUSTIN GUERRERO; DEVOE BABCOCK vs. AUGUSTIN GUERRERO, BY JOHN S. ELLIS, SHERIFF, TO JULIEN PERRAULT.

JUSTICE COURT, SECOND TOWNSHIP.

SHERIFF'S CERTIFICATE.

Dated January 2, 1862. Cons. $310.75.

By virtue of two executions in above causes, tested November 23, 1861, for amount of $150 and $50, sold at public auction to Julien Perrault, who was the highest bidder, for $310.75, all the right, title and interest of Augustin Guerrero in and to land—

Commencing on the northerly line of Sparks street, 53 feet westerly from the north-westerly corner of Sparks and Dolores streets, and running thence westerly along said line of Sparks street 507 feet more or less to Church street, thence at right angles northerly along said line of Church street 400 feet more or less to the southerly line of Market street, thence north-easterly along said line of Market street 100 feet more or less to the southerly line of Tracy street, thence easterly along said line of Tracy street 335 feet, thence at about right angles southerly 520 feet more or less to beginning.

Filed, January 7, 1862.

Recorded Liber 6, Sheriff's Certificates, page 397.

ANDREW THOMPSON AND JAMES G. DENNISTON TO R. H. LLOYD.

DEED.

Dated August 15, 1862. Cons. $1000.

Do grant, bargain, sell, alien, remise, release, and convey unto second party, his heirs and assigns, all that lot of land commencing at the intersection of Ridley street with Market street, thence running along Market street to Noe street, thence northerly alone Noe street to Ridley street, thence easterly along Ridley street to Steiner street, thence northerly along Steiner street to Hermann street, thence easterly along Hermann street to Fillmore street, thence southerly along Fillmore street to Ridley street, thence along Ridley street to beginning.

Including Block 80, 98, 99, 101, 102, 100, 373.

Covenant of warranty against acts of grantor.

Witness: T. B. Merry.

Ackn'd before T. B. Merry, N. P.

Recorded September 12, 1862, Liber 173 of Deeds, page 250.

AUGUSTIN GUERRERO BY J. S. ELLIS, SHERIFF, TO JOSEFA HARO DE DENNISTON; JULIEN PERRAULT vs. AUGUSTIN GUERRERO AND DEVOE BABCOCK vs. AUGUSTIN GUERRERO.

JUSTICE COURT, SECOND TOWNSHIP.

SHERIFF'S DEED.

Dated August 16, 1862. Cons. $310.75.

By virtue of two writs of execution, issued out of the Justice Court, Second Township, tested November 23, 1861, upon two judgments recovered in said Court, June 22, 1861 (in above causes), said sheriff levied on all interest said judgment debtor had in the lands hereinafter described, and January 2, 1862, sold said premises at public auction, after notice according to law, to Julien Perrault, for $310.75, he being the highest bidder, and gave to him such certificate as is by law directed, and six months having expired and no redemption made, and said Perrault having, March 19, 1862, assigned to second party said certificate of sale and all interest in the premises.

Now, &c., grants, bargains, and sells all interest of said judgment debtor in the lot of land—

Commencing on the northerly line of Sparks street, 53 feet west from Dolores street, running thence west along Sparks street 507 feet more or less to Church street, thence at right angles north along Church street 400 feet more or less to Market street, thence north-east along Market street 100 feet more or less to the southerly line of Tracy street, thence easterly along Tracy street 335 feet, thence about right angles southerly 520 feet more or less to beginning.

Witness: Geo. T. Knox.

Ackn'd before Geo. T. Knox, N. P.

Recorded February 17, 1865, Liber 277 of Deeds, page 151.

R. H. LLOYD TO A. W. VON SCHMIDT.

DEED.

Dated August 25, 1863. Cons. $2000.

(Stamp, $2, canc'd).

Remises, releases and quit-claims to second party, his heirs and assigns, all that piece of land described as follows:

Commencing at a point on the north-westerly corner of Market and Ridley streets, thence running along Market street westerly 5.83 chains, thence south-westerly parallel with Ridley street 4.76 chains, thence north-westerly to Ridley street, thence along Ridley street to the point of beginning.

Witness: Geo. T. Knox.

Ackn'd August 25, 1863, before Geo. T. Knox, N. P.

Recorded October 6, 1863, Liber 212 Deeds, 378.

A. W. VON SCHMIDT TO EUGENE L. SULLIVAN.

DEED.

Dated August 25th, 1863. Cons. $1.

(No Stamp.)

Grants, bargains, sells, remises, and quit-claims to second party, his heirs, and assigns forever all right, title, and interest in and to the piece of land described as follows:

Commencing at a point on the north-westerly corner of Market and Ridley streets, thence running along Market street westerly 5.83 chs., thence south-westerly parallel with Ridley street, 4.76 chs., thence north-westerly to Ridley street, thence along Ridley street to the point of beginning, (and other property.)

Witness: W. W. Wiggins.

Ackn'd Oct. 5, 1863, before W. W. Wiggins, N. P.

Recorded Oct. 6, 1863. Liber 212 Deeds, 381.

JAMES G. DENNISTON AND JOSEFA DE DENNISTON, HIS WIFE, TO AUGUSTINE GUERRERO.

DEED.

Dated November 19th, 1863. Cons. $1.

(50-cent stamp, canceled.)

Remise, release, and quit-claim all interest which first parties, or either of them acquired by deed from Jno. S. Ellis, Sheriff, to said Josefa, dated August 16, 1862, in all that lot of land,

Commencing on the northerly line of Sparks street 53 feet west of Dolores street, running thence west along Sparks street 507 feet, more or less, to Church street, thence at right angles north along Church street 400 feet, more or less, to Market street, thence north-easterly along Market street 100 feet, more or less, to the southerly line of Tracy street, thence easterly along Tracy street 335 feet, thence at about right angles southerly 520 feet, more or less, to beginning.

It being expressly understood and agreed that the deed shall not convey any other interest except that acquired by said Sheriff's deed.

Witness: P. B. Cornwall.

Acknowledged Nov. 25, 1863.

And acknowledged by Josefa Haro de Denniston, May 4, 1864.

Before P. B. Cornwall, N. P.

Recorded Feb. 17, 1865. Liber 277 of Deeds, page 154.

PROBATE COURT OF THE CITY AND COUNTY OF SAN FRANCISCO —ESTATE AND GUARDIANSHIP OF VICTORIANO GUERRERO, A MINOR.

Register 3, Case 1898, Page 171.

Nov. 21, 1864. Petition of Victoriano Guerrero, minor, and Josefa de Haro Denniston, for appointment of guardian. Recites, that said minor nominates and requests the Probate Judge to appoint his mother, Josefa de Haro Denniston, widow by her first marriage of Francisco Guerrero, deceased, father of petitioner, and now wife of James G. Denniston, to be the guardian of the estate and person of your petitioner.

The petition of Josefa de Haro Denniston recites that the late Francisco Guerrero died in the county of San Francisco, in the year 1852, and his estate was opened the same year, and is still pending.

That your petitioner Josefa, being administratrix of said estate, was married some time in February, 1853, to James G. Denniston, that the family of said James G. Denniston, including the said Victoriano, resides a part of the time at the rancho of the estate, in the county of San Mateo, but the greater part of the time at the Mission of Dolores, in this city and county.

That said estate of Francisco Guerrero, deceased, consists principally of landed property, situated partly in the county of San Mateo and partly in this city and county, in which your petitioner, Josefa, considered the residence of the family to be.

That for the settlement of said estate, as well as for the future administration of the property of said minor, it is necessary that a guardian be appointed to said minor.

That being informed and advised that his mother cannot be appointed such guardian your petitioner, Victoriana, respectfully nominates her brother, Augustin Guerrero, for such guardian, and requests your honor so to appoint him.

Signed, VICTORIANO GUERRERO,
JOSEFA DE HARO DENNISTON.

Ordered that citation be issued to James G. Denniston to show cause why said Augustin Guerrero should not be appointed guardian.

March 20, 1865. Citation returned served on James G. Denniston, March 17, 1865.

Answer of James G. Denniston filed. Recites that he has no objection to the appointment of guardian.

Amended petition of Victoriano Guerrero and Josefa de Haro Denniston, filed, shows that the residence of said minor is at the Mission Dolores, within the city and county of San Francisco, and in accordance with the petition herein filed, Nov. 21, 1864, they reiterate the other allegations therein made.

That your petitioner, Victoriano Guerrero, nominates her brother, Augustin Guerrero, for her guardian, and requests your honor to appoint him.

Order allowing filing of amended petition made, entered, and filed.

March 23. Order appointing Augustin Guerrero guardian upon taking oath and giving bond in sum of $10,000.

November 1, 1867. Approved bond of guardian, $10,000, filed and recorded.

Letters of Guardianship issued to Augustin Guerrero recorded and duplicate filed.

March 9, 1868. Return and account of sales of real estate filed. Guardian recites, that under and by virtue of the authority conferred upon him as such guardian by an Act of the Legislature of the State of California, which became a law on Feb. 20, 1868, he, as such guardian, sold at private sale, subject to your approval, all the right, title, and interest of his said ward, being 8-27th parts undivided in and to land:—

Commencing at a fence in the Mission Dolores (along side of old ditch) on the north side of a lane at a block of China granite 40½ inches long, 7 inches wide and 6 inches thick, marked S. D. 1, from which the southwest corner of Thompson's house bears north 34¾° east, the south gable end of the Hermitage Hotel bears north 21° west, and Richard's Nursery House bears north 47¼° west, thence along said ditch with hedge of willows on north side of lane south 81¾° west, 16.85½ chains to willow tree 5 inches in diameter marked S. D. 2, thence north 8¼° west, 16.85½ chains to a sawed redwood post marked S. D. 3, from which northeast corner of brick house bears north 86½° west 2.80 chains, thence north 81¾° east, 16.85½ chains to sawed redwood post marked S. D. 4, from which the south gable of Hermitage Hotel bears south 37½° west, and Richard's Nursery House bears south 22° west, thence south 8¼° east 16.85½ chains to beginning, and containing $28\frac{41}{100}$ acres, more or less.

Being the tract of land near the Mission Dolores, heretofore enclosed and cultivated by and on behalf of said ward and his co-tenants, and known as the Manzanitas, 400 varas square, be the same more or less, containing all the land contained in said enclosure, to Alvinza Hayward for $\$14,814\frac{82}{100}$.

That your petitioner is ready to file in this Court before the execution of such conveyance such bond, conditioned for the due and proper application of the proceeds arising from such sale.

Wherefore your petitioner submits said sale to your Honor's consideration for approval, etc.

Copy of an Act of the Legislature of the State of California, authorizing the guardian of Victoriano Guerrero to sell above real estate at private sale, passed Feb. 20, 1868. Filed.

April 7. Approved bond of guardian $25,000 on sale of real estate. Filed and recorded.

April 7. Order confirming sale of real estate, and authorizing guardian to make, execute, and deliver to purchaser a good and sufficient deed of conveyance of the interest of said minor.

A certified copy of the order of confirmation is recorded April 9, 1868, in Liber U of miscellaneous records, page 278.

(Signed) AUGUSTIN GUERRERO.

AUGUSTIN GUERRERO TO HENRY COWELL.

MORTGAGE.

Dated Feb. 17, 1865.

To secure payment of $3,857.36, gold coin, in twelve months, with interest at 2 per cent. per month, with privilege of extending payment for one year longer after maturity, provided all interest due at maturity shall have been paid. Stamps $4. Canceled.

Conveys all his interest, being an undivided one-third in all that piece of land near the Mission Dolores, known as the Guerrero tract, of 400 varas square, the same lying within the boundaries of Ridley street on the north, Dolores street on the east, Center street on the south, and Sanchez street on the west.

Witness: Isaac T. Milliken.

Acknowledged Feb. 17, 1865.

Before Isaac T. Milliken, N. P.

Recorded Feb. 17, 1865.

Liber 134 of Mortgages, page 280.

Canceled by a certificate of release, dated March 20, 1867, and recorded April 29, 1867.

Liber 38 Releases, page 121.

AUGUSTIN GUERRERO AND JOSEFA DE HARO DENNISTON, WHO SIGNS, JOSEFA DENNISTON, TO FORTUNE CAMILLE AGUILLON.

LEASE.

Dated March 21, 1865.

Of the piece of land bounded on the right by a line fence, on the left by property now occupied by Benetti Carlo Franco Giovani, north by Holt's fence, and south by the "Hermitage" now occupied by Alexander Roze and Aucelin Edoured. ($5 stamp. Canceled).

For the term of two years from April 1, 1865, at the monthly rent of $85, gold coin (in advance).

Witness: Wm. P. Wheeler,
M. Turrell.

Execution proven by M. Turrell, April 26, 1865.
Before W. C. Parker, N. P.
Recorded April 26, 1865.
Liber 19 of Leases, page 240.

AUGUSTIN GUERRERO TO HENRY COWELL.

MORTGAGE.

Dated April 7, 1865.

To secure payment of $1,200, gold coin, in twelve months, interest at 2 per cent per month.

($1.50 stamp. Canceled).

Conveys all his interest (being an undivided one-third) in all that piece of land known as the Guerrero tract, of 400 varas square (described as in Liber 134 of Mortgages, page 280).

Witness: Geo. T. Knox. Acknowledged April 7, 1865, before Geo. T. Knox, N. P.

Recorded April 7, 1865.
Liber 138 of Mortgages, page 289.

Canceled by certificate of release, dated March 20, 1867, and recorded April 29, 1867. Liber 38 of Releases, page 119.

AUGUSTIN GUERRERO TO CONSTANT JACQUOT.

LEASE.

Dated November 2, 1866.

(Stamp, $2, canc'd.)

Grants, demises, and to farm, lets to second party all that tract of land, being at the Mission Dolores on the line of Market street, and better known as the hermitage grounds, and within the 400 varas called "Manzanitas," being the same lot of ground formerly held under lease by J. B. Pelissier, said lease having been made formerly by James G. Denniston and wife to said Pelissier (see 9 of Leases, page 322), said lot of ground containing about 100 varas square, etc.

For the term of one year from November 1, 1866, at the monthly rent of $65.

Witness: A. Schwab.

Ackn'd March 30, 1867, before J. H. Blood, N. P.

Recorded March 30, 1867. Liber 25 of Leases, page 273.

JAMES G. DENNISTON TO JAMES E. NUTTMAN.

DEED.

Dated January 4, 1867. Cons. $1000.

(Stamp, $1, canc'd.)

Grants, bargains and sells, conveys and confirms to second party, his heirs and assigns forever, all those pieces of land described as follows:

A lot of ground in block 81 of the Mission Addition—

Commencing at the south-east corner of Market and Dolores streets, running thence southerly along the line of Dolores street 316 feet, thence westerly along the line of Tracy street 95.11 feet, thence northerly 220 feet to Market street, thence north-easterly 146 feet along the line of Market street to the place of beginning. (And other property.)

Witness: Wm. Huefner.

Ackn'd January 4, 1867, before Wm. Huefner, N. P.

Recorded January 5, 1867. Liber 351, Deeds, 279.

JAMES G. DENNISTON, JOSEPHA DE HARO DENNISTON, HIS WIFE, AND AUGUSTIN GUERRERO, TO ALVINZA HAYWARD.

DEED.

Dated March 7, 1867. Cons. $35,116.

(Stamp, $36, canc'd.)

In consideration of $10,165 paid by second party to Josepha de Haro Denniston, and $7,393 paid by second party to Augustin Guerrero, and the further sum of $10,165 to be paid to said Josepha de Haro Denniston, and $7,393 to be paid to Augustin Guerrero, within six months, grants, bargains, sells, conveys and confirms to second party, his heirs and assigns forever, all that piece of land (same as described in 356 Deeds, page 342, Maria O'Connor, Administatrix, to Hayward—see forward), except the distance which the north-east corner of brick house bears from post marked S. D. 3, which in this deed is 2.80 chains.

Witness: R. C. Hopkins.

Ackn'd March 7, 1867, before E. V. Sutter, N. P.

Recorded March 8, 1867. Liber 363, Deeds 23.

JAMES G. DENNISTON, JAS. E. NUTTMAN, AND R. H. LLOYD, TO ALVINZA HAYWARD.

DEED.

Dated March 8, 1867. Cons. $5.

(50-cent stamp, canc'd.)

Do remise, release, and quit-claim unto the said second party all that piece of land in the city and county of San Francisco, near the Mission Dolores, which has been heretofore enclosed and cultivated by heirs of Francisco Guerrero, deceased, and James G. Denniston, and known as the "Manzanitas," 400 varas square, including all the land contained in said enclosure; also, all our right, title, and interest in and to Mission blocks Nos. 80, 81, 82, and 99.

Witness: Sol. A. Sharp.

Ackn'd March 20, 21st, 1867, before E. V. Sutter, N. P.

Recorded March 27, 1867. Liber 361 of Deeds, page 338.

AUGUSTIN GUERRERO, GUARDIAN OF THE PERSON AND ESTATE OF VICTORIANO GUERRERO, A MINOR, TO ALVINZA HAYWARD.

DEED.

Dated April 9, 1868. Cons. $14,814.82.

(Stamp, $15, canc'd.)

Recites that by virtue of an act of the Legislature, passed February 20, 1868, said Augustin Guerrero, guardian of Victoriano Guerrero, son of Francisco Guerrero, deceased, made a sale of the interest of said ward, being 8-27 parts undivided in the property hereinafter described, which sale was duly reported to the Probate Judge of the city and county of San Francisco, and was approved by said Judge, etc., a certified copy of which order has been this day recorded in the office of the County Recorder.

Now, etc., grants, bargains, sells, and conveys to second party, his heirs and assigns forever, all right, title and interest of said Victoriano Guerrero, being 8-27 undivided in and to the piece of land described as follows:

(Same as in 356 Deeds, page 342, Maria O'Connor, Administatrix, to Hayward) except the distance which the north-east corner of brick house bears from post marked S. D. 3, which in this deed is 2.80 chains.

Being the tract of land heretofore enclosed and cultivated by and on behalf of said ward and his co-tenants, and known as the Manzanitas, 400 varas square, etc.

Witness: Sidney L. Johnson.

Ackn'd April 9, 1868, before Henry Haight, N. P.

Recorded April 9, 1868. Liber 428, Deeds 274.

JAMES G. DENNISTON AND JOSEPHA DE HARO DENNISTON, HIS WIFE, AND AUGUSTIN GUERRERO TO ALVINZA HAYWARD.

DEED.

Dated April 9, 1868.

(Consideration $1. Stamp, 50 cents. Canceled).

Recites that said first parties did, on March 7, 1867, sell by deed duly executed to second party the premises hereinafter described for the consideration therein expressed, viz: the sum of $10,165, paid by said Hayward to said Josepha de Haro Denniston, and the further sum of $10,165 to be paid, same to same, within six months thereafter, and the sum of $7,393 paid by said Hayward to Augustin Guerrero, and the further sum of $7,393 to be paid by same to same, within six months thereafter; and said consideration and purchase money has been paid in full by said Hayward to said Josepha de Haro Denniston and Augustin Guerrero, etc.

Now, etc., grant, bargain and sell, convey and confirm to second party, his heirs and assigns, the piece of land (same as described in 356 deeds, page 342, Maria O'Connor, Administratrix, to Hayward, except the distance which the northeast corner of brick house bears from post marked S. D. 3, which in this deed is 2.80 chains).

Acknowledged April 22, 1868.
Before F. J. Thibault, N. P.
Recorded April 22, 1868.
Liber 432, deeds 219.

ALVINZA HAYWARD TO LESTER L. ROBINSON.

DEED.

Dated August 6, 1868.

(Consideration $175,000. Stamp, $175. Canceled).

Grants, bargains, sells, conveys and confirms to second party, his heirs and assigns forever, all right, title and interest in and to the tract of land near the Mission Dolores (same as described in 356 deeds, 342 Maria O'Connor, Administratrix, to Hayward, except the distance which the northeast corner of brick house bears from post marked S. D. 3, which in this deed is 2.80 chains.)

Being all that tract of land known as the Manzanitas, 400 varas square.

Excepting out of the same a tract of 100 varas square, bounded as follows:

Commencing at the southeast of the tract (at the southeast corner) above described, and running thence south 81¾ degrees west 100 varas, thence north 8¼ degrees west 100 varas, thence north 81¾ degrees east 100 varas, and thence south 8¼ degrees east 100 varas, to the place of beginning, and also his interest in all of the lands adjoining said Manzanitas 400—tract heretofore occupied by the heirs of Francisco Guerrero and James G. Denniston within the Mission Blocks 80, 81, 81, and 99, in the City of San Francisco. Witness: E. V. Joice.

Acknowledged Aug. 11, 1868.
Before E. V. Joice, N. P.
Recorded October 31, 1868.
Liber 464, deeds 354.

LESTER L. ROBINSON TO THE PACIFIC INSURANCE COMPANY.

MORTGAGE.

Dated August 6, 1868.

(Stamp $125. Canceled).

To secure payment of $125,000 in 24 months, etc.

Conveys the piece of land (same as described in 356 deeds, page 342, Maria O'Connor Administratrix, to Hayward).

Excepting out of the same a tract of 100 varas square, commencing at the southeast of the tract (at the southeast corner) above described, and running thence south 81¾ degrees west 100 varas, thence north 8¼ degrees west 100 varas, thence north 81¾ east 100 varas, thence south 8¼ east 100 varas to the place of beginning, and also all his interest in all of the lands adjoining said Manzanitas 400-vara tract, heretofore occupied by the heirs of Francisco Guerrero and James G. Denniston, within the Mission Blocks 80, 81, 82, and 99.

Recorded October 31, 1868.
Liber 246, Mortgages 99.
Canceled April 15, 1871.

On the margin of the records by Pacific Insurance Company, by J. Hunt, President.

MAURICE DORE TO ALVINZA HAYWARD.

DEED.

Dated August 7, 1868. Cons. $1.

(50-cent stamp, canc'd.)

Grant, bargain, sell, alien, remise, release, convey and confirm all that certain tract or parcel of land—

Commencing at a fence in the Mission Dolores alongside an old ditch on north side of a line at a block of China granite 40½ inches long, 7 inches wide, and 6 inches thick, marked S. D. 1, from which the south-west corner of Thompson's house bears north 34¾ degs. east the south gable end of the Hermitage Hotel, bears north 21 degs. west, and Richard's nursery house bears north 47¼ degs. west, thence along said ditch with hedge of willows on north side of lane, south 81¾ degs., west 16 chains 85½ links to willow tree five inches in diameter, marked S. D. 2, thence north 8¼ degs., west 16 chains 85½ links to a sawed redwood post marked S. D. 3, from which north-east corner of brick house bears north 86½ degs., west 2.80 chains, thence north 81¾ degs., east 16 chains 85½ links to sawed redwood post marked S. D. 4, from which the south gable of Hermitage Hotel bears south 37½ degs. west, and Richard's nursery house bears south 22 degs. west, thence south 8¼ degs., east 16 chains 85½ links to the place of beginning. Containing 28.41 acres more or less; being all that certain tract of land situated near the Mission Dolores, heretofore enclosed or cultivated by the heirs of Francisco Guerrero deceased, and James G. Denniston, and known as the Manzanitas, 400 varas square, be the same more or less, including all the land contained in said enclosure, and also all the interest of first party in Mission Blocks 80, 81, 82, 99.

Covenant of warranty against the acts of grantor, and all persons lawfully claiming under him.

Ackn'd September 15, 1868, before J. W. McKenzie, N. P.

Recorded, September 15, 1868. Liber 450 of Deeds, page 377.

No deed to grantor for the above property of Record.

CERTIFICATE OF INCORPORATION OF THE MARKET AND FOURTEENTH STREETS HOMESTEAD ASSOCIATION, NO. 3966.

Recites that the undersigned have associated themselves into an incorporation under the acts of the Legislature of the State of California, which shall be known and called the Market and Fourteenth Streets Homestead Association.

The objects of said Association are: The purchase of certain lands in the city and county of San Francisco, near the junction of Market and Fourteenth streets, the improvement thereof, and the sub-division thereof into lots suitable for Homesteads, and the distribution of said lots among shareholders.

The capital stock of the corporation to be the sum of $280,800, divided into 234 shares of $1200 each, and so much more in addition thereto, as may be necessary for the working expenses of the Association.

The corporation shall exist for a term of five years, unless sooner dissolved.

The business and concerns of said corporation to be managed by a Board of seven Trustees, or Directors, and the said Board of seven Trustees, or Directors, for the first three months shall be Alvinza Hayward, Charles J. Brenham, Lester L. Robinson, John B. Felton, Gustave Dussol, George W. Mowe, and Henry Pichoir.

That the office and principal place of business shall be located in city and county of San Francisco.

"In witness whereof, we have hereunto set our hands and seals at the city and county of San Francisco, this 25th day of September, A. D. 1868."

(Signed) L. L. ROBINSON, [SEAL.]
H. PICHOIR, [SEAL.]
G. DUSSOL, [SEAL.]
JOSIAH H. APPLEGATE. [SEAL.]

Ackn'd by the above, September 25, 1868, before W. H. Chevers, N. P.

Filed in the office of the County Clerk, September 25, 1868.

LESTER L. ROBINSON TO THE MARKET AND FOURTEENTH STREETS HOMESTEAD ASSOCIATION.

COVENANT.

Dated September 26, 1868.

(20-cent stamp, canc'd.)

First party, in consideration of the sum of $280,800 gold coin, to be paid to him as hereinafter provided, agrees with second party, its successors and assigns, to sell and convey to it by deed of grant, bargain, and sale, all that piece of land lying in the city and county of San Francisco, described as follows:

Commencing at a point where the north-westerly line of Market street, if extended south-westerly, would intersect the south line of Reservoir street, said point of commencement being the north-east corner of Mission Block 80, as laid down on the official map of said city and county, thence running westerly and along the south line of Reservoir street and the continuation thereof until it reaches a point 125 feet westerly of where the west line of Church street, if extended northerly, would intersect the same, thence running at right angles southerly 25 feet, thence at right angles westerly 310 feet, thence at right angles southerly 25 feet, thence at right angles westerly 125 feet to the easterly line of the extension northerly of Sanchez street, thence at right angles southerly and along the easterly line of Sanchez street 350 feet to the intersection of said east line of Sanchez street with the westerly line of the Guerrero tract of 400 varas square, thence southerly and along said western line of said Guerrero tract about 15 feet until it reaches a point 75 feet south of the south line of Tracy or Fourteenth street when extended, thence at right angles easterly 125 feet, thence at right angles southerly and parallel with Sanchez street 170 feet, to a point 100 feet north-westerly from the north-westerly line of Market street when extended south-westerly, thence south-westerly and parallel with the extension of Market street 170 feet more or less to the westerly line of the Guerrero tract as aforesaid, thence southerly along the westerly line of said Guerrero tract about 30 feet, thence south-easterly in a line at right angles with the line of Market street, 85 feet, to the north-westerly line of Market street when extended, thence southerly to the intersection of the south line of Fifteenth street when extended with the south-easterly line of the extension of Market street, thence along the south-easterly line of the extension of Market street until it reaches a point 90 feet east of east line of Sanchez street, thence southerly and parallel with Sanchez street to a point 100 feet south of the south line of the extension of Fifteenth street, thence at right angles easterly 75 feet, thence at right angles southerly 100 feet, thence at right angles easterly 125 feet, thence at right angles northerly 25 feet, thence at right angles easterly about 435 feet to the southerly line of said Guerrero tract, thence easterly along said line of said Guerrero tract about 85 feet to a point 125 feet east of the east line of Church street when extended, thence northerly parallel with Church street about 68 feet to a point 100 feet south of the south line of Fifteenth street when extended, thence at right angles easterly 100 feet, thence at right angles northerly 274 feet, thence at right angles easterly 210 feet, thence at right angles northerly 300 feet, thence at right angles easterly 25 feet, thence at right angles northerly 110 feet, thence at right angles westerly 25 feet, thence at right angles northerly about 145 feet to a point 100 feet distant south-easterly from south-easterly line of Market street when extended, thence north-easterly parallel with Market street about 60 feet to easterly line of said Guerrero Tract, thence northerly along said line of Guerrero Tract 35 feet, thence on a line at right angles with Market street north-westerly about 80 feet to the southeasterly line of the extension of Market street, and thence north-westerly about 122 feet to the point of commencement.

And second party agrees to purchase the above described premises and will pay to first party, or his legal representatives, the said sum of $280,800 in installments as follows: $10,000 on Oct. 15, 1868, and $7,000 on the 15th of each and every month thereafter, beginning with November, 1868, and ending December 15, 1871, and also the remaining sum of $4,800 on January 15, 1872; and whenever any of said installments shall remain unpaid after the same become due, and shall remain unpaid for 30 days, it shall bear interest at the rate of one per cent. per month, payable monthly, and if not so paid to be compounded with the principal.

And in case default be made for the space of three months in the performance of the covenants in this agreement by second party, then all right and claim of second party to said premises, and to said installments and interest (which may have been paid), either at law or in equity, shall be forfeited and determined anything in the law or principles of equity notwithstanding.

Executed on the part of the Market and Fourteenth Streets Homestead Association by its President, H. Pichoir, and Secretary, Josiah H. Applegate.

Witness: W. H. Chevers.

Ackn'd June 28, 1870. Before W. H. Chevers, N. P.
Recorded Nov. 14, 1870.
Liber 11, Covenants 14.

LESTER L. ROBINSON vs. JOHN CARROLL, ET ALS.

FOURTH DISTRICT COURT.

Register M., Case 15,233.

June 4, 1869. Complaint filed to recover possession of the piece of land commencing at a point on the westerly boundary line of the Guerrero 400-vara tract where an old fence crosses the same, said point being 247.6 feet northerly from the north-westerly corner of said 400-vara lot, running thence north-easterly along said old fence 221.10 feet to an angle in said fence, thence north-westerly along said fence 274.11 feet to the westerly boundary line of said 400-vara tract, and thence southerly along said westerly boundary 486.4 feet, more or less, to the place of beginning.

Summons issued.
July 21. Answer of Carroll filed.
April 1, 1870. Summons served filed.
April 30, 1873. Discontinuance filed.

UNITED STATES TO JOSEPHA PALOMARES, WIDOW, JOSE AUGUSTIN PALOMARES, FRANCISCO PALOMARES, AND VICTORINO PALOMARES, CHILDREN OF FRANCISCO GUERRERO PALOMARES, DECEASED.

PATENT.

Dated June 1st, 1870.

The United States of America. To all to whom these presents shall come greeting:

Whereas it appears from a duly authenticated transcript filed in the General Land Office of the United States that, pursuant to the provisions of the Act of Congress approved the third day of March, 1851, entitled an Act to ascertain and settle the private land claims in the State of California, Josepha Palomares, widow, and Jose Augustin Palomares, Francisco Palomares, and Victorino Palomares, children of Francisco Guerrero Palomares, deceased, as claimants, filed their petition on the fifteenth day of May, 1852, with the Commissioners, to ascertain and settle the private land claims in the State of California, sitting as a Board, in the city of San Francisco, in which petition they claimed the confirmation of their title to a tract of land called "Suerte," or lot of land near the Mission of Dolores, containing 400 varas square, situated in the county of San Francisco and State aforesaid, said claim being founded on a Mexican Grant to Francisco Guerrero, made on 30th day of November, 1836, by Nicolas Gutierrez, the Governor *ad interim* of California.

And whereas, the Board of Land Commissioners aforesaid, on the 14th day of March, 1854, rendered a decree of confirmation in favor of the claimants, which decree or decision was, on appeal, affirmed by the District Court of the United States for the Northern District of California, at a stated term on the 24th day of March, 1856, as follows:

THE UNITED STATES, APPELLANTS vs. HEIRS OF FRANCISCO GUERRERO PALOMARES, APPELLEES.

This cause came on to be heard at a stated term of the Court on Appeal from the final decision of Board of the Commissioners, to ascertain and settle private land claims in the State of California, under an Act of Congress approved March 3d, A. D. 1851. Upon the transcript of the proceedings and decisions of said Board of Commissioners and the papers and evidence on which the said decision was founded, and it appearing to the Court that the said transcript has been duly filed according to law, and counsel for the respective parties having been heard, it is by the Court hereby ordered, adjudged, and decreed, that said decision be and the same is hereby in all things affirmed, and it is likewise further ordered, adjudged, and decreed that the claim of the Appellees is a good and valid claim, and that the said claim be and the same is hereby confirmed to the extent and quantity of four hundred varas square, being the same land described in the grant and of which possession was proved to have been long enjoyed. Provided that the said quantity of four hundred varas square now confirmed to the claimants be contained within the boundaries called for in said grant and the map to which the grant refers, and if there be less than that quantity within the said boundaries, then we confirm to the claimant that less quantity.

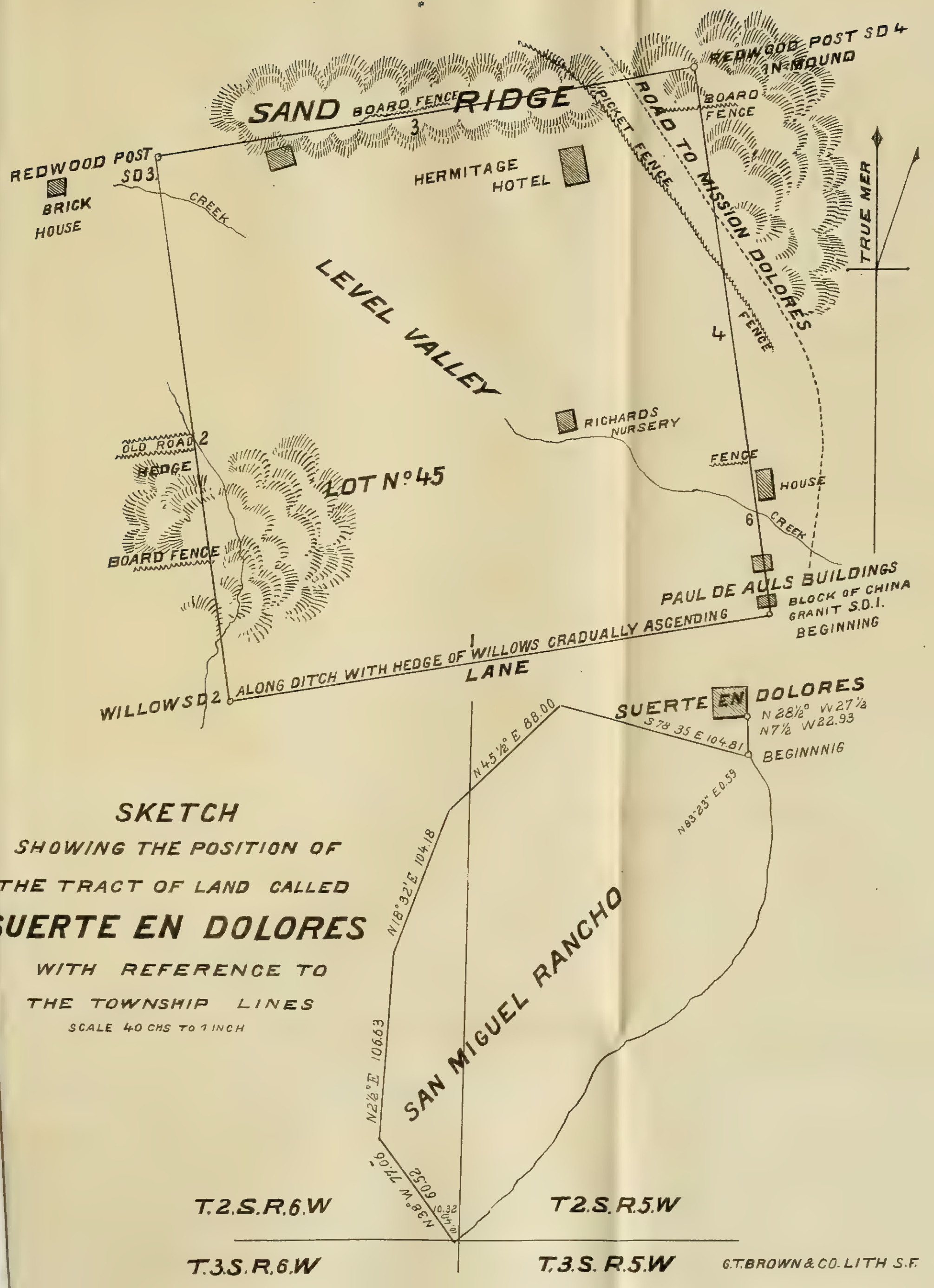
And the Attorney-General of the United States having given notice that appeal would not be prosecuted in this case the aforesaid District Court, at a stated term, on the 2d day of April, 1857, ordered, adjudged, and decreed that claimants have leave to proceed under the decree of this Court heretofore rendered in their favor as under final decree.

And, whereas, under the 13th Section of said Act of 3d March, 1851, and the supplemental legislation, and in accordance with the proceedings had, pursuant to said Act and supplemental legislation there has been deposited in the General Land Office a return with a plat of survey of the said claim confirmed as aforesaid, authenticated by the signature of the United States Surveyor-General of the State of California, whereby it appears that said claim has been designated as lot numbered forty-five, in township two, south of range five, west of the Mt. Diablo meridian, containing twenty-eight and forty-one hundredths acres in the State of California, the plat in the aforesaid return of survey being in the words and figures as follows, to wit:

PLAT OF THE TRACT OF LAND, CALLED SUERTE EN DOLORES,

Finally confirmed to the heirs of Francisco Guerrero Palomares, surveyed under instructions from the U. S. Surveyor-General, by R. C. Matthewson, Department Surveyor. November 1860. Containing $28\frac{41}{100}$ acres.

Scale 4 chains to 1 inch.



SKETCH
SHOWING THE POSITION OF
THE TRACT OF LAND CALLED
SUERTE EN DOLORES
WITH REFERENCE TO
THE TOWNSHIP LINES
SCALE 40 CHS TO 1 INCH

G.T. BROWN & CO. LITH S.F.

BOUNDARIES.

No.	Course.	Distance.
1	S 81¼° W	16.85½
2	N 8¼° W	16.85½
3	N 81¾° E	16.85½
4	S 8¼° E	16.85½

NOTE.

Notice of the approval of this plat and its retention in office for four weeks, subject to inspection, was published from 11th of March to 11th of May, 1861, in pursuance to the Act of Congress of June 14, 1860.

J. W. Mandeville,
U. S. Surveyor-General, California.

The field notes of the tract of land called Suerte en Dolores, and from which this plat has been made out have been examined and approved, and are on file in this office.

San Francisco, California, April 16, 1861.

J. W. Mandeville,
U. S. Surveyor-General, California.

NOTE.

It being suggested to the Surveyor-General that the publication of this plat in the "San Mateo Gazette," was informal, in this that the "Alameda County Herald," published in Oakland, is the paper "nearest the land," and it being so found, a republication was ordered to comply with the law, from the 4th of July to the 24th of August, 1861.

E. F. Beale, U. S. Surveyor-General, California.

A full, true, and correct copy of the original plat on file in this office.

U. S. Surveyor-General's Office, San Francisco, California.
August 16, 1866.
[SEAL.] Signed, L. Upson,
U. S. Surveyor-General, California.

And, whereas, there has been deposited in the General Land Office a certificate dated October 13, 1869, from the Clerk of the Circuit Court, and ex-officio Clerk of the District Court of the United States for the District of California, showing that no further proceedings have, since said 2d day of April, 1857, been taken in said cause,

Now know ye, That the United States of America, in consideration of the premises and pursuant to the provisions of the Act of Congress aforesaid of the 3d of March, 1851, and the legislation supplemental thereto, have given and granted, and by these presents do give and grant unto the said Josepha Palomares, et als., and to their heirs, the tract of land embraced and described in the foregoing survey, but with the stipulation that, in virtue of the 15th Section of the said Act, the confirmation of the said claim, and this patent "shall not affect the interests of third persons."

To have and to hold the said tract with the appurtenances unto the said Josepha Palomares, et al., and to their heirs, and assigns forever with the stipulation aforesaid.

In testimony whereof, I, Ulysses S. Grant, President of the United States, have caused these letters to be made patent and the Seal of the General Land Office to be hereunto affixed.

[SEAL.] Given under my hand, at the city of Washington, this first day of June, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States the ninety-fourth.

By the President,
U. S. GRANT.
By CHAS. WHITE, Secretary.

I. N. Granger, Recorder of the General Law Office.
Recorded Vol. 7, pages 308 to 311 inclusive. (Ex'd.)
Recorded June 20, 1870.
Liber 1 of Patents, page 49.

J. A. BUCK AND N. OHLANDT TO W. F. WHITTIER AND W. P. FULLER (FIRM OF WHITTIER, FULLER & CO.) [SIGNED: OHLANDT CO., BY J. A. BUCK. J. A. BUCK AND N. OHLANDT.]

DEED.

Dated September 17, 1870. Cons. $2,250.

(Stamp, 10 cents, canc'd.)

Grant, bargain, sell, assign, transfer and convey to second parties, their heirs and assigns forever, the undivided half of the Glue Factory situate on the corner of Market and

Church streets, known as the "San Francisco Glue Works," that is to say, the undivided half of the stock, good will, machinery, buildings, etc., belonging to said business.

Covenant that all debts and demands against said factory have been paid, and the same is clear of all debts contracted whilst first parties were engaged in said business.

Witness : J. H. Blood.

Ackn'd September 26, 1870, before J. H. Blood, N. P.

Recorded September 27, 1870. Liber 2 Miscellaneous Records, page 216.

No lease to grantors of record.

J. H. PITTS TO W. F. WHITTIER, W. P. FULLER & CO.

DEED.

Dated September 24, 1870.

(Stamp, 5 cents, canc'd.)

Grants, bargains, sells and conveys to second parties, their executors, administrators and assigns, all the undivided half interest in and to the Glue Factory presently carried on at or near the junction of Market and Church streets, under the firm or style of The San Francisco Glue Works, consisting of lease, plunt buildings, stock on hand, etc.; and contracts to pay all debts and demands existing against said undivided interest.

Covenant of warranty against all persons lawfully claiming.

Witness: James Milburn.

Ackn'd September 26, 1870, before E. V. Joice, N. P.

Recorded September 26, 1870. Liber 2 Miscellaneous Records, page 210.

No lease to grantor of record.

LESTER L. ROBINSON TO THE MARKET AND FOURTEENTH STREETS HOMESTEAD ASSOCIATION.

DEED.

Dated December 26, 1872. Cons. $280,800.

Grants, bargains, sells and conveys to second party, its successors and assigns forever, all that piece of land (same as described in 11 Covenants, page 14, Robinson to the Market street and Fourteenth street Homestead Association).

This indenture being made and executed in pursuance of the covenants contained in a certain agreement dated September 26, 1868, between first and second party, and recorded in 11 Covenants, page 14.

Ackn'd December 26, 1872, before Arnold Fuller, N. P.

Recorded December 30, 1872. Liber 687 Deeds, 383.

THEODORE LE ROY vs. JOHN CARROLL, ET AL.

U. S. CIRCUIT COURT. Reg. 3. Case 1,150.

1873.
May 5. Filed complaint, issued summons.
May 21. Filed answer.
June 5. Filed summons.
July 7. Order cause set for 31st July.
July 31. Order continued to August 21.
Filed stipulation waiving jury trial.
August 21. Order cause continued to August 22.
August 22. Order cause continued to September 22.
September 22. Order cause continued to September 30.
September 29. Issued original subpœna and one copy for plaintiff.
September 30. Order cause continued.
October 6. Order cause continued to November 13.
November 14. Filed stipulation setting cause for same day in January, 1874.
1874.
February 2. Order set for March 18.
March 21. Complaint amended, substituting true for fictitious names, and cause submitted for decision.
June 19. Filed findings.
Judgment for plaintiff with costs (opinion read).
Entered judgment Judgment Book, Common Law No 2, pages 44, 45.
Filed judgment roll.
June 22. Filed memorandum of costs.

Judgment entered June 19, 1874.

For possession of tract of land commencing at a point on the westerly boundary of the Guerrero 400 vara lot, where an old fence crosses the same, said point being 147.6 feet northerly from the south-westerly corner of said 400 vara tract, running thence north-easterly along said old fence 221.10 feet to an angle in said fence, thence north-westerly along said fence 274.11 feet to the westerly boundary line of said 400 vara tract, and thence southerly along said westerly boundary, 486.4 feet more or less to the place of beginning.

VICTORIANO GUERRERO TO CHARLES H. BURTON.

DEED.

Dated December 1, 1874. Cons. $100.

Does grant, bargain, sell and convey unto second party and to his heirs and assigns, all that certain lot of land in the city and county of San Francisco, described as follows:

The property formerly known as "Manzanitas," and near the Mission Dolores, being 8-27ths parts undivided in and to the same, and which commences at a point where once stood a fence on the Mission Dolores, alongside of where was once an old ditch on the north side of a lane, at a block of china granite 40½ inches long, 7 inches wide, and 6 inches thick, marked S. D. 1, from which the south-west corner of Thompson's house bore north 34¾ degs. east, the south gable end of the Hermitage Hotel bore north 21 degs. west, and Richard's nursery house bore north 47¼ degs. west, thence along said old ditch with hedge of willows on north side of lane south 81¾ degs. west 16 chains 85½ links to willow tree 5 inches in diameter, marked S. D. 2, thence north 8¼ degs. west 16 chains 85½ links to where formerly stood a sawed redwood post, marked S. D. 3, from which north-east corner of brick house bore north 86½ degs. west 280 chains, thence north 81¾ degs. east 16 chains 85½ links to where formerly stood a sawed redwood post marked S. D. 4, from which the south gable of Hermitage Hotel bore south 37½ degs. west, and Richard's nursery house bore south 22 degs. west, thence 8¼ degs. east 16 chains 85½ links, to the place of beginning; and containing 28.41 acres, more or less.

The same being the same tract of land situated as aforesaid, near the Mission Dolores in the said city and county, and formerly enclosed and cultivated by and on behalf of first party and his co-tenants, and being 400 varas square, more or less.

Witness: John Lloyd.

Ackn'd December 1, 1874, before E. H. Tharp, N. P.

Recorded December 24, 1874. Liber 764 of Deeds, page 232.

VICTORIANO PALOMARES TO CHARLES H. BURTON.

DEED.

Dated December 1, 1874. Cons. $100.

Does grant, bargain, sell and convey unto second party and to his heirs and assigns all that lot of land in city and county of San Francisco.

(Same as described in Liber 764 of Deeds, page 232, Guerrero to Burton.)

Witness: John Lloyd.

Ackn'd December 1, 1874, before E. H. Tharp, N. P.

Recorded December 24, 1874. Liber 764 of Deeds, page 235.

CHARLES H. BURTON vs. THE MARKET AND FOURTEENTH STREET HOMESTEAD ASSOCIATION, JOHN RIZZO, L. L. ROBINSON, JOHN B. MAGENTA, JOHN JOHNSON, ELLEN BOLTON, JOHN DOE, RICHARD ROE, AND OTHER FICTITIOUS NAMES.

FOURTH DISTRICT COURT.

NOTICE OF LIS PENDENS.

Dated March 30, 1875.

Of action to recover certain real estate and the possession thereof, with damages for the withholding thereof, and accrued and accruing rents, and that the premises affected by this suit are described as follows:

The property formerly known as Manzanitas, and near the Mission Dolores, and which commences at a point where once stood a fence on the Mission Dolores, along side of where once was an old ditch on the north side of a lane, at a block of china granite 40½ inches long, 7 inches wide, and 6 inches thick, marked S. D. 1, from which the south-west corner of Thompson's house bore north 34¾ degs. east, the south gable end of the Hermitage Hotel bore north 21 degs.

west, and Richard's nursery house bore north 47¼ degs. west, thence along said old ditch with hedge of willows, on north side of lane, south 81¾ degs., west 16 chains 85½ links to willow tree 5 inches in diameter, marked S. D. 2, thence north 8¼ degs. west 16 chains 85½ links to where formerly stood a sawed redwood post marked S. D. 3, from which north-east corner of brick house bore north 86½ degs. west 280 chains, thence north 81¾ degs. east 16 chains 85½ links to where formerly stood a sawed redwood post marked S. D. 4, from which the south gable of Hermitage Hotel bore south 37½ degs. west, and Richard's nursery house bore south 22 degs. west, thence south 8¼ degs. east 16 chains 85½ links, to the place of beginning; and containing 28.41 acres, more or less.

GREATHOUSE & HAGGIN, and
THOMAS H. BURKE,
Atty's for Plaintiff.

Recorded March 30, 1875. Liber 19 Lis Pendens, page 374.

Register P, Case 19,578.

CHARLES H. BURTON vs. THE MARKET AND FOURTEENTH STREET HOMESTEAD ASSOCIATION, A CORPORATION; JOHN RIZZO, L. L. ROBINSON, JOHN B. MAGENTA, JOHN JOHNSON, ELLEN BOLTON, AND FICTITIOUS NAMES.

FOURTH DISTRICT COURT. Reg. P. Case 19,578.

1875.
March 27. Suit to recover possession of the premises (described as in Liber 764 of Deeds, page 232, Guerrero to Burton), and $15,000 damages and costs of suit. Summons issued.

CHARLES H. BURTON TO LESTER L. ROBINSON.

DEED.

Dated August 13, 1875. Cons. $7,500.

Does grant, bargain and sell, convey and confirm unto second party and to his heirs and assigns forever, all the undivided 8-27ths of that piece of land in the city and county of San Francisco, State of California, formerly known as Manzanitas, beginning at a point where once stood a fence on the Mission Dolores, alongside of where was once an old ditch on the north side of a lane, at a block of china granite 40½ inches long, 7 inches wide, and 6 inches thick, marked S. D. 1, from which the south-west corner of Thompson's house bore north 34¾ degs. east, the south gable end of the Hermitage Hotel bore north 21 degs. west, and Richard's nursery house bore north 47¼ degs. west, running thence along said old ditch with hedge of willows, on north side of lane, south 81¾ degs. west 16 chains 85½ links to willow tree 5 inches in diameter, marked S. D. 2, thence north 8¼ degs. west 16 chains 85½ links, to where formerly stood a sawed redwood post marked S. D. 3, from which north-east corner of brick house bore north 86½ degrees west 280 chains, thence north 81¾ degs. east 16 chains 85½ links, to where formerly stood a sawed redwood post marked S. D. 4, from which the south gable of Hermitage Hotel bore south 37½ degs. west, and Richard's nursery house bore south 22 degs. west, thence south 8¼ degs. east, 16 chains 85½ links, to the place of beginning; and containing 28.41 acres of land, more or less.

It being expressly agreed, that first party hereby conveys unto second party all such right, title and interest in said land as first party received under and by virtue of the deed from Victoriano Palomares to him, dated December 1, 1874, recorded in Liber 764 Deeds, page 235, and of the deed from Victoriano Guerrero to him of said last named date, recorded in said Book of Deeds, page 232, to which said two deeds reference is hereby made.

And it is further expressly understood and agreed, that this deed and no covenant or guaranty, either expressed or implied, herein contained, shall be taken as a covenant or guaranty against any taxes or assessments of any kind, whether now levied or hereafter to be levied, or imposed, and that first party does not covenant against any taxes or assessments of any kind whatsoever.

Witness: E. H. Tharp.

Ackn'd August 13, 1875, before E. H. Tharp, N. P.

Recorded August 13, 1875. Liber 795 Deeds, page 372.

LESTER L. ROBINSON TO THE MARKET AND FOURTEENTH STREETS HOMESTEAD ASSOCIATION.

DEED.

Dated September 7, 1875. Cons. $5.

Does grant, bargain and sell unto second party and to its successors and assigns forever, all right, title, and interest of first party in and to that certain piece of land in the city and county of San Francisco, State of California, described as follows:

Commencing at a point where the north-westerly line of Market street, if extended south-westerly, would intersect the south line of Reservoir street, said point of commencement being the north-east corner of Mission block 80, as laid down upon the official map of said city, running thence westerly and along the southerly line of Reservoir street and the continuation thereof 373 feet 11¼ inches, to the centre of Church street, thence southerly and through the center of Church street 5 feet, thence at right angles westerly 41 feet 3 inches to the west line of Church street at a point 275 feet north of the north-westerly corner of Church and Fourteenth streets, thence westerly and parallel with Fourteenth street 125 feet, thence at right angles southerly 25 feet, thence at right angles westerly 310 feet, thence at right angles southerly 25 feet, thence at right angles westerly 125 feet, to the easterly line of Sanchez street, thence at right angles southerly and along the easterly line of Sanchez street 323 feet 8 inches to the intersection of said easterly line of Sanchez street with the westerly line of the Guerrero tract of 400 varas square, then southerly and along said westerly line of said Guerrero tract 40 feet 5 inches, to a point 75 feet south of the south line of Fourteenth street, thence easterly and parallel with Fourteenth street 122 feet 5 inches, thence at right angles southerly and parallel with Sanchez street, 176 feet 1⅞ inches, to a point 100 feet north-westerly from the north-westerly line of Market street, thence south-westerly and parallel with Market street 138 feet 9¼ inches to the westerly line of Guerrero tract aforesaid, thence southerly and along the westerly line of said Guerrero tract 37 feet 5¼ inches, thence south-easterly in a line at right-angles with the line of Market street 70 feet ½ inch to the north-westerly line of Market street, thence southerly to the intersection of the south line of Fifteenth street with the south-easterly line of Market street, thence along the south-easterly line of Market street 39 feet 6 inches, thence southerly and parallel with Sanchez street 74 feet 4 inches to a point 100 feet south of the south line of the extension of Fifteenth street, thence at right angles easterly 80 feet 9 inches, thence at right angles southerly 100 feet, thence at right angles easterly 155 feet to the centre of Sharon street, thence at right angles northerly through the centre of Sharon street 25 feet to a point 175 feet south of the south line of Fifteenth street, thence easterly and parallel with Fifteenth street 397 feet 11¾ inches, to the southerly line of said Guerrero tract, thence easterly along the said southerly line of said Guerrero tract 89 feet 8¼ inches, to a point 125 feet east of the east line of Church street and 169 feet 2¾ inches south of the south line of Fifteenth street, thence northerly and parallel with Church street 69 feet 2¾ inches, thence at right angles easterly and parallel with Fifteenth street 100 feet, thence at right angles northerly and parallel with Church street 274 feet, thence at right angles easterly 210 feet, thence at right angles northerly and parallel with Dolores street 300 feet, thence at right angles easterly 25 feet, thence at right angles northerly 142 feet to the centre of Fourteenth street, thence at right angles westerly through the centre of Fourteenth street 25 feet, thence at right angles northerly 109 feet 11 inches, to a point distant south-easterly 100 feet from the south-easterly line of Market street, thence north-easterly and parallel with Market street 31 feet 8⅛ inches, to the easterly line of said Guerrero tract, thence northerly and along the said easterly line of said Guerrero tract 20 feet 8 inches, thence on a line at right angles with Market street north-westerly 83 feet 5½ inches to the south-easterly line of Market street, and thence north-westerly across Market street 122 feet more or less to the point of commencement.

This indenture being made and executed for the purpose of correcting any and all errors or omissions that may exist, in the description of the premises contained in a certain deed dated December 26, 1872, from first party to second party hereto, and recorded in Liber 687 Deeds, page 383; and also for the purpose of conveying any and all interest that said first party may have subsequently acquired in the premises above described, by virtue of a certain deed made to him by one Charles H. Burton, on August 13, 1875, and recorded in Liber 795 Deeds, page 372.

Witness: Josiah H. Applegate.

Ackn'd September 16, 1875, before J. H. Blood, N. P.

Recorded, September 16, 1875. Liber 803 Deeds, page 117.

CHARLES MAYNE vs. JAMES L. BLAKIE, SOPHIA A. FERRIS, RICHARD ROE, AND ALBERT STYLES.

THIRD DISTRICT COURT.

NOTICE OF LIS PENDENS.

Dated — ———.

To obtain a decree against said defendants directing the sale of that certain tract of land:—

Commencing at a point in the centre of 15th street on the west line of Dolores street, thence northerly 130.3 feet along the west line of Dolores street to the north line of the land conveyed by the Real Estate Associates to L. L. Robinson, thence westerly 62.2 feet to the easterly line of the land known as the "Suerte en Dolores" thence northerly following the easterly line of said tract called "Suerte en Dolores" to its north-east corner, thence at right angles westerly 1100 feet, thence at right angles southerly 1100 feet to the south-west corner of said "Suerte en Dolores," thence at right angles westerly 825 feet to a point on the southerly line of said tract, distant 275 feet easterly from the south-easterly corner of said "Suerte en Dolores," thence at right angles northerly 200 feet, more or less, to a point in the middle of 15th street, thence easterly following the middle of said 15th street 335 feet, more or less, to the westerly line of Dolores street, the point of beginning.

To pay the sum of $5,500 with interest at 1¼ per cent. per month, from June 20, 1873; and for costs.

WM. MATTHEWS,
Attorney for Plaintiff.

Recorded July 31, 1875.
Liber 20, Lis P., p. 224.
Reg. D, case 3711.
July 30, 1875. Complaint to foreclose.
Mortgage filed.
Summons issued.
August 7. Dismissal filed.

THEODORE LE ROY TO THE MARKET AND FOURTEENTH STREETS HOMESTEAD ASSOCIATION.

DEED.

Dated March 1, 1875.

(Con. $1, and other good considerations.)

Does grant and convey unto the Market and Fourteenth Streets Homestead Association, all that tract of land situated in the city and county of San Francisco, State of California, described as follows:

All that portion of the premises, heretofore conveyed to the above named parties, by Lester L. Robinson, by deed dated Dec. 26, 1871, lying between the westerly boundary line of the Guerrero 400-vara tract and the fence to the easterly—thereof, and which fence is claimed as an easterly boundary of the lands of one John Carroll, said strip or tract of land lying to the east of Sanchez street and northerly from 16th street.

The premises hereby conveyed being the same which was conveyed to the above named grantor by the above named grantee, by deed dated May 2, 1873, and none other or different tract or parcel of lands.

Witness: Josiah H. Applegate.
Ackn'd April 15, 1875.
Before J. H. Blood, N. P.
Recorded Aug. 18, 1875.
Liber 794, Deeds p. 353.

The De Haro Title.

THE DE HARO TITLE.

The Grant is not recorded.

ROSALIE BROWN DE HARO, WIFE OF CHARLES BROWN.

INVENTORY OF SEPARATE PROPERTY.

Dated June 13, 1851.

Declares as her separate property one undivided seventh of all the estate, real and personal, which Francisco Haro, late of the district of San Francisco, deceased, died, siezed and possessed of, said real estate lying and being within the county of San Francisco, one dwelling house situate at the Mission of Dolores, known as the Eight-Ward House, etc., (and personal property).

Witness: M. W. Suersderve, Jno. H. Corkery.
Ackn'd June 13, 1851.
Before F. P. Tracy, N. P.
Recorded June 14, 1851.
Liber 1 Sep. Prop. Wife, p. 24.

I. N. DENNISTON TO C. HARO.

MARRIAGE CERTIFICATE.

I hereby certify that Isaac N. Denniston and Charlotte Haro, both of Mission Dolores, were married by me, 14th Aug. 1855. RICHARD CARROLL, Pastor.

Mission Dolores, Aug. 21, 1855.
Recorded Aug. 24, 1855.
Liber 2 Mar. Cert.'s, p. 120.

JOHN B. PREZZO TO C. DE HARO.

MARRIAGE CERTIFICATE.

Mission Dolores, June 30, 1856.

I hereby certify that I married John Baptist Prezzo and Candelario De Haro on the 30th day of June, 1856.

RICHARD CARROLL.

In presence of Isaac N. Denniston, Thos. C. May, Charlotte Denniston, and Clara Moses.

Recorded Sept. 30, 1856.
Liber 3 Mar. Cert., p. 41.

PRUDENCIO DE HARO, [SIGNED PRUDENCIO (HIS MARK) DE HARO,] TO JOSEFA DE HARO DENNISTON.

DEED.

Dated April 5, 1862.

(Cons. $500.)

Doth grant, bargain, and sell all the right, title, and interest of said first party in and to that certain block or parcel of land near the Mission Church, known on the map of said city of San Francisco as Block No. 83, bounded by Dolores, Church, Center, and Sparks streets.

Witness: Clinton Palmer.
Ackn'd April 5, 1862.
Before Clinton Palmer, N. P.
Recorded April 5, 1862.
Liber 157 of Deeds, page 12.

ISAAC N. DENNISTON TO R. H. LLOYD.

DEED.

Dated September 16, 1862.

(Cons. $1,000.)

Does grant, bargain, and sell unto second party his heirs and assigns, all that lot of land described.

(Same as in Liber 173 of deeds, page 250, Thompson et al. to Lloyd.)

Witness: P. B. Cornwall.
Before P. B. Cornwall, N. P.
Ackn'd Sept. 16, 1862.
Recorded Sept. 24, 1862.
Liber 174 of deeds, page 186.

CHARLES BROWN AND ROSALIA DE HARO BROWN, HIS WIFE, PAUL TISSOT AND NATIVIDAD DE HARO TISSOT, HIS WIFE, ISAAC V. DENNISTON AND CARLOTA DE HARO DENNISTON, HIS WIFE, ALONZO DE HARO, (WHO SIGNS ALONZS DE HARO), PRUDENCIO DE HARO, JUAN PRUSSO, (WHO SIGNS JUAN PRUZZO), AND MARIA CANDELARIA DE HARO PRUSSO, HIS WIFE (WHO SIGNS MARIA CANDELARIA DE HARO PRUZZO), TO AUGUSTUS D. SPLIVALO.

DEED.

Dated Dec. 21, 1865.

(Cons. $1. Stamp $5, canceled.)

Grant, bargain, sell, convey, and confirm all the undivided one-half of that piece of land known and called "La Huerta Vieja" at the Mission of Dolores, the same being the place formerly called "La Huerta Vieja," to the north-west of the Mission Establishment, said piece of land being 270 varas square and the same tract granted by Manuel Castro to Francisco de Haro on June 2, 1846.

Witness: John Gorman.

Ackn'd Dec. 21, 1865, by Brown and wife, Tissot and wife, and Prudencio de Haro, before John Gorman, N. P.

Ackn'd Dec. 26, 1865, by Pruzzo and wife, in Sonoma Co., before D. D. Carder, N. P.

Ackn'd March 1, 1876, by Alonzo de Haro, before John Gorman, N. P.

Recorded March 11, 1867.
Liber 355, Deeds 381.

CHARLES BROWN AND ROSALIA DE HARO BROWN, HIS WIFE, PAUL TISSOT AND NATIVIDAD DE HARO TISSOT, HIS WIFE, ISAAC V. DENNISTON AND CARLOTA DE HARO DENNISTON, HIS WIFE, (WHO DO NOT SIGN OR ACKNOWLEDGE,) ALONZO DE HARO, PRUDENCIS DE HARO, JUAN PRUSSO, AND CANDELARIA DE HARO PRUSSO, (SPELLED IN SIGNATURE AND ACKNOWLEDGED PRUZZO) TO AUGUSTUS D. SPLIVALO.

POWER OF ATTORNEY.

Dated December 21, 1865.

(No stamp.)

To enter into and take possession of the piece of land known and called "La Huerta Vieja," at the Mission of Dolores, being 270 varas square, and the same tract granted by Manuel Castro to Francisco de Haro on June 2, 1846, and to that end to institute and cause to be instituted all suits and actions, he, our said Attorney, may deem proper to demand, collect, sue for, recover, and receive any and all the rents, issues, and profits which have heretofore resulted, or which may hereafter result, from the said land or any part or parcel thereof, to compound, settle, adjust, or compromise, upon any terms our said Attorney shall think proper, and to arbitrate and submit to arbitration any question touching the possession or title to said land and the rents, issues, and profits resulting or to result therefrom, and for all and any of these purposes, to make and execute any releases, compromises, compositions, agreements, or contracts by deed or otherwise in his opinion necessary and expedient in the premises, of whatever kind or nature, etc.

Witness: John Gorman.

Ackn'd Dec. 21, 1865 and March 1, 1866, before John Gorman, N. P.; by all except the Pruzzos and Dennistons.

Ackn'd Dec. 26, 1865, before D. D. Carder, N. P., County of Sonoma, by the Pruzzos.

Recorded July 18, 1868.

Liber 25, Powers 25.

ISAAC V. DENNISTON AND CARLOTA DE HARO DENNISTON, HIS WIFE (SHE SIGNS CARLOTA DENNISTON) TO AUGUSTUS D. SPLIVALO.

POWER OF ATTORNEY.

Dated January —, 1866.

Sepan todos por estas presentes letras que nosotros Isaac

V. Denniston y Carlota de Haro Denniston, marido y muger vecinos de la cuidad y condado de San Francisco, Estado de California, damos y confermos a Augustus D. Splivalo vecino del mismo lugar todo nuestro poder amplio bastante y complido, cuanto en derecho se requiera especial para que como nuestro legitimo representante haga uso de los facultades siguentes paraque demande yadquera posesion de la septima parte indusa que nos pertence como herederos del finado Francisco de Haro en cierto terséno situado en esta cuidad y condado al noroesta del Establecimiento de la Mission de Dolores, llamado "la Huerta Vieja" y que consiste de 270 vara cuadradas siendo el mismo toreno que concedido el dia dos de Junio 1846, por Manuel Castro a Francisco de Haro y a cuyo ejecto si fuese necesario pueda comparecer en juicio ante todos los tribunales de este Estado dando los parsos que a el mejor le parezea para que demande y reciba frutos e entereses entre en composiciones y conciliacion, someta a arbitrio arregla venda y trespase y de todos y cualesquiera paso que fuere necesario en el asunto y a tal ejecto le damo poder hara que firmy y ejecute todos los documentos, actos y instrumentos necesarios sin que se entienda restringido por falta de clansulas que aqui no se espresan dando por insertos los que aqui no se expresan y que fueren necesarios, pues para to do lo referido le conferimos el poder mas amplio especial que en derecho se requiera sin limitacion alguno con facultad de sustituir revocar sustitutos y nombra otros.

Asi lo otorgamos y firmamos el dia del mes de Enero de 1866.

Ackn'd July 23, 1866.
Before John Gorman, N. P.
Recorded July 18, 1868.
Liber 25, Powers 22.

ISAAC V. DENNISTON AND CARLOTA DE HARO DENNISTON, HIS WIFE, TO A. D. SPLIVALO.

(Stamp, 50 cents, canc'd.)

Sepan todos por estas presentes letras que nosotros Isaac V. Denniston y Carlota de Haro Denniston, marido y muger, vecinos de la cuidad y candado de San Francisco, Estado de California, vendemos, concedemos y hacemos formal traspaso de la mitad indiva de la septima parte indivisa en cierto terreno, situado en la cuidad y condado de San Francisco, Estado de California, conocido bajo el nombre de la Huerta Vieja al noroeste del Establecimiento de la Mision de Dolores, cuyo terreno consiste de docientos setenta varas cuadradas y es el mismo terreno concedido por Manuel Castro a Francisco de Haro, el dio dos de Junio de 1846, en favor de Augustus D. Splivalo veceno del mesmo lugar y de sus herederos y consecionarios para siempre en la suma de un peso valor por nosotros ya recibido de la mitad indivisa, vale Septima, vale San Francisco, Enero 23, de 1866.

Signed ISAAC V. DENNISTON, JR.
CARLOTA DENNISTON.

Ackn'd January 23, 1866, before John Gorham, N. P.
Recorded July 18, 1868. Liber 437 Deeds, 264.

AUGUSTUS SPLIVALO, CHARLES BROWN, AND ROSALIA DE HARO BROWN, HIS WIFE, NATAVIDAD DE HARO TISSOT, ISAAC V. DENNISTON, AND CARLOTTA DE HARO DENNISTON HIS WIFE, ALONZO DE HARO, AND JUAN PRUZZO, AND MARIA CANDELARIO DE HARO, HIS WIFE, vs. JOHN RIZZO, CHAS. HAMBERGER, JOHN B. MAGENTA, PAOLO REALE, STEFFANO RUBINO, ANDREA DANERI, ANTHONY MARASCHI, JOHN CARL, JOHN BEALE, JOHN JOHNSON, CAMDIDO MAYNUNO, AUGUSTINE ARMANINO, MARY JACQUOE, ELLEN BOLTON, SICH FREITT, AND RIVALLO WELLS.

FOURTH DISTRICT COURT. Reg. M. Case 14,246.

1868.

April 17. Complaint filed Action to recover possession of all that lot of land known by the name of Los Manzanitas y La Huerta Vieja, at the place formerly called Mission Dollorasso, being the same tract of land known as Los Manzanetos y La Huerta Vieja, 270 Spanish varas square, and situate to the west of the Mission Establishment, and being same land granted by Manuel Castro to Francisco de Haro, June 2, 1846, and described as follows: Commencing at a stone monument north of the old Mission building, about 42 feet west of the west line of Dolores street, thence south 81¾ degs. east 270 varas, south 8¼ degs. west 270 varas, to beginning. (Description defective, two courses omitted.)

Summons issued.

1869.	
April 19.	Answer of Bolton filed.
26.	Demurrer filed.
	Substitution filed.
29.	Order demurrer sustained.
May 24.	Amended complaint filed.
29.	Sep. answer of Hamberger filed.

COPY OF DESCRIPTION TAKEN FROM AMENDED COMPLAINT.

That piece of land known by the name of Los Manzanitas y La Huerta Vieja, situate at the Mission Dolores, and to the north-west of the old Mission church, being 270 Spanish varas square, and being the same land granted by Manuel Castro to F. de Haro, June 2, 1846, and more particularly described as follows:

Commencing at a fence in the Mission Dolores, alongside an old ditch on the north side of a lane, at a block of china granite 40½ inches long, 7 inches wide, and 6 inches thick, marked S. D. 1, from which the south-west corner of Thompson's house bears north 34¾ degs. east, the south gable end of the Hermitage Hotel bears north 21 degs. west, and Richard's nursery house bears north 47¼ degs. west, thence northerly 270 varas, thence westerly 270 varas, and thence southerly 270 varas, thence easterly 270 varas, to the place of beginning.

JAMES G. DENNISTON TO EDWARD G. DENNISTON.

DEED.

Dated April 20, 1868. Cons. $1,000.

(Stamp, $1, canc'd.)

Grant, bargain, sell, alien, remise, release, convey, and confirm to second party, his heirs and assigns forever, all right, title and interest in and to the piece of land situate in the city and county of San Francisco, near the Mission Dolores, and known on the map of said city as block 83, and bounded by Dolores, Church, Centre, and Sparks streets; the interest in said block 83 hereby conveyed and intended to be conveyed being all the interest therein derived to first party under deed from Prudencio de Haro, dated June 17, 1867. (And other property.)

Witness: Wm. V. Garvey.

Proven March 25, 1860. John Gorman, N. P., by William V. Garvey, subscribing witness.

Recorded March 25, 1869. Liber 490 of Deeds, page 254.

The deed from Prudencio de Haro referred to is not recorded.

CHARLES BROWN AND WIFE, ROSALIA DE HARO BROWN, NATIVIDAD DE HARO TISSOT, ISAAC V. DENNISTON AND WIFE, CARLOTA DE HARO DENNISTON, ALONZO DE HARO, PRUDENCIO DE HARO, JUAN PRUSSO AND WIFE, MARIA CANDELARIA DE HARO PRUSSO, BY AUGUSTUS D. SPLIVALO, THEIR ATTORNEY IN FACT, TO F. E. LYNCH.

DEED.

Dated June 15, 1868. Cons. $1,000.
(Stamp, $1, canc'd.)

Do remise, release, and forever quit-claim all the undivided half part of 6 undivided 7ths of that certain piece of land known as La Huerta Vieja, at the Mission Dolores, in the said city and county, the same being the tract of land 270 varas square, granted under the authority of the Mexican government, on June 2, 1846, by Manuel Castro, Prefect, to Francisco de Haro, as shown in the original title papers thereto.

Witness : John Gorman.

Ackn'd June 15, 1868, by Augustus D. Splivalo, Attorney in Fact for all the Grantors, before John Gorman, N. P.

Recorded June 15, 1868, Liber 441 Deeds, 171.

AUGUSTUS D. SPLIVALO (SIGNED AUG. D. SPLIVALO) TO WILLIAM B. CARR.

DEED.

Dated July 10, 1868. Cons. $5.
(50-cent stamp, canceled.)

Doth remise, release, and forever quit-claim all the undivided one-half of all his right, title, and interest in and to that certain piece of land known as La Huerta Vieja, at the Mission of Dolores, the same being the tract of land 270 varas square, granted under authority of the Mexican government, on the 2d day of June, 1846, by Manuel Castro, Prefect, to Francisco de Haro, as shown in the original title papers thereto.

Witness: John Gorman.

Ackn'd July 17, 1868, before John Gorman, N. P.

Recorded July 18, 1868. Liber 445 Deeds, 324.

FRANCISCO E. LYNCH (SIGNED AND ACKN'D, F. E. LYNCH) TO WILLIAM B. CARR.

DEED.

Dated July 10, 1868. Cons. $5.

(Stamp, 50-cents, canc'd.)

Doth remise, release, and forever quit-claim all the undivided one half of all his right, title, and interest in and to that certain piece of land known as La Huerta Vieja, at the Mission Dolores, the same being the tract of land 270 varas square, granted under authority of the Mexican government, on June 2, 1846, by Manuel Castro, Prefect, to Francisco de Haro, as shown in the original title papers thereto.

Ackn'd July 17, 1868, before John Gorman, N. P.

Recorded July 18, 1868. Liber 445 of Deeds, page 326.

WILLIAM B. CARR, FRANCIS E. LYNCH, AND AUGUSTUS SPLIVALO, TO THEODORE LE ROY.

DEED.

Dated November 30, 1868. Cons. $20,000.

(Stamp, $20, canc'd.)

Grant, bargain, sell, convey, remise, release, and forever quit-claim to second party, his heirs and assigns, all right, title, and interest in and to the piece of land. (Same as described in 480 Deeds, page 66, Brown et al. to Splivalo.)

Ackn'd November 30, 1868, before John Gorman, N. P.

Recorded January 22, 1869. Liber 480 Deeds, page 77.

CHARLES BROWN AND ROSALIA DE HARO BROWN, HIS WIFE, NATIVIDAD DE HARO TISSOT, PRUDENCIO DE HARO, AND ALONZO DE HARO, TO AUGUSTUS D. SPLIVALO.

DEED.

Dated December 3, 1868.

[Cons. $2,500. Stamp $2.50, canceled.]

Grant, bargain, sell, convey, release, and forever quit claim to second party, his heirs and assigns, all right, title, and interest in and to that certain piece of land lying and being in the city and county of San Francisco, and more particularly known as "La Huerta Vieja" at the Mission Dolores, the same being the tract of land 270 varas square, granted under the authority of the Mexican Government on June 2, 1846, by Manuel Castro, Prefect, to Francisco de Haro, as shown in the original title papers thereto.

Witness: John Gorman.

Ackn'd Dec. 3, 1868. Before John Gorman, N. P. By all except Alonzo de Haro.

Ackn'd Jan. 6, 1869. Before John Gorman. By Alonzo de Haro.

Recorded Jan. 22, 1869.

Liber 480 of Deeds, p. 66.

JOHN PRUSSO AND CANDELARIA DE HARO PRUSSO, HIS WIFE, [SIGNED JOHN PRUZZO AND CANDELARIA DE HARO PRUZZO,] TO AUGUSTUS D. SPLIVALO.

DEED.

Dated December 9th, 1868.

(Cons. $350. Stamp 50c, canc'd).

Grant, bargain, sell, convey, remise, release, and forever quit-claim to second party, his heirs and assigns, all right, title, and interest in the piece of land, (same as described in Liber 480 of deeds, page 66, Brown et al. to Splivalo.)

Witness: Frank W. Shattuck.

Acknowledged Dec. 9, 1868, before Frank W. Shattuck, N. P.

Recorded Jan. 22, 1869.

Liber 380 of Deeds, page 70.

ISAAC V. DENNISTON AND CARLOTA DE HARO DENNISTON, HIS WIFE, TO AUGUSTUS D. SPLIVALO.

DEED.

Dated Dec. 10, 1868.

[Cons. $5. Stamp 50c, canceled.]

Grant, bargain, sell, convey, remise, release, and forever quit-claim to second party, his heirs and assigns, all right, title and interest in and to the piece of land. (Same as described in Liber 480 of Deeds, page 66, Brown et al. to Splivalo.)

Witness: John Gorman.
Ackn'd Dec. 24, 1868.
Before John Gorman, N. P.
Recorded Jan. 22, 1869.
Liber 480 of Deeds, page 72.

AUGUSTUS D. SPLIVALO TO THEODORE LE ROY.

DEED.

Dated January 6, 1869.

[Cons. $5,000. Stamp $5, canceled.]

Grants, bargains, sells, conveys, remises, releases, and forever quit-claims to second party, his heirs and assigns, all right, title, and interest in and to the piece of land. (Same as described in Liber 480 of Deeds, page 66, Brown et al. to Splivalo.)

Witness: John Gorman.
Ackn'd Jan. 6, 1869.
Before John Gorman, N. P.
Recorded Jan. 22, 1869.
Liber 480 of Deeds, page 75.

THEODORE LE ROY TO THE MARKET AND FOURTEENTH STREETS HOMESTEAD ASSOCIATION.

DEED.

Dated December 26, 1872.

[Cons. $1, and other good considerations.]

Does remise, release, and quit-claim unto second party, and to its successors, and assigns forever, all that tract of land situated in the city and county of San Francisco, State of California, described as follows:

Commencing at a point on the north-westerly line of Market street if extended south-westerly would intersect the south line of Reservoir street, said point of commencement being the north-east corner of Mission Block 80, as laid down on the official map of said city, thence running westerly and along the south line of Reservoir street and the continuance thereof, until it reaches a point 125 feet westerly of where the west line of Church street if extended northerly would intersect the same, thence running at right angles southerly 25 feet, thence at right angles westerly 310 feet, thence at right angles southerly 25 feet, thence at right angles westerly 125 feet to the easterly line of the extension northerly of Sanchez street, thence at right angles southerly and along the easterly line of the extension of Sanchez street 340 feet to the intersection of said east line of Sanchez street with the westerly line of the Guerrero tract of 400-varas square, thence southerly and along said western line of said Guerrero tract about 15 feet until it reaches a point 75 feet south of the south line of Tracy or 14th street when extended, thence at right angles easterly 125 feet, thence at right angles southerly and parallel with Sanchez street 170 feet to a point 100 feet north-westerly from the north-westerly line of Market street when extended south-westerly, thence south-westerly and parallel with the extension of Market street 170 feet, more or less, to the westerly line of Guerrero tract as aforesaid, thence southerly along the westerly line of said Guerrero tract about 30 feet, thence south-easterly in a line at right angles with the line of Market street 85 feet to the north-westerly line of Market street when extended, thence southerly to the intersection of the south line of 15th street when extended with the south-easterly line of the extension of Market street, thence along the south-easterly line of the extension of Market street, until it reaches a point 50 feet east of the east line of Sanchez street, thence southerly and parallel with Sanchez street to a point 100 feet south of the south line of the extension of 15th street, thence at right angles easterly 75 feet, thence at right angles southerly 100 feet, thence at right angles easterly 125 feet, thence at right angles northerly 25 feet, thence at right angles easterly about 435 feet to the southerly line of said Guerrero tract, thence easterly along said line of said Guerrero tract about 85 feet to a point 125 feet east of the east line of Church street when extended, thence northerly parallel with Church street about 68 feet to a point 100 feet south of the south line of 15th street when extended, thence at right angles easterly 100 feet, thence at right angles northerly 274 feet, thence at right angles easterly 210 feet, thence at right angles northerly 300 feet, thence at right angles easterly 25 feet, thence at right angles northerly 110 feet, thence at right angles westerly 25 feet, thence at right angles northerly about 145 feet to a point 100 feet distant south-easterly from the south-easterly line of Market street when extended, thence north-easterly parallel with Market street about 60 feet to the east line of said Guerrero tract, thence northerly along said line of the Guerrero tract about 30 feet, thence on a line at right angles with Market street north-westerly about 80 feet to the south-easterly line of the extension of Market street, and thence north-westerly about 122 feet to the point of commencement.

Witness: Josiah H. Applegate.
Proven April 15, 1875.
By Josiah H. Applegate, subscribing witness.
Before J. H. Blood, N. P.
Recorded Aug. 18, 1875.
Liber 794 Deeds, p. 350.

The O'Connor Title.

THE O'CONNOR TITLE.

BENJAMIN R. BUCKELEW TO FREDERICK W. HAHNE.

DEED.

Dated October 8th, 1849. Cons. $3,000.

Sells, transfers, and conveys to Frederick W. Hahne all right, title, and interest in and to all his buildings and other improvements on the public land located on by him, the said Buckelew, on Nov. 13, 1848, which is situated north and west of the Mission of Dolores. Said claim was intended to commence at and was run from the point where the upper fork of the road for the distance of a mile, thence turning to a right angle and running due west for the distance of half a mile, thence turning to a right angle and running due east to the point of beginning.

The said F. W. Hahne to hold the same as fully as the same was held by said Buckelew, and the confirmation of title to said Hahne to be subject to the ultimate decision of competent authority.

Witness: W. S. Clark, Wm. Petit.
Ackn'd Oct. 23, 1849.
Before Jno. W. Geary, First Alcade.
Recorded Oct. 23, 1849.
Liber H Deeds, 101.
Also recorded Feb. 25, 1865.
Liber 274, Deeds 279.
With assignment as follows:

F. H. HAHNE TO M. T. O'CONNOR.

"In consideration of the sum of $500 to me in hand paid I hereby sell, assign, transfer, and set over unto M. T. O'Connor all my right, title, and interest, claim and demand to the within deed, and all the land therein contained, and authorize said O'Connor, to use my name in all proper ways to obtain said land and premises, and to sign all requisite conveyances and papers in order to convey the same in as full a manner as I could do myself." "In witness," etc. Not acknowledged.

PROBATE COURT OF THE CITY AND COUNTY OF SAN FRANCISCO—IN THE MATTER OF THE ESTATE OF MICHAEL T. O'CONNOR, DECEASED.

REG. 1, CASE 684.

Nov. 27, 1858. Petition of Maria O'Connor filed, shows that she is the relict of M. T. O'Connor, that said O'Connor was a resident of the city and county of San Francisco, that he died at the Mission Dolores, Nov. 21 last past, leaving property worth $3,000, being real estate worth $2,500, personal property worth $500; that said property is located some in San Francisco county, some in San Mateo county; that said property is encumbered to the amount of $800; that deceased left no will save and excepting a document in his own hand writing, which petitioner has found among his papers, and which is amended to this petition; that she has heard and believes said document is void in law.

Prays that letters of administration by issued to her.

Said document recites that being sick in body but sound of mind, etc., declares it to be his last will and testament, revoking all other wills, and bequeaths to his wife, Marie O'Connor, his farm, situate in Canada Raimundo, County of San Mateo, being 709 acres, more or less, also house and lot situate on Vallejo street, between Montgomery and Sansome, all his right in any property she may have which is recorded as her separate property, and all property she may have acquired as sole trader, (also certain personal property), also bequeaths to his said wife all his interest in Mission Blocks No. 39, and 40.

To his son, Francis O'Connor, his law library, if he elect the legal profession, should he not so elect, to his son Edward O'Connor, and should he not adopt said profession, then to his wife, etc. Constitutes his wife Maria O'Connor sole executor.

In witness whereof, I have hereunto set my hand and seal this 19th day of November, A. D. 1858. (No seal.)

Witness: Dr. Bernard Lambert.

Nov. 30. Order appointing Dec. 13, 1858, to show cause why petition should not be granted.

Register shows filing of proof of posting.

Dec. 13. Order appointing Maria O'Connor, administratrix, that letters issue upon filing bond in $1,000.

(Register shows filing of bond.)

Letters of administration issued.

April 20, 1863. Order appointing Freeland Holmes, R. W. Hent, and W. L. Crowell, appraisers.

April 27. Inventory and appraisement filed.

Real estate.

Any right, title, and interest claimed by deceased in land in city and county of San Francisco, $50, (and other property in San Mateo County.)

Affidavits of appraisers attached.

March 8, 1867. Report of sale of real estate filed, shows that under a certain act of the Legislature, approved May 9, 1861, authorizing and empowering her to sell all the real estate owned by said M. T. O'Connor, deceased, said administratrix on March 6, 1867, sold, at private sale, to Alvinza Hayward, for $2,300, the following real estate:

Commencing at a fence in the Mission Dolores along side an old ditch on north side of lane at a block of China granite 40½ inches long, 7 inches wide, and 6 inches thick, from which the south-west corner of Thompson's house bears north 34¾ degs. east to the south gable end of the Hermitage Hotel bears north 21 degs. west, and Richard's nursery-house bears north 47¼ degs. west, thence along said ditch with hedge of willows on north side of lane south 81¾ degs., west 16 chains, 85½ links to willow tree 5 inches in diameter, marked S. D. 2, thence north 8¼ degs., west 16 chains, 85½ links to a sawed red-wood post marked S. D. 3, from which north-east corner of brick house bears north 86½ degs., west 28 chains, thence north 81¾ degs., east 16 chains, 85½ links to sawed red-wood post, marked S. D. 4, from which the south gable of Hermitage Hotel bears south 37½ degs. west, and Richard's nursery-house bears south 22 degs. west, thence south $8\frac{1}{4}$ degs. east 16 chains, $85\frac{1}{2}$ links, to place of beginning and containing $28\frac{41}{100}$ acres. The title of said M. T. O'Connor is in litigation.

Prays for confirmation.

March 8, 1867. Order confirming sale and directing conveyance.

July 7. Petition of Eugene B. Drake, for citation on administratrix, to show cause why she should not be compelled to render an account, etc., made, entered, and filed.

July 12. Citation returned, served, filed.

Petition of E. B. Drake, for citation on administratrix, to show cause, on July 19, 1870, why she should not be compelled by attachment and order of this Court to pay to petitioner $2,500, legal interest from September 1, 1868, due for legal services rendered, made, entered, and filed.

July 18. Citation returned, served, filed.

July 19. Demurrer of Maria O'Connor to petition of Eugene B. Drake, filed.

Continued till July 22, 1870.

July 22. Administrator's account filed.

Amended petition of Eugene B. Drake, to show cause why petitioner's claim should not be allowed.

Demurrer of Maria O'Connor to amended petition of E. B. Drake filed.

August 30. Second amended petition of E. B. Drake for order on administatrix to allow and pay claim of E. B. Drake filed.

September 6. Objections of administratrix to allowance of Eugene B. Drake filed.

Objections of Frank O'Connor, one of the heirs of deceased, to allowance of pretended claim of Eugene B. Drake.

February 13, 1871. Finding on application of E. B. Drake for an order to allow claim, entered and filed.

Ordered that judgment be entered that petitioner E. B. Drake take nothing by his action herein.

MARIA O'CONNOR, ADMINISTRATRIX OF THE ESTATE OF M. T. O'CONNOR, DECEASED, vs. ELLEN BOLTON, A. THOMPSON, JAMES G. DENNISTON, JOSEFA DE HARO DENNISTON, S. W. LEE, T. B. VALENTINE, HENRY COWELL, AUGUSTIN GUERRERO, JOSEFA DE HARO GUERRERO, ADMINISTRATRIX OF THE ESTATE OF FRANCISCO GUERRERO, DECEASED, ET ALS.

TWELFTH DISTRICT COURT.

NOTICE OF LIS PENDENS.

Dated May 1, 1865.

To recover possession of the premises described as follows:

By following a line running south 38 degs. 20 min. west, 2 97-100 chains from the south-east corner of Dolores and Sparks streets, thence south 81¾ degs. west 44 links, to a stone monument set in the ground, and which stone monument is the point of commencement, and running thence south 81¾ degs. west 16 chains 85½ links, thence north 8¼ degs. west 16 chains 85½ links, thence north 81¾ degs. east 16 chains 85½ links, and thence south 8¼ degs. east 16 chains 85½ links, to said stone monument the point of commencement.

Containing 28.41 acres of land, and $10,000 damages.

EUGENE B. DRAKE,
Att'y for Plaintiff.

Filed and recorded May 1, 1865. Liber 6, Lis Pendens page 50.

Register L. Case 12,071.

1865.

May 1. Complaint in ejectment filed.
Summons issued.

1868.

December 10. Dismissal as to defendant Horace Hawes filed.

Nothing further.

MARIA O'CONNOR TO JOHN W. DWINELLE.

DEED.

Dated March 13th, 1866. Cons. $1.
(Stamp, 50-cents, canc'd.)

Grants, bargains and sells to second party, his heirs and assigns forever, 3 certain acres of land, of average quality and value with the rest to be taken and assigned out of the right, title, and interest of first party in and to those certain lands described as follows:

Commencing at a fence in the Mission Dolores (along side of an old ditch), on the north side of a lane at a block of China granite 40½ inches long, 7 inches wide, and 6 inches thick, marked S. D. 1, from which the south-west corner of Thompson's house bears north 34¾ degs. east, the south gable end of the Hermitage Hotel bears north 21 degs. west, and Richard's nursery house bears north 47¼ degs. west, thence along said ditch with hedge of willows on north side of lane south 81¾ degs. west, 16.85½ chs. to willow tree 5 inches in diameter, marked S. D. 2, thence north 8¼ degs. west 16.85½ chs., to a sawed red-wood post, marked S. D. 3, from which north-east corner of brick house bears north 86½ degs. west 28 chains, thence north 81¾ degs., east 16.85½ chs. to sawed red-wood post marked S. D. 4, from which the south gable of Hermitage Hotel bears south 37½ degs. west, and Richard's nursery-house bears south 22 degs. west, thence south 8¼ degs. east, 16.85½ chs. to beginning, and containing 28.41 acres more or less.

The meaning and intention of this conveyance is, that second party shall have three full acres in fee in his own right, when said property comes to be divided or partitioned.

Witness: Eugene B. Drake.

Ackn'd March 15, 1866, before Eugene B. Drake, Justice of Peace, Fourth Township.

Recorded March 16, 1866. Liber of Deeds 316, page 310.

MARIA O'CONNOR, ADMINISTRATRIX OF THE ESTATE OF MICHAEL T. O'CONNOR, DECEASED, TO ALVINZA HAYWARD.

DEED.

Dated March 9, 1867. Cons. $2,300.
(Stamp, $2.50, canc'd.)

Recites, that the Legislature of the State of California passed An Act to authorize Maria O'Connor, administratrix of the estate of Michael T. O'Connor, deceased, to sell and convey real estate, approved May 9, 1861, authorizing her to sell at public or private sale all the real estate owned or claimed by said M. T. O'Connor, deceased, as in the judgment of administratrix shall best promote the interests of said estate.

And said administratrix, by virtue of said powers, did, on March 6, 1867, sell at private sale to second party, for $2,300, and subject to confirmation by the Probate Court of the city and county of San Francisco, all the real estate hereinafter described, owned by M. T. O'Connor, deceased, at the time of his death: And on March 8, 1867, said administratrix made a report of said sale to the Probate Court, and said Court made an order confirming said sale, and directing said administratrix to convey to second party the premises sold as aforesaid, a certified copy of which order was recorded in the office of the County Recorder of said city and county, on March 9, 1867, and which said order, on file in the Probate Court, and said record in the Recorder's Office, are hereby referred to, and made a part of this indenture.

Now, etc., grants, bargains, sells and conveys to second party, his heirs and assigns forever, all right, title, and interest of said Michael O'Connor, deceased, at the time of his death, and all right, title and interest that said estate, by operation of law or otherwise, may have acquired other than or in addition to that of intestate at the time of his death, in and to that certain piece of land in the city and county of San Francisco, described as follows:

Commencing at a fence in the Mission Dolores (along side of an old ditch) on the north side of a lane at a block of China granite 40½ inches long, 7 inches wide and 6 inches thick, marked S. D. 1, from which the southwest corner of Thompson's house bears north 34¾° east, the south gable end of the Hermitage Hotel bears north 21° west, and

Richard's nursery house bears north 47¼° west, thence along said ditch with hedge of willows on north side of lane south 81¾° west, 16.85½ chains to willow tree 5 inches in diameter marked S. D. 2, thence north 8¼° west, 16.85½ chains to a sawed redwood post marked S. D. 3, from which northeast corner of brick house bears north 86½° west 28 chains, thence north 81¾° east, 16.85½ chains to sawed redwood post marked S. D. 4, from which the south gable of Hermitage Hotel bears south 37½° west, and Richard's nursery house bears south 22° west, thence south 8¼° east 16.85½ chains to beginning, and containing $28\frac{41}{100}$ acres, more or less.

Witness: R. W. Hent.
Eugene B. Drake.
Ackn'd March 9, 1867, before John White, N. P.
Recorded March 9, 1867. Liber 356 of Deeds, page 342.

The certified copy of the Order of Confirmation is recorded in the Recorder's Office, March 9, 1867. Liber R. of Miscel., page 240.

JOHN W. DWINELLE TO ALVINZA HAYWARD.

DEED.

Dated March 15, 1867. Cons. $1,000.
(Stamp, $1, canc'd.)

Grants, bargains and sells to second party, his heirs and assigns forever, all the interest derived or conveyed by Maria O'Connor by deed of conveyance dated March 13, 1866, in and to those certain acres of land, of equal average quality and value with the rest, to be taken and assigned out of the right, title, and interest of first party in and to those certain lands situate in the city and county of San Francisco.

(Same as described in 356 Deeds, page 342. Maria O'Connor, Administratrix, to Hayward.)

Witness: Henry Haight.
Ackn'd March 21, 1867, before Henry Haight, N. P.
Recorded March 21, 1867. Liber 363 of Deeds, page 89.

CONSOLIDATED TAXES.

MISSION BLOCKS 80, 81, 82, 83, 96, 97, 98, 99—MARKET AND FOURTEENTH STREETS HOMESTEAD ASSOCIATION.

1856–57. Block 82 paid. Blocks 81, 83, not paid or sold. Balance not assessed.

1857–58. Blocks 80, 82, 83, 96, off by Board.

Block 81 not paid or sold; balance not assessed.

1858–59. Blocks 80, 81, 82, 83, 96, paid. Block 97, portion commencing on Market, 86 feet from south-west corner of Church, south 33 degs. east 159½ feet, south 63 degs. west 248 feet to south line of Market, east 280 feet to beginning, assessed to Trustees of Santa Clara College. Not paid or sold. Marked "exempt" in pencil. Balance of block paid. Block 98. The portion commencing on south-east corner of Sanchez and Tracy streets, east 431½ feet, south 33 degs. east 145 feet, west to north line of Market 469 feet, north 35½ degs. west 429 feet, north on Sanchez 37½ feet to beginning. Assessed to Trustees of Santa Clara College. Not paid or sold. Marked "exempt" in pencil. Balance of block paid.

Block 99. The portion commencing on the north-east corner of Sanchez and Tracy street, north 281.6, north 56¾ degs., east 345 feet, south 33¼ degs., east 370½ feet, west, on north line of Tracy, 417 feet to beginning. Assessed to Trustees of Santa Clara College. Not paid or sold. Balance of block paid.

1859–60. Portion sold does not affect the premises in question.

Portion block 96 sold and redeemed.

Sold certificate 3,442, portion of block 97, and redeemed.

Sold certificate 3,444, portion of block 98, and redeemed. Balance paid.

1860–61. Sold certificate 1,462, portion of block 80. Lot south-east Ridley and Church streets, east 40x560. Dec. 28, 1860. To H. Ayres.

No deed, no redemption.

Sold certificate 1,464, portion of block 81 and redeemed.

Sold certificate 1,465, portion of block 82. Lot north-west corner Sparks and Dolores, north 15x560 feet. Dec. 26, 1860. To Wm. Bosworth.

No deed, no redemption.

Sold certificate 1,468, portion of block 83. Lot west line Dolores, 400 feet north of Center, north 20x560. Dec. 28, 1860. To E. J. Baldwin. No deed, no redemption.

Sold certificate 1,473, portion of block 96. Not covering premises searched.

Sold certificate 1,474, portion block 97, and redeemed.

Sold certificate 1,475, portion block 98. Not covering premises searched.

Sold certificate 1,476, portion block 99. Lot north-west corner Tracy and Church streets, west 10x560 feet. Dec. 26, 1860. To E. W. Burr.

No deed, no redemption.

Balance paid.

1861–62. Sold certificate 836, portion of block 80. Lot south-east Church and Ridley streets, east on Ridley 20 feet, south to land of Pelissier, north 57 degs. west to Church, north 63 feet to beginning.

Jan. 2, 1862, to John B. Lewis. Assigned to E. L. Sullivan.

Deed issued Dec. 21, 1863.

Sold certificate 837, portion of block 81, not covering premises searched.

Sold certificate 838, portion of block 82, not covering premises searched.

Sold certificate 839, portion of block 82, not covering premises searched.

Sold certificate 842, portion of block 83, lot north-east Church and Center streets, east 30x365.10, Jan. 4, 1862, to Michael Lynch. Deed issued Sept. 23, 1862.

Sold certificate 855, portion of block 98, lot north-east Sanchez and Market streets, north on Market 407 feet, more or less, south 33¼ degs. east 335 feet, thence south 5¼ degs. west 24 feet to Market street, south-west 86.6 feet to beginning. This description cannot be located.

Jan. 4, 1862. To John G. Klumpke, assigned to John Carroll, June 8, 1868. Deed issued June 25, 1868. Lot north-west Church and Center, north 327, south 81 degs. west 557, etc.

Sold certificate 854, portion not including any of the premises searched. Balance paid.

1862–63. Sold certificate 1396, portion of block 80, not covering premises searched.

Sold certificate 1397, portion block 80. Lot assessed to Estate of Pelissier. North-west Market 335, south-west from north-west corner of Dolores, north 57 degs. west 356 feet, south 17 degs. 45 min. east 235.5 feet, thence south 84 degs. 55 min., east 213 feet to Market, to place of beginning. ("18 feet to Marshutz.") Certificate in pencil. No deed, no redemption.

Sold certificate 1,398, portion of block 81, not covering premises searched.

Sold certificate 1,399, portion of block 82, not covering premises searched.

Sold certificate 1,400, portion of block 82, not covering premises searched.

Sold certificate 1,404, portion of block 83. Lot north-east Church and 16th streets, east 290x365.10 feet. Dec. 30, 1862. To William Dehon. Deed issued April 29, 1864.

Sold certificate 1,417, lot in block 96. The portion sold does not affect the property searched.

1863–64. Sold certificate 840, portion of block 80, and redeemed.

Sold certificate 841, portion of block 80, and redeemed.

Sold certificate 843, portion of block 83. "5 feet to Vassault." Certificate in pencil. No deed, no redemption.

Sold certificate 857, portion of block 99. Lot assessed to Trustees Jesuit College. "All that portion not assessed, to Jas. G. Denniston." "5 feet to Nelson." Certificate in pencil. No deed, no redemption. Balance paid.

1864–65. Sold certificate 678, portion of block 81, not covering premises searched.

Sold certificate 680, portion of block 83. Lot east Church, 365.10 north Center, thence south 87x290. Dec. 27, 1864. To John Parnell. No deed, no redemption.

Sold certificate 696, portion of block 99. Lot north-east

Sanchez and 14th, thence north on Sanchez 281.6, north 56¾ degs. east 345 feet, south 33¾ degs. east 370.6 feet to 14th street, west 417 feet to beginning. Dec. 23, 1864. To John B. Lewis, for Trustees of Jesuit College, Santa Clara. Assigned to Alvinza Hayward, March 26, 1867. No deed, no redemption.

Sold certificate 694, portion of block 96. The portion sold does not affect the property searched.

1865–66. "Exempt No. 440," portion block 81, north-west Dolores and Fourteenth, thence 92 feet west on Fourteenth, north 198 to south line of Market, north-east 147 to Dolores, south on Dolores 300 feet to beginning.

Sold certificate 499, portion block 83. Lot north-east Sixteenth and Church, east 290, north 90.10, west 5, north 36.1 1-7, east 5 feet, north 80 feet, west 5 feet, north 39.8 5-7, east 5 feet, north 119.2 1-7 feet, west 290, south 365.10. January 11, 1866. To Isaac N. Thorne. Deed issued January 22, 1867.

Sold certificate 512, portion block 99, lot north-east Sanchez and Fourteenth, north 281.6, north 56¾ degs. east 345, more or less, south 33¾ degs. east 70.6 more or less to Fourteenth street, west 417 feet to beginning. January 11, 1866. To John B. Lewis. Assigned to Alvinza Hayward. No deed, no redemption; balance paid.

1866–67. Sold certificate 633, portion block 83, and redeemed.

Sold certificate 634, portion block 83.

Lot north Sixteenth 69 feet east of Church, east 221, north at right-angles 361, more or less, to land assessed to Cobb, south 81 degs. 45 min. west 49 feet, more or less, to land assessed to Halleck, Peachy & Billings, south 8 degs. 15 min. east 289 feet, south 81 degs. west 194.8½, south 4 degs. east 51.4 feet to point of beginning. December 22, 1866. To William B. Swain. No deed, no redemption.

Sold certificate 653, portion block 99. North-east corner Sanchez and Fourteenth, north 281.6, thence north 72 degs. 15 min. east 345 feet, south 17 degs. 15 min. east 370.6 feet to Fourteenth street, west 417 feet to beginning. December 22, 1866. To John B. Lewis, assigned to Alvinza Hayward. No deed, no redemption; balance paid.

1867–68. Sold certificate 667, portion block 96, lot south-east Sanchez and Market, south 149½ feet, north 84 degs. east 17.9 feet, north 5¼ degs., east 197½ feet to Market, south-west 64.8½ feet to beginning. December 23,

1867. To Jonathan Peel. Deed issued July 1, 1868; balance paid.

1868–69. Sold certificate 508, portion block 99. Not covering premises searched. Balance paid.

1869–70. Sold certificate 421, portion block 99, not covering premises searched. Balance paid.

1870–71. Sold certificate 490, portion block 99, not covering premises searched. Balance paid.

1871–72. Sold certificate 414, portion block 99, not covering premises searched. Balance paid.

1872–73. Lot north-west corner Fourteenth and Church, west 143, north 17¼ degs. west 370.6 feet, south 72¼ degs. west 345 feet to east line of Sanchez, north 278.6 feet along said line to south line of Ridley, east on said line 560 feet to Church, south 560 feet to beginning. Delinquent $686.41. Offered for sale March 11, 1873, no bid. Balance paid.

1873–74. Block 99. Sold certificate 556, lot north-west corner of Fourteenth and Church streets, west on Fourteenth street 143 feet, north 17½ degs. west 370.6, south 72¼ degs. west 345 to Sanchez street, north 278.6 to Ridley street, east 560 feet to Church, south 560 feet to beginning. March 6, 1874. To Josiah H. Applegate. No deed, no redemption. Balance paid.

1874–75. Block 83. Lot north line Sixteenth street, 270 feet west of Dolores, west 221 feet, north 4 degs. west 51.4 feet, south 81 degs. east 194.8½ feet, north 8¼ degs. west 289.1 feet, north-east 49 feet, more or less, to line of land assessed to Prudencia de Haro, south 361 feet to beginning.

Sold certificate 407, March 17, 1875, to J. G. Klumpke. Assigned to Julia M. Dehon.

Parts of block 98 sold. Certificates 439 and 440. Sales cancelled. Taxes paid.

Block 99. Lot north-west corner of Fourteenth and Church, west 143 feet, north 70¼ degs. west 370.6 feet, south 72¼ degs. west 345 feet, north 218.6 feet, east 560 feet, south 560 feet.

Sold certificate 441, March 17, 1875, all to J. H. Applegate. Balance paid.

E. H. WASHBURN, TAX COLLECTOR, TO MICHAEL LYNCH.

TAX DEED.

Dated September 23, 1862. Cons. $38.66.

For non-payment of taxes for the fiscal year 1861–62.

Tax collector sold Jan, 4, 1862, to second party, the piece of land—

Commencing on the north-easterly corner of Church and Center streets, thence running easterly on Center street 30 feet, with a uniform depth at right angles northerly parallel with Church street of 365.10 feet.

Now, etc., grant, bargain, sell, convey and confirm to second party, his heirs and assigns forever, the said property, etc.

Witness: Wm. R. Wheaton.

Ackn'd Sept. 4, 1862, before Henry Haight, N. P.

Recorded Sept. 25, 1862. Liber 11 of Tax Deeds, page 56.

E. H. WASHBURN, TAX COLLECTOR, TO EUGENE L. SULLIVAN.

TAX DEED.

Dated Dec. 21, 1863. Cons. $20.58.

For the non-payment of taxes for the fiscal year 1861-62.

Tax collector sold Jan. 2, 1862, to John B. Lewis the piece of land—

Commencing on the south-easterly corner of Church and Ridley streets, thence easterly on Ridley street 20 feet, thence at right angles southerly to land of Pelissier, thence north 57 degs. west to Church street, thence northerly along the easterly line of Church street 63 feet to place of beginning. And said Lewis has assigned his certificate to second party.

Now, etc., grant, bargain, sell, convey and confirm to second party, his heirs and assigns forever, the piece of land above described.

Witness: John Hanna.

Ackn'd December 21, 1863, before Henry Haight, N. P.

Recorded Dec. 22, 1863.

Liber 11 of Tax Deeds, page 122.

E. H. WASHBURN, TAX COLLECTOR, TO WILLIAM DEHON.

TAX DEED.

Dated April 29, 1864. Cons. $74.56.

For non-payment of taxes for the fiscal year 1862–63.

Tax collector sold, Dec. 30, 1862, to second party, the piece of land—

Commencing on the north-easterly corner of Church and Sixteenth streets, thence running easterly on Sixteenth street 290 feet by 365.10 feet in depth, and no redemption has been made.

Now, etc., grant, bargain, sell, convey and confirm to second party, his heirs and assigns forever, the above described property, etc.

Witness: John Hanna.

Ackn'd April 30, 1864, before Henry Haight, N. P.

Recorded April 30, 1864. Liber 12, Tax Deeds, page 124.

FERDINAND VASSAULT TO HENRY A. COBB.

DEED.

Dated Jan. 2, 1866. Cons. $1.

(50-cent stamp, canc'd.)

Remises, releases, and quit-claims to second party, his heirs and assigns forever, all right, title, and interest in and to the piece of land in the city and county of San Francisco, known as Mission block 82, bounded by Fourteenth, Fifteenth, Dolores and Church streets.

This deed being given to convey any interest acquired by reason of purchase at tax sales of parts of said land for the years 1863–64, and 1864–65.

Ackn'd Jan. 2, 1866, before J. W. McKenzie, N. P.

Recorded Feb. 8, 1868. Liber 419 Deeds, page 6.

CHARLES R. STORY, TAX COLLECTOR, TO JOHN CARROLL.

TAX DEED.

Dated June 25, 1868. Cons. $5.51.

For non-payment of taxes for the fiscal year 1861–62.

Tax collector sold on Jan. 4, 1862, to John G. Klumpke, the lot of land—

Beginning on the north-east corner of Sanchez and Market streets, thence running northerly on Market street 407 feet more or less, thence south 33¼ degs. east 355 feet, thence south 5¼ degs. west 24 feet to the line of Market street, thence south-westerly 86.6 feet to the point of beginning. And said Klumpke assigned his certificate to second party.

Now, etc., grant, bargain, sell, convey and confirm to second party, his heirs and assigns forever, the lot above described.

Witness: John Hanna.

Ackn'd June 25, 1868, before Henry S. Tibbey, N. P.

Recorded July 21, 1868. Liber 15 Tax Deeds, page 81.

CHARLES R. STORY, TAX COLLECTOR, TO JONATHAN PEEL.

TAX DEED.

Dated July 1, 1868. Cons. $6.44.

(Stamp, 50 cents, canc'd.)

For non-payment of taxes for the fiscal year 1867-68.

Tax collector sold, Dec. 23, 1867, to second party, the piece of land

Beginning on the south-east corner of Sanchez and Market streets, thence running 149½ feet southerly on Sanchez street, thence north 84 degs. east 17.9 feet, thence north 5¼ degs. east 197 feet to Market street, thence south-westerly 64.8½ feet to the point of beginning. And no redemption being made.

Now, etc., grant, bargain, sell, convey and confirm to second party, his heirs and assigns forever, the piece of land above described.

Witness: John Hanna.

Ackn'd July 1, 1868, before Henry S. Tibbey, N. P.

Recorded July 2, 1868. Liber 15 Tax Deeds, page 75.

ISAAC N. THORNE TO JOHN MORRISON.

DEED.

Dated April 3, 1869. Cons. $1.
(Stamp 50 c. Canceled).

Remises, releases and quit-claims to second party all right, title and interest in and to certain portions of Mission blocks Nos. 83, 95, and 96, which portions were assessed to the estate of T. Dehon, for taxes for the fiscal year ending June 30, 1866, and were sold on January 11, 1866, by Charles R. Story, tax collector, to said Thorne, as shown in the book of descriptions of property, sold for delinquent taxes for said year, on file in said office, and which certificates were numbered 499, 507, and 510, and for which said Charles R. Story afterwards, on Jan. 22, 1867, made, executed, and delivered to said Thorne, tax deeds in due form for said premises, reference to which certificates and tax deeds is hereby made, for a more definite description.

Witness: E. V. Sutter.

Ackn'd July 12, 1869, before E. V. Sutter, N. P.

Recorded July 14, 1869. Liber 513 of Deeds, page 323.

JOHN MORRISON TO THOMAS M. J. DEHON.

DEED.

Dated May 18, 1869. Cons. $500.
(50-cent stamp, canc'd.)

Remises, releases, and quit-claims to second party, his heirs and assigns, forever, all right, title, and interest in the following described lots of land:

Commencing on the north-east corner of Sixteenth and Church streets, thence running east 290 feet on Sixteenth street, thence at right angles north 90.10 feet, thence at right angles 5 feet west, thence at right angles north 36.7 feet, thence at right angles east 5 feet, thence at right angles north 80 feet, thence at right angles west 5 feet, thence at right angles north 39.8 5-7 feet, thence at right angles east 5 feet, thence at right angles north 119 2-7 feet, thence at right angles west 290 feet, thence at right angles south 365.10 feet to the place of beginning.

Also, commencing on the north-west corner of Church and 16th streets, thence 338 feet north on Church street, thence south-west 566.9 feet more or less to Sanchez street, thence south 307 feet more or less to Sixteenth street, thence at right angles east 560 feet to the point of beginning.

Also, all right, title and claim in and to blocks 83, 95 and 96 at said Mission, etc. (And other property.)

Witness: Charles Nettleton.

Ackn'd May 18, 1869, before Charles Nettleton, Commissioner for California in New York.

Recorded June 22, 1871. Liber 621 of Deeds, page 46.

No further search made of this title.

ALEXANDER AUSTIN, TAX COLLECTOR, TO EVANS S. PILLSBURY.

TAX DEED.

Dated April 14, 1875.

(Consideration $734.14.)

For non-payment of taxes for the fiscal year 1873–74, Tax Collector sold the lot of land hereinafter described to Josiah H. Applegate, on March 6, 1874:

And said J. H. Applegate duly assigned his certificate of sale, and his rights thereunder, to second party, and no redemption having been made, etc., conveys to second party the lot of land: Commencing on the north-westerly corner of 14th and Church streets, thence running westerly on the northerly line of Fourteenth street 143 feet, thence north 17¼ degs. west 370.6 feet, thence south 72¼ degs. west 345 feet to Sanchez street, thence northerly 278.6 feet to Ridley street, thence easterly 560 feet to Church street, and thence southerly 560 feet to the point of beginning.

Witness: H. S. Tibbey.

Acknowledged April 17, 1875, before Henry S. Tibbey, N. P.

Recorded Dec. 21, 1875. Liber 17, Tax Deeds, p. 95.

EVANS S. PILLSBURY TO THE MARKET AND FOURTEENTH STREETS HOMESTEAD ASSOCIATION.

DEED.

Dated January 20, 1876.

(Consideration $5.)

Doth, remise, release, and forever quit-claim unto second party, and to its successors and assigns, all that lot of land in the city and county of San Francisco, etc.

Commencing on the north-westerly corner of 14th and Church streets, and running thence northerly along the west line of Church street 275 feet, thence at right angles westerly 125 feet, thence at right angles southerly 25 feet, thence at right angles westerly 310 feet, thence at right angles southerly 25 feet, thence at right angles westerly 125 feet to the easterly line of Sanchez street, thence southerly along the easterly line of Sanchez street 225 feet to the northerly line of 14th street 560 feet to point of commencement. Being portion of Mission Block No. 99.

The interest hereby conveyed being the same as acquired by the first party by virtue of deed from Alexander Austin, Tax Collector on sale of property in fiscal year 1873–74. Deed dated April 14, 1875, and recorded Dec. 21, 1875.

Witness: James L. King.

Ackn'd Jan. 20, 1876, before James L. King, N. P.

Recorded Jan. 20, 1876. Liber 820, Deeds p. 55.

JOSIAH H. APPLEGATE TO THE MARKET AND FOURTEENTH STREETS HOMESTEAD ASSOCIATION.

DEED.

Dated January 13, 1876.

(Consideration $505.46.)

Does remise, release, and forever quit-claim unto second party, and to his successors and assigns, all that certain tract of land in the city and county of San Francisco, State of California, described as follows, to wit:

Commencing on the north-westerly corner of Church and Fourteenth streets, and running thence northerly and along the westerly line of Church street 275 feet, thence at right angles westerly 125 feet, thence at right angles southerly 25 feet, thence at right angles westerly 310 feet, thence at right angles southerly 25 feet, thence at right angles westerly 125 feet to the easterly line of Sanchez street, thence at right angles southerly and along the easterly line of Sanchez street 225 feet to the northerly line of Fourteenth street, and thence easterly and along the northerly line of Fourteenth street 560 feet to the point of commencement; the same being a portion of Mission Block 99.

The interest hereby conveyed being the same as acquired by first party by virtue of two sales thereof made by the Tax Collector of San Francisco for the State, city, and county taxes for the fiscal year 1873–74, and 1874–75, and none other.

Witness : Samuel S. Murfey.

Ackn'd Jan. 13, 1876, before Samuel S. Murfey, N. P.

Recorded Jan. 13, 1876. Liber 817 Deeds, p. 49.

THE PEOPLE OF THE STATE OF CALIFORNIA vs. JAS. G. DENNISTON, LEVI PARSONS, I. E. DAVIS, AND GEO. F. SHARP.

Third District Court. Reg. B., Case 1111.

Suit brought to recover $217.75, delinquent State taxes for the 24th fiscal year, due against the lot of land:

On "northwest corner of Fourteenth and Church streets, thence running west 143 feet on Fourteenth street, thence north 17¼ degs. west 370.6 feet, thence south 72¼ degs. west 345 feet to east line of Sanchez street, thence north 278.6 feet along said line to south line of Ridley street, thence east along said line 560 feet to west line of Church street, thence south along said line 560 feet to point of beginning; together with the improvements thereon.

And for judgment, directing that said real property be sold, and the proceeds applied to the payment of costs herein, the expenses of sale and the amount due plaintiffs, etc.

Sept. 26, 1874. Complaint for delinquent State taxes filed. Summons issued.

Nov. 18. Demurrer filed, (of I. E. Davis and Geo. F. Sharp.)

TAXES.

1875–76. Paid.

No personal taxes against Market and Fourteenth Streets Homestead Association.

No street assessments.

No judgment liens.

STREET CONTRACT No. 5,872.

P. McATEE TO S. H. KENT, SUPERINTENDENT OF PUBLIC STREETS, ETC.

Dated, Oct. 27, 1874.

To grade Fifteenth street from Valencia to Sanchez street.

The work to be commenced within seven days and completed within ninety days from date of contract.

Witness: R. A. Robinson.

Recorded Nov. 10, 1874. Liber 3 Contract Records, page 169.

Time extended 90 days, Jan. 15, 1875.

Time extended 150 days, March 12, 1875.

No street assessments. No judgment liens.

The property searched is covered by the following claims, none of which I have thought it necessary to investigate: the Charles Crisman title, the Peter Smith title, the Bolton and Barron title, the Dehon and Moses title.

Done at the City of San Francisco, State of California, this twentieth day of January, one thousand, eight hundred and seventy-six. F. A. Rouleau.

We have examined the foregoing Abstract, and we find that a good and sufficient title, free from incumbrances, to the land shown on the accompanying map, is vested in the Market and Fourteenth Streets Homestead Association.

Sidney V. Smith & Son,

Attorneys at Law.

RECLAMATION

—OF—

ARID LANDS

—BY—

IRRIGATION.

REPORT OF COMMITTEE ON ARID LANDS

OF THE

California State Board of Trade.

COMMITTEE:

M. M. ESTEE,
W. H. MILLS,
FRANK H. CUNNINGHAM,
E. W. JONES,
L. M. HOLT,
WM. THOMPSON,
C. C. WRIGHT,
JESSE D. CARR,
N. P. CHIPMAN.

SAN FRANCISCO:
H. S. Crocker & Co., Stationers and Printers,
215, 217, 219 Bush Street.
1889.

RECLAMATION OF ARID LANDS BY IRRIGATION.

The questions presented are:

What is the physical condition of California so far as it relates to irrigation?

What amount of irrigable land is there in the State?

What amount of water can be obtained for the purpose of irrigation?

What are the advantages of irrigation?

In this connection, does irrigation pay?

What is the condition of irrigation as at present practiced in California, and what interest has the national Government in the subject of irrigation on the Pacific Coast and in relation to all that extent of country known as the "Arid Region" which lies west of the Missouri river?

I.

The Physical Condition of California and its Adaptability to Irrigation.

California lies between the 32d and 42d degrees of north latitude; it has a coast line of over 900 miles, and in width is from 150 to 200 miles, and has an area of 157,801 square miles. Two ranges of mountains extend north and south through the whole length of the State.

The Coast Range, which lies just back of the ocean, parallels its shore line from one end of the State to the other. In many places it is but a range of low hills covered with timber and open pasture lands, while in other places great valleys cut wide swaths through the hills to the sea, like the Salinas valley, Santa Inez and Santa Ana valleys. But generally this range of low mountains or high hills forms a continuous western wall from the northern boundary of the State to the Mexican line. In some places this range of mountains rises in height to from 4,000 to 6,000 feet, and is cut up in every direction with small but fertile valleys, fed by canyons which carry living streams of water, flowing both inland and to the sea.

The other and principal range of mountains is the Sierra Nevadas. This mountain range also extends the full length of the State, north and south, and for the greater part forms its eastern boundary. Its sides are covered with timber and its summits with perpetual snows. Its average height is about 8,500 feet, while its loftiest peaks are Mount Shasta, in the extreme northern end of the State, which rises 14,440 feet above the level of the sea; Lassen Peak, which is 10,557 feet in height; Mount Whitney, which is 15,000 feet in height; and Mount San Bernardino, which stands a solitary sentinel at the extreme southern end of the State, and which is 11,000 feet above the sea-level. Both of these mountain ranges are "storm-gatherers." Along the Coast Range the rain is excessive in winter; and, as a rule, heavy fogs prevail during the summer months.

In the Sierra Nevada range, the rains are also very heavy in winter; in some places, for instance, at the base of Mount Shasta, there has fallen as much as eighty inches of water in a single season. The depth of snow in winter on this range of mountains averages from eight to twenty feet.

Between these two mountain ranges is the great valley of California. In the central and northern part of the State this valley is divided into the valley of the Sacramento and the valley of the San Joaquin. These valleys are in width from 30 to 75 miles, and their combined length is 450 miles. South of these valleys lies another one of surpassing beauty, which extends through the whole length of Los Angeles and San Bernardino counties, and in which irrigation has recently been largely and most successfully introduced.

II.

The Peculiar Topographical Advantages of California for Irrigation

will be noted when we observe that nearly every stream heading in the Sierra Nevada mountains comes from the snow belt, and is supplied by the melting snows which continue until July or August of each year.

The two great valleys before referred to are almost on a sea-level. Sacramento, which is 89 miles from San Francisco, has an altitude of but 30 feet. Bakersfield, in Kern county, which is distant from San Francisco 314 miles, is 282 feet above sea-level. Redding, in the north, and which is nearly at the head of the valley of the Sacramento, is 299 miles from San Francisco and has an altitude of 556 feet. Add to this the fact that in these great plains there is very little rolling land, that there is an uniform trend of the surface of the ground from the foothills of the Sierra Nevadas west to the Sacramento and San Joaquin rivers, and we must note the peculiar advantage of this country for irrigation. Perhaps there is no country in the world where so much land can be regularly and profitably irrigated without making any serious changes to the surface of the land as in California. These conditions of things are found to exist in all the great valleys of the State. The two valleys of the Sacramento and the San Joaquin, according to General Alexander, alone cover an area of about 12,000,000 acres of *irrigable land.* The drainage of this vast country is effected through the Sacramento and San Joaquin rivers.

III.

The Peculiar Productions of California

is another reason why irrigation will soon be a great feature in our agriculture. California is situated quite differently from any other Pacific Coast State or Territory. Indeed, many of the productions of its soil are peculiar to it. For instance, there are planted in California, according to authentic data, 50,000 acres in orange and lemon trees; all these must be irrigated. Last year there were shipped East for sale 1,850 carloads of oranges and lemons, and about 600 carloads were consumed at home. There are over 20,000 acres of olive trees planted in California. Most of these are not bearing; some of them are; but enough are in bearing to show that this remarkable fruit grows here with wonderful luxuriance and bears abundantly. The olive thrives nowhere else in the United States. Last year there were produced in this State 3,400 cases of olive oil, and of the very best quality. There are 140,000 acres of land now planted in grape vines in the State of California; and for the year 1888 there were produced 18,000,000 gallons of wine, 20,500,000 pounds of raisins, and 1,000,000 pounds of dried grapes. These vines are the European varieties, which will not grow where the ground freezes; and they are not successfully cultivated in any other part of the United States. Both our wines and raisins are successfully competing with European productions. There are about 1,000,000 prune trees growing in California, outside of the acreage planted during the winter of 1888–1889. This most-needed fruit is not produced in the United States except on the Pacific Coast.

In 1888 California produced 7,000,000 pounds of prunes; and it will be observed that there were imported into the United States for the same year, for consumption in America, over 70,000,000 pounds. In a very short time, California will be able to supply the American market. There are 300,000 fig trees planted in California; and the figs produced here are of the very best quality. The trees grow luxuriantly and thrive well. It must be admitted that it is of infinite importance to our country to encourage the production at home of all these articles which otherwise we would be compelled to import.

In this connection, it may be added that California is a great nut-producing country; the almond grows well and produces well. There are now over 25,000 acres of land planted in almond trees, and this acreage is yearly increasing. In 1888 California produced 180,000 pounds of almonds. The so-called English walnut is also a most valuable California nut, and grows well in nearly all sections of the State where the soil is deep or irrigation possible. No mention is made of the peach, the cherry, the pear, the apricot, the nectarine, the plum or the apple. All these fruits are grown in California in such abundance that the mention of them seems unnecessary. Add to these fruits the whole berry family, conspicuous among them the strawberry, the blackberry and the raspberry, and we may well observe the unlimited capabilities of this State for fruit culture.

IV.

The Facilities Within the State of California for an Ample Water Supply for Irrigation.

This is the most vital question we have to consider, because, however much irrigation may be needed in this State, if there is not an ample supply of water, it would be more than useless to attempt to carry on any extensive system of irrigation. Owing to the peculiar topographical situation of California, and the fact that for over 900 miles it borders the Pacific Ocean, the great ranges of mountains before referred to and their high altitude, there are a large number of living streams of water flowing from both these ranges of mountains into the valleys below, and which make the water supply most abundant. Two of these streams are navigable rivers, namely, the Sacramento and the San Joaquin,—the Sacramento for fully two hundred miles and the San Joaquin for about one hundred miles. On the extreme southern boundary of the State is the Colorado.

V.

The Names and Character of the Streams that May be Utilized for Irrigation.

The principal rivers which flow into the Sacramento from the east, and whose tributaries reach the highest altitudes in the Sierra Nevada mountains, are the Feather, Yuba, Bear, American and Cosumnes rivers. There are a large number of smaller streams which head in the snow belt of the Sierra Nevada mountains, and which flow down through the foothills across the Sacramento valley and empty into that river. On the west side of the Sacramento valley there are no large rivers which are tributaries to the Sacramento; but there are a large number of creeks which have a very extensive watershed and which bear a great amount of water down their courses during the winter. Some of them are perennial streams. Among the larger of these streams flowing from the Coast Range east to the Sacramento are Putah, Cache, Stoney and Cottonwood creeks.

The San Joaquin valley is watered by a number of rivers, all of which have their sources in the great snow belt of the Sierra Nevadas. Chief among these rivers are the Mokelumne, Calaveras, Stanislaus, Merced, Tuolumne, San Joaquin, Kaweah, Kings and Kern rivers; all of these flow down into and through the San Joaquin valley. The combined watershed of these rivers is 38,500 square miles.

The Mojave river lies south of the San Joaquin valley, and contains a large amount of water which can be successfully used for irrigation on what is known as the Mojave desert. The Mojave desert is a desert only in this sense: there is not rainfall sufficient to make grass and crops mature; but the soil is rich, the climate genial, and with water almost anything will grow with luxuriance. The capabilities of this river are more fully referred to hereafter. South of this and forming the extreme southern boundary of the State is the Colorado river, which, with the exception of the Columbia, is the largest river on the Pacific Coast. It bounds the State of California on the south, and it borders what is known as the Yuma desert. Wherever water has been applied on this desert, the soil has proven productive, instance Indio and other points. Much of this desert is below the level of the river, and some of it below sea-level; it is nearly all susceptible of irrigation, and by bringing water upon it would make this one of the most fertile places in the world. It is estimated that this river will successfully irrigate 1,000,000 acres of land; the most of which that can be thus irrigated is public land and is now of no value.

VI.

The Rainfall in Different Parts of California.

In considering the amount of water that can be appropriated in California for the purposes of irrigation, we must take into view the average amount of rainfall in the different parts of California, and what portions of the State most need irrigation.

The average annual rainfall at San Francisco is $23\frac{5}{10}$ inches. In the foothills of much of Northern and

Central California the average rainfall exceeds 30 inches; while in the great valleys of California it is much less, varying in different localities, but generally increasing as you go north from the lower part of the San Joaquin valley, where it is about seven inches, until you reach Shasta at the upper end of the Sacramento valley, where the annual rainfall is thirty-five inches. At San Diego it is $9\frac{2}{10}$ inches. In California fair crops can be raised from a rainfall of from ten to twelve inches, if it comes at the right time, but it rarely comes that way. The trouble is that the annual rainfall is not uniform, that is, uniform one year with the other. Some years there will be an abundant rainfall, and another year there will be altogether too light a fall of rain to make good crops.

To illustrate: at Fort Redding one year the rainfall was $37\frac{4}{10}$ inches, while the next year it was $15\frac{9}{10}$ inches. At Sacramento the rainfall one year was $27\frac{9}{10}$ inches, while the next year it was but twelve inches. At Fort Tejon one year it was $34\frac{2}{10}$ inches, while the next year it was $9\frac{8}{10}$ inches. Clear Lake had one year a rainfall of $66\frac{7}{10}$ inches, and the next year it had only $16\frac{2}{10}$ inches. Visalia one year had $10\frac{3}{10}$ inches of rain, while the next year it had but $6\ \frac{7}{0}$ inches. These are extreme cases and only referred to as an illustration; but it shows that everywhere on the Pacific Coast there are years of drouth and years of floods. It is true that in the northern and central parts of the State there is rarely a failure of crops; by summer fallowing and careful farming, good crops are generally produced. In the coast counties north of Monterey there has never been a failure, though some years have been much better than others. South of Monterey, for the years 1868, 1869, 1870 and 1871, there was a noticeable drouth; stock-raisers were compelled to drive their stock to the mountains or drive it north. In the San Joaquin valley very little hay and less grain was grown. Even the irrigation now practiced in that great valley would have been of infinite importance. From Tulare to San Diego in 1871 the country was almost barren of verdure; except in favored localities, there was no grass for stock; thousands of sheep, horses and cattle were lost. It is so long since this occurred that we have almost forgotten it, but still it is an historical fact, and what has been once may be again. It is the part of wisdom to recognize the danger and provide against its recurrence. This could have been avoided if proper systems of irrigation had been introduced. Even now, should a drouth occur, the irrigation that is practiced in the central and southern part of the State would largely protect the people against disaster.

VII.

The Area of Lands that can be Successfully Irrigated in California.

According to the survey made by Gen. Alexander, and a report he afterwards submitted to Congress, the area of land in California which may be readily irrigated is about 7,650,000 acres. This does not include the so-called swamp and overflow lands. But should we include these and also include the low foothills in this estimate, there would be about 12,000,000 acres of irrigable land in the State of California. Nearly all the foothill country of the Sierra Nevada mountains is not only irrigable, but is wonderfully productive when irrigated. This is now demonstrated in the counties of Placer and Butte, where irrigation is very extensively carried on for the purpose of fruit-raising. Practically only a small portion of this State, as compared to its whole area, can be irrigated. We should now add 1,000,000 of acres to the above estimate, which would include Mojave and Yuma deserts, Sierra and Honey Lake valleys, making quite 13,000,000 acres of irrigable land in California.

The area of catchment or watershed outside of the lands to be irrigated, and which forms a watershed of the irrigable lands, is estimated at about 3½ square miles to each square mile of land to be irrigated; and when we bear in mind the fact that this watershed is most of it in high altitudes, where storms are excessive and snow falls to a great depth and remains for a large part of the year, it will be readily observed that if catchment reservoirs are made in the most favorable localities, and if the running streams are utilized, there is more than ample water in the State of California to irrigate every foot of land which is susceptible of irrigation.

VIII.

Is Irrigation Advantageous?

The advantage of irrigation is two-fold: first, the water is applied at a time when it will do the most good, and when the ground is in such a condition that the grain or the fruit trees will get the full benefit of all the water that is run upon the land; and second, where irrigation is practiced there are no drouths. In countries where there is ordinarily an ample rainfall, the crops often fail by reason of drouths. This arises from the fact that the rain falls in vast quantities, but at unpropitious times, when it does little or no good to the crops.

In California, from about the middle of May until the last of October, we have no rains. During this period grain is harvested.

The use of water is often more valuable for fruit growing than for small grains. We doubt whether the wheat fields of California will ever be irrigated, because fruit is more valuable and the irrigation of orchards is more readily accomplished than the irrigation of the small grains; and because, as a rule, in the great wheat producing portions of California, irrigation for the purpose of producing one crop of cereals is not necessary. But California is especially a fruit-growing country. Its adaptability to almost all kinds of fruit is peculiar. Perhaps no country in the world is its equal; and in some of the great interior valleys of the State, and also in the foothill counties, successful fruit-growing can be made certain only by irrigation. With the orange and lemon, irrigation is a necessity. Where orchards require irrigation, it has been proved that to sustain the trees in their growth and fructification, water need not be put upon the land more than from three to five times during the summer and fall months. The practice is to run water in small ditches between the rows of trees, through the orchard about once a month, commencing in June and ending in September. Then immediately after irrigating the ground, by allowing the water to flow through these small ditches, the practice is to put in the cultivator, stir up the ground anew so that the evaporation will not be rapid, and the ground will not settle down and become hard. The land thus remains friable, and the trees grow with great rapidity.

The orchards and vineyards in the coast counties and in Central and Northern California have hitherto never been irrigated. Where the size of the grape is an especial and important factor, like in the making of raisins, the irrigation of the vines is advantageous, and especially where the vineyard is planted in very hot and dry situations, like at Fresno and Merced. Up to this time, no grapevines nor orchards have been irrigated in any of the counties of Santa Clara, Alameda, Contra Costa, Solano, Sonoma, Marin or Napa, and the fruit-trees and the vines grow there with great luxuriance and produce abundantly; and yet, in each of these counties, vegetables and the smaller fruits like strawberries are now irrigated during some of the summer months.

IX.

The Amount of Water necessary for Irrigation in California.

There will not be required the same amount of water for successful irrigation in California as is used in India. In India it requires about one cubic foot of water running every second to irrigate two hundred acres of land to produce cereals. In Granada, Spain, where cereals are produced, one cubic foot of water running per second irrigates about two hundred and fifty acres.

One inch of water, running continually, irrigates in Southern California about ten acres. Even less than this amount would be required in portions of Central and Northern California.

X.

The Results of Irrigation in California.

Los Angeles and San Bernardino counties are conspicuous illustrations of what irrigation can accomplish. Nothing can picture the change which has there been made by means of irrigation. A great plain which once looked like a desert is now covered with beautiful homes surrounded with orange orchards and vineyards, dotted with towns and cities which have grown up everywhere as if by magic. The population has more than quadrupled in a single decade; lands which sold ten years ago at from five to twenty-five dollars per acre now sell at from one hundred to one thousand dollars per acre; and these prices seem to be fixed from what the lands actually produce. Nor is this condition of things peculiar only to Southern California. In Placer county, water has for some years been used for the irrigation of orchards and vineyards there planted. It is impossible to describe the change thus created. Orchards of every variety of fruits,—from the orange and lemon to the apple,—and vineyards of every rare variety of grape, and nuts of all known varieties grown in semi-tropical climates, and the fig and the olive,—all seem to flourish in the foothills of Placer county. Nor does the result in Placer county seem to be peculiar to that locality; for everywhere in the foothills of the Sierra Nevadas, where irrigation has been introduced, the result has been equally surprising.

The foothill country about Oroville, in the county of Butte, where water has been introduced, is no less conspicuous for its luxuriant tree-growth. Within the last four years 1,500 acres of orange orchards have been planted, and these trees seem to be thriving well. The oranges are rich in color, luscious in taste and attractive as to size. This is mentioned only to show the effect of irrigation upon both the foothill and valley lands of the State of California.

More marvelous still is that section of country lying about half-way between the extreme northern and southern part of the State. We refer to Fresno. The writer of this has seen Fresno a veritable desert; it is now a garden of surpassing luxuriance and great beauty. Within the past few years a town has been built there, which has a population of over 10,000; the surrounding country is cultivated in everything the farm can produce. Indeed, Fresno county is to-day the great raisin-growing center of the State, and nearly every variety of fruit grows abundantly. There a beautiful orchard stands side by side with an alfalfa or grain field. Homes are literally hid away by the remarkable ornamental tree-growth which irrigation has caused. Ten years ago the lands of Fresno sold at from $3 to $20 per acre; now the same land with water on it sells at from $75 to $750 per acre. This is all due to irrigation. Kern county is another conspicuous landmark on the road to successful irrigation; more than 80,000 acres of land is being irrigated in that county. The production is generally alfalfa.

Everywhere in California during the summer months garden vegetables are raised by irrigation. In the fall, winter and spring months in most parts of the State they require no irrigation, except such as they get from the natural rainfall. So with strawberries; this fruit is universally irrigated. In Santa Clara county alone it is claimed there are 1,500 acres of land cultivated in berries, all of which are irrigated; and that there are over 500 acres cultivated in garden vegetables, which are also irrigated. Even in northern counties like Napa, where the annual rainfall is almost three times as great as in some parts of Southern California, strawberries, other small berries and garden vegetables during the summer months are universally irrigated.

Without wishing to select any portion of the State to give it especial prominence in this report, yet it would seem both wise and necessary that the most conspicuous object lessons found in California, in the way of irrigation, should be particularly and exhaustively referred to. We do this for the purpose of illustrating what irrigation has done in the past, what it is doing now, and what its possibilities for the future are. Your committee has therefore selected, as special examples for this purpose, some portions of Southern California and the San Joaquin valley, where irrigation has been carried on for a great many years, and where it is now largely and most successfully adopted. And as this report is intended, in so far as we are able to do so, to place facts before the people both of our own State and the people of other sections of the country, as well as the committee of Congress which is soon to visit us, we have ventured to select the most marked and illustrious examples within the range of our knowledge to give more forcible expression to what is known upon this most interesting subject. Los Angeles and San Bernardino counties are most conspicuous illustrations of what is being done in irrigation; and we therefore venture to present the following carefully prepared yet conservative reports from those two counties, and also an equally interesting and conservative report from a part of the San Joaquin valley.

XI.

Necessity for Irrigation in Portions of Northern California.

The Sacramento valley contains no lands strictly arid; but most of that great valley would be benefited by irrigation, and as to which the Government might well lend its assistance, at least to the extent of determining the water storage supply or other means of irrigation.

Large areas of plain or bench lands, lying above the bottom lands of the river, are to be found in Shasta, Tehama, Butte, Colusa and other counties. They are all within reach of the water flowing down the Sacramento river and its lateral tributaries. Most of the streams emptying into the Sacramento from the Coast Range sink and disappear during the summer not far below where they debouch from the mountains into the open country; but at their sources there are large quantities of water and extended areas of watersheds. It is believed that excellent facilities for water storage can be found on all these streams.

The creeks flowing from the Sierras, on the contrary, are generally constant and unfailing, though diminishing in quantity through the summer.

In Lassen and Modoc counties, especially in Lassen, will be found an extended field of usefulness for Government work. There are few places to be found in all the regions to be examined by the Senate Committee, covering an area of excellent lands, worthless without irrigation and invaluable with it, where all conditions are so favorable for immediate results as in Lassen county. Nature has built a reservoir in Lassen county called Eagle Lake, covering and area of 35,000 acres and of great depth, in many places over 1,500 feet. A tunnel 7,000 feet long would tap the lake twelve feet below the surface; and, by an additional open tunnel of like length, the lake could be tapped twenty feet below the surface. It has a watershed of over 400,000 acres in the regions of our heaviest rains and snowfall. Its elevation is 5,115 feet.

Willow creek was probably once its outlet, and through subterranean passages now receives its first escaping waters. This creek runs through Willow Creek valley to-day and into Honey Lake valley.

The Susan river rises west of Eagle Lake and has a watershed separate from that of Eagle Lake and about as large. It flows into Honey Lake valley; very fine storage sites are to be found near the source of this stream, consisting of lakes and extended flats.

The irrigable lands of Lassen county, lying about 1,000 feet below these sources of water, are are not far from 500,000 acres; and east of these lands, in the State of Nevada, is an area of like extent, which would form a part of this scheme of irrigation. The lands are rich, sandy loam, productive with water, but comparatively useless without. The climate of Honey Lake valley is most delightful, being free from excessive heat and not subject to very low temperatures. Hardy fruits excel here, and with irrigation alfalfa grows luxuriantly, producing three crops in a season. To many Eastern people, the climate would be preferred to the lower valleys. Here there is a region of nearly or quite 1,000,000 acres of public lands that cannot now be settled upon, but are nevertheless capable of sustaining a large population.

A rough calculation shows that in Eagle Lake there is already stored enough water to irrigate 500,000 acres of land; and at the head of Susan river comparatively cheap reservoir sites are available to store water sufficient for a half million acres more.

North of this region lies Madelin plains, a large area of good lands if irrigated.

In Modoc county, like areas are lying idle and useless, yet are capable of high cultivation and of sustaining a large population.

These lands are all within reach of water, but the work of survey is expensive; and, there being no way by which capital can acquire the land, there is no probability of any relief ever coming to these regions except by Governmental interposition.

If it is true that there are one million acres of land which may be irrigated at an expense of one million dollars, and that these lands lie upon the great interior desert plain of our continent, by what possible scheme could the Government hope that enough people would go there in advance and expend the money which they must do before the land is available? The Government must either do the work, or it must give to capital something more than the vague expectation that people will buy the water.

As a first step, the surveys of irrigable land and sites of reservoirs will prove beneficial. The duties of the Senate Committee must reach beyond the mere demonstration that land and water may be brought together. It must show how this may be done, and ought to be done, by the general Government.

XII.

Owens Valley in Inyo County.

Inyo county, California, is especially adapted to irrigation, particularly that part of it known as Owens valley. From Olancha to the head of Round valley is 100 miles; the whole of this distance, a strip of country from four to six miles in width, is susceptible of irrigation. There are from three to four hundred thousand acres of land of unsurpassed fertility, which are utterly worthless without the use of water. It is claimed by experienced engineers that the Owens river carries on an average, and during the summer months, water enough to place at least a surface depth of fifteen inches upon an area of three hundred thousand acres of land, and this without preparing catchment reservoirs. A large portion of this country is still a part of the public domain. Less than 12,000 acres of land are now cultivated in Owens valley.

XIII.

Irrigation in Los Angeles and Orange Counties.

In considering the subject of irrigation in Los Angeles and Orange counties, we find it a complicated one. The number of ditches run into the hundreds, and the number of systems and sub-systems, companies and associations, to several scores. The length of the ditches is hundreds of miles, irrigating many varieties of soil and crops. The area of actually irrigated land in the two counties is in the vicinity of 150,000 acres.

THE SOURCES OF THE IRRIGATING WATER SUPPLY OF THESE COUNTIES

are the rivers Los Angeles and San Gabriel in Los Angeles county, the lower part of the Santa Ana in Orange county (the upper part being in San Bernardino county), many creeks and small streams whose flow is of short duration, springs and springy lands (called cienegas), and many hundreds of artesian wells. The rivers, except the Los Angeles, rise in the high mountains and are practically perennial. It is true their waters disappear in their sands during most of the dry season soon after debouching from the mountains; but they reappear at intervals all the way to the sea, and can be taken out at almost any point along their channels by simply running ditches into them. The water supply in the rivers alone is sufficient to irrigate all the land of the counties to which water could be advantageously applied, if properly stored and distributed. The volume of the streams in winter is enormous,—utterly beyond computation; and but a small portion of it would need to be saved for use in the dry season. The average summer flow of the San Gabriel river is about 10,000 inches; that of the Los Angeles river is 3,750 inches, and that of the lower Santa Ana 4,000 inches. This estimate is of surface flow only. During the usual three months of the irrigating season, the water is all appropriated; it is not all utilized, however, as much is wasted both by seepage and evaporation in the open, porous-earth ditches in which it flows, and much is allowed to run to waste. The streams whose waters rarely show outside the mouths of their gorges, except under the influence of considerable rainfall, are capable of furnishing a great quantity of water for storage. In many instances they are the only source of supply for the higher mesa and foothill lands, and are well worth the expenses of storing; for some of these lands yield fruits in the greatest perfection, and they are unquestionably the most healthful and delightful dwelling places. A great deal of water is obtained from springs and springy lands. These lands are found all the way from the mountains to the sea; but the greater number of those used for irrigation are situated on the higher plains, or at the base of the main range. The most notable instances of these sources of supply are the springs and marshy lands of Pomona, on the eastern border of Los Angeles county, the springs of Santa Anita and San Gabriel, the marsh lands of the Rio Honda and Paso de Bartola, near the center, and those at the head of the Los Angeles river, on the San Bernardino plains near the west line. They furnish many hundred inches of water, and are among the most reliable and valuable of water-rights.

THE ARTESIAN WELLS OF THE TWO COUNTIES AFFORD A VERY LARGE AMOUNT OF WATER.

Pomona orchards are largely supplied by them. So are those of the Santa Anita and San Gabriel valleys; while the lower coast plain has hundreds of such wells irrigating fields of alfalfa, vegetables and most varieties of fruit. These wells have an average bore of six inches, depth of 150 feet and a flow of two inches. Not more than one-third of them, however, are flowing—that is, about 1,500.

There is promise of the development of great quantities of water by the construction of submerged dams in the gravel-filled channels of the streams. There are several such dams in the county; but I have been unable to get statistics with regard to but one. That was built in the Pacorima, a stream in the northeast corner of the San Fernando basin. The owner claims it to be the largest in the world ; it is 600 feet long, with an average depth of sixty feet. It consists of a wall six feet thick, of granite boulders and Portland cement, built up from bedrock and filled against, back and front, with sand and gravel. It developed a subterraneous stream forty feet wide and sixteen feet deep. Unfortunately, through some fault in construction, the dam was unable to retain the waters but a short time after its completion last year.

SUB-IRRIGATING SYSTEMS HAVE BEEN CONSTRUCTED.

They consist of cement pipe of the smaller dimensions laid at a depth of the deepest plowing. The pipe cannot endure much pressure and requires to be laid nearly level. The ends of the pipes are perforated to admit a flow of the water into the earth about the roots of the trees. By a patented process, a continuous pipe is laid at the required depth. Sub-irrigation requires much less water and no surface work except cultivation. It discourages the growth of weeds and prevents the hardening of the ground about the trees. As at present applied, however, it does not uniformly moisten the earth inclosing the roots, and is not regarded as a complete success.

THE FACILITIES FOR STORAGE.

There is a difference of opinion among engineers. Some think there are many basins and canyons in the mountains which are adapted to the purpose, and others think these, on most streams, are wanting. Most, however, agree that the bench lands furnish abundant opportunities for the construction of reservoirs. The storage of water in the canyons may be affected by throwing dams at favorable places across the mouths of such canyons or basins as have the least wash, and afford the largest capacity and possibility of leading the water into them from adjacent streams.

THE RESERVOIRS ON THE BENCH LANDS MAY BE CONSTRUCTED

by excavating, and at much less expense, than those in the canyons, and be of much safer character. They would not, however, be able to deliver their waters at so high an elevation, and would leave considerable land to be supplied from other sources. The filling of such reservoirs is effected by piping, fluming or ditching from the upper waters of the streams. There are a number of reservoirs of both kinds, finished and in process of construction, of capacity varying from a few thousand to a billion gallons. One on Mormon creek, in the rim of the San Fernando basin, is of more than the latter capacity.

Suffice it to say there is no lack of facilities for the storage of water with safety and profit. The first expense, however, is very great; and private enterprise is not ready to undertake it on a large scale except in the most favorable localities. The waters of the San Gabriel river brought out upon the higher hill lands of the Ayusa or Duarte would suffice to irrigate all the great valley below, the coast plain beyond, and the intervening range of hills to their very tops. The waters of Millard canyon and the Arroyo Seco stored in the vicinity of the Giddings ranch, or the lands of the John Brown's sons, or other available places, could be made to flow over the San Rafael hills and those in and adjoining east Los Angeles. So with the San Dimas and the streams of Santa Anita, Eaton, Tejunga, Pacorima, San Fernando, Mormon Creek, Verdugo and Santiago, whose flow in the aggregate is enough to supply all the lands between them and the ocean many times over. Also over the range in the hitherto regarded irredeemable desert of the Mojave, where most of the land still belongs to the Government, and the soil is as rich as lies under the sun, whole townships of the finest raisin grape, fig and deciduous fruit land may be irrigated by the waters of the Mojave, Big and Little Rock creeks, Oak creek and some others,—most of which show surface water only in the rainy season,—if those waters are husbanded, as there are abundant facilities for doing. And in the Newhall region, the Santa Clara, the San Francisquito and the Castaic may be made to greatly increase the productiveness of the valley and the wealth of the county.

THE NUMBER OF ACRES OF GOOD LAND WHICH REQUIRE IRRIGATION

are, south of the mountains, according to the State engineer's estimate, 460,900. North of the Sierra Madre range, Los Angeles county shares with Kern and San Bernardino in the great Mojave desert, so-called. This desolate region contains many thousand square miles. In these three counties, one-half of this is probably arid beyond redemption; one-half of the remainder is too rough and mountainous to be valuable for cultivation, but the remainder is mostly highly fertile soil, lying favorably for the application of water. Of this vast territory, Los Angeles county possesses 250,000 acres which can be made to comfortably sustain a population of 100,000 people.

It is stated that the lowest summer flow of the Mojave river is about 5,000 inches. The average flow for six months in the year, the winter and spring months, is from 20,000 to 30,000 inches, during May, June and July, more than 10,000, and for the rest of the season more than 5,000 inches. Of this the Hesperia Land and Water Company has filed a claim of 5,000 inches. The Hesperia Company irrigates about 300 acres of land, and is flooding 15,000 acres for the purpose of preparing it for cultivation with the use of less water than it would otherwise require. The remainder, properly cared for, will redeem half a million acres of now absolute desert and make it as rich and blooming as the plains of Babylon thirty centuries ago.

SITES FOR STORAGE RESERVOIRS ARE ABUNDANT.

The land is mostly Government land, and the profits thereon would pay for enormous and elaborate works. *Big* and *Little Rock* creeks, which debouch upon the desert plain at higher elevation, west of the Mojave river, are wholly within Los Angeles county. Their flow in winter is thousands of inches, and in summer is sufficient, as at present handled, to irrigate several hundred acres. Facilities for storage on these creeks are as abundant as on the Mojave. The land below is still owned, for the most part, by the Government. The universal testimony is that it is as fertile as the best. It is covered with grass and flowers during several months of the year, and is capable, under irrigation, of producing the most luxuriant and profitable crops. Artesian well-boring has proved successful in places on the desert, but the expense is of course greater than elsewhere. The region is one of the most healthful on the globe. Its hot, dry atmosphere is found congenial to many people. It is especially adapted to the production of certain crops, as the fig and raisin grape. It produces in some places as fine wheat as is raised anywhere, but to become habitable for any more than a few scattered families or small communities, it must have water to save its crops in summer. We have an engineer's report with regard to Little Rock creek. He finds ample winter flow to furnish irrigation water, if stored, for 270,000 acres, allowing one inch to five acres. He allows for thirty inches of evaporation, and finds sites and gives estimates for two reservoirs, the larger one having a capacity of 644,000,000 gallons and to cost $125,000. There is reported from the same locality 800 acres to which water is applied; 200,000 acres irrigable—one-half of which belongs to the Government; fourteen miles of ditches. Value of irrigable land, $50.00 per acre; non-irrigable land, $1.15 per acre; the number of artesian wells in the region, seven, with an average depth of 340 feet and average flow of twelve inches. The counties of Los Angeles and Orange have an area of 4,812 square miles or 3,079,680 acres. Their population is fully 150,000 souls. Without irrigation not one quarter of this number would be living there; and "this in spite of the fact that those two counties produce more than one-half of the corn of the State almost altogether without irrigation; that there are nearly 90,000 acres of good land that require no irrigation."

THE LAND NOW IRRIGATED IS ABOUT 150,000 ACRES,

and this is the basis of maintenance of 113,000 people. Theoretically, no increase of this population is wanted without a corresponding increase of irrigated lands. Factories and mineral developments, travel and transportation by sea and land, and the healthfulness and delightfulness of the climate, would add to the population; but the cost of living would be increased in proportion to growth, the homes of the poor would no longer be those of people who control their own destinies; and this would become a rich man's paradise,—a thing not to be desired.

FORMER AND PRESENT POPULATION.

Ten years ago the population of the counties was little over 30,000. Fifteen years ago the land on which Pasadena now stands was held at $7.00 per acre; in seven years it was valued and sold in large quantities at from $500 to $1,000 per acre. This was for orchards—not city lots—orchards made possible only by a supply of moisture for the roots of the trees during the long arid season of the year. So with the whole of the great foothill region along the base of the Sierra Madre range from Tejunga and Crescenda Cañada on the west through Altadena, Sierra Madre, Lamanda Park, Santa Anita, Monrovia, Duarte, Ayusa, Glendora, Alosta, San Dimas, Lordsburg, Cucamonga, Rialto, Redlands and over the San Gorgonio Pass into the desert at Indio, and again at Riverside and Arlington, and places too numerous to mention. The growth has been proportionate to the extent to which irrigation has been carried. The region mentioned was almost worthless even for grazing purposes, and was as incapable of sustaining a population as the Mojave desert itself. Now visit it and you will find it the most charming region and the most valuable land in all California, or in the United States for that matter.

IRRIGATING CONDUITS FOR THE WATER OBTAINED FROM THE MOUNTAINS.

In every direction, either above or below the surface like a spider's web, the ditches, flumes and pipes are leading the life-giving fluid. It is for the most part above the region of wells, so that the water for all purposes has to be brought in. Where no provision has been made for supplying a locality from running streams, a reservoir is made or other methods adopted. The mountains are bored and tunneled for seepage and spring water ; wet places in the canyons and gulches are under-drained; springs are cleaned out, and reservoirs of various sizes constructed to increase and store the flow. Pipes are laid for long distances into the canyons to bring the trickling streams from their hiding places to the light and usefulness. Ingenuity and experience as well as capital are required to find many of these waters. Much money has been expended to little purpose in such work; but a great many inches of flow have been obtained in this way,—much more than enough to compensate for the outlay in this direction.

In the ranges of hills between the mountains and ocean, water has been and is being developed in the same way; but the difference in the soil and the moisture borne on the ocean breeze renders less water necessary, and the same enterprise in obtaining it has not been displayed. The Whittier Colony is a notable exception to this rule as to enterprise, though not as to need of irrigation.

THERE PROBABLY ARE NOW FIFTEEN HUNDRED MILES OF IRRIGATING CONDUITS IN THOSE TWO COUNTIES.

The *character* of these conduits is continually changing. Flumes are being substituted for catch-ditches, and cement or iron pipes for both. There are now quite four hundred miles of underground conduits. Every system and character of irrigation is here exemplified,—from the ancient methods of the Indians and Mexicans to the most improved modern systems, including sub-irrigation, flooding the lands, channels and basins, slow streams and deep-wetting, quick, full and frequent flow, the use of one inch to ten acres, and of an inch to one acre (the inch flow giving 12,560 gallons per day, equivalent to four and a half inches rainfall in the one hundred days of the irrigating season), and so on, *ad infinitum*. All phases of the subject may be found treated here.

IN MOST INSTANCES THE VALUE OF THE WATER-RIGHT AND THE APPURTENANCES IS DIVIDED INTO SHARES,

and then are owned by each irrigator in proportion to the number of acres he wishes to irrigate. He pays his share of the expenses, and takes his share of the water in his turn, which is settled by agreement at the beginning of the irrigating season. The amount of water applied to irrigation depends upon contingencies. The water is measured by inches or heads, one inch being the amount that will flow through an inch-square orifice under four-inch pressure. The head nominally is one hundred inches; the run is for any number of hours according to agreement, usually from twelve to twenty-four. The irrigating season is ordinarily about three months, July, August and September. A man is employed to turn the water to each irrigator as his time comes; this man is called a "Yanjero," as the ditch in Spanish is called a "Yanja." He receives from $1.00 to $1.50 per day for the season. The cost per acre is from thirty cents to $1.50 for the year, which covers all expenses. Many of the open ditches are injured during the rainy season, and a great deal of ditch repairing is required at the beginning of every dry season. The pipe system escapes this and other drawbacks which attend the old, crude methods of the first settlers.

THE AVERAGE RAINFALL OF THE REGION IS ABOUT TWELVE INCHES,

running from a light precipitation near the coast to a copious one in the mountains and foothills, though different parts of both localities are more or less differently farmed. There have been no drouths in ten years; but drouths can have no such effect upon the region as formerly. The people know so well how to use and husband the moisture, that no material damage could be done to the country by a lack of rainfall that did not continue for several years. We have no general failure of crops; and every year makes assurance doubly sure that it can never occur again.

The value of land in this section lies in the water. In the San Gabriel valley, water has actually been sold at the price of $15,000 per inch, which price, at one inch to ten acres, would be $1,500 per acre.

THE AVERAGE VALUE OF THE PRODUCT OF UNIRRIGATED LAND IS NOT MORE THAN ONE-TENTH THAT OF IRRIGATED

The difference in the *variety* of the crops possible to raise, and in the capacity of the two kinds of land to sustain population, is quite as great. The improvement in the *character* of the population is as marked as in numbers ; intelligence and energy distinguish the new occupants of this country from the old. With regard to the practical knowledge of irrigation, there is probably no field in the world where it is more exhaustive than in these two counties. It has been applied here for more than a hundred years, and has gradually grown from the simple methods of Spanish-American settlers to the most elaborate of modern systems.

XIV.

Irrigation in San Bernardino County.

STORAGE RESERVOIRS AS AIDS TO IRRIGATING SYSTEMS.

The great value of storage reservoirs is just beginning to be appreciated in Southern California since the actual use of water from Bear Valley reservoir has commenced, in connection with the natural flow of the Santa Ana river.

The supply of water from a stream is just the reverse to the demands made upon it for irrigating purposes. The natural stream is large in January, diminishes in size till July or August, and then increases in volume till January again.

The use of water for irrigating purposes is least in January, and increases gradually until August, and then diminishes again till January.

The value of a stream for irrigating purposes is measured by the duty its water will do at that season of the year when the most water is required, or when the stream will irrigate the smallest amount of land.

All surplus water at other seasons of the year is of no value for irrigation purposes, except as it can be stored for future use.

Suppose we have a stream of water that carries one thousand inches under a four-inch pressure, or twenty cubic feet of water per second, at the dryest time of the season—say August—of each year. This stream of water is sufficient, in San Bernardino county, to irrigate 5,000 acres of land in good shape, or, if conditions are favorable, perhaps 10,000 acres. The water in the stream is not all called into use until the months of July and August, and then at times every drop must be utilized. During June and September, there is enough water for 20,000 acres; and during the balance of the year there is enough to irrigate from 25,000 to 50,000 acres, or more. These are rough estimates, but they are practically correct, although in different seasons the irrigating capacity of the stream will differ.

Now the theory of the people should be to furnish an independent supply of water that could be turned into this irrigating system at a time when it will do the most good.

Suppose that it was desirable to make this stream irrigate 50,000 acres of land where it now irrigates but 5,000 acres.

To do this work would require 9,000 inches additional in July and August, perhaps 5,000 inches additional in June and September, 2,000 inches additional in May and October; and, as a rule, the stream would take care of the entire tract during the remainder of the year.

Here we find that a stream of water equal to 30,000 inches for one month would irrigate 40,000 acres of land, whereas if it were not used in connection with a natural stream it would not irrigate one-quarter that amount. This would require a reservoir one mile square and about an average of fifty-five feet deep.

Bear Valley reservoir, in San Bernardino county, was started as an experiment, but it has proved itself more valuable than its founders had hoped it would be; and steps are being taken to make it still more valuable by increasing its capacity, and constructing a dam to a height of 120 feet, whereas its present height is but fifty feet. This reservoir is located 6,000 feet above sea-level, where the evaporation is very light, and where the water can be stored in its natural purity.

This reservoir commands the entire San Bernardino valley on both sides of the Santa Ana river, from the mountains to the chain of hills which separate the interior valley from the coast valleys of Orange county. This great interior valley extends from Pomona on the west to San Gorgonio Pass on the east, a distance of fifty miles, and from the Sierra Madre mountains on the north to the Temescal mountains on the south, a maximum width of twenty-five miles.

In this great valley is to be found Pomona, watered by the waters of San Antonio creek and artesian wells; Chino with its vast extent of moist land, and its large tract of dry land irrigated by artesian water from the Pomona artesian belt; Ontario irrigated from San Antonio canyon, and by waters flowing from a tunnel run for half a mile beneath the bed of the San Antonio creek; Cucamonga irrigated by the waters of Cucamonga creek and by artesian wells and by tunnels run beneath large cienegas; Etiwanda irrigated by waters from Etiwanda and other canyons; and Rialto watered by Lytle creek. These form a group of thrifty settlements extending along the foot of the mountains to the west of San Bernardino.

The city of San Bernardino is located in the midst of a large tract of artesian land that is naturally moist, and that covers over twenty square miles of territory.

Through this artesian belt flows the Santa Ana river, which in summer time gets its entire available water supply from its tributaries, which take their rise in this moist-land section; for at the mouth of the canyon, where the river debouches from the mountains, the entire stream is taken from the river-bed, one-half to irrigate Highlands on the north, and the other half to irrigate Lugonia, Redlands and Old San Bernardino on the south.

The mouth of the Santa Ana canyon, where these waters are taken out, is about 2,000 feet above sea-level.

Farther down the stream and on the southeast bank is to be found the Riverside settlement. This valley, or section of the valley, comprises 12,000 acres under the Riverside system of canals, which take their water from the Santa Ana river and from its principal tributary—Warm Creek. Above this lies the Gage tract of 10,000 acres, irrigated from the Gage canals, which take their waters mostly from artesian wells; and still above this is another strip of 5,000 acres, which is being irrigated from a system of wells located to the northeast of San Bernardino, and piped to the land, a distance of about ten miles. This gives the Riverside section a tract of country amounting to about 27,000 acres.

Still farther down the river, and on the same side, is located South Riverside, with about 8,000 acres on the south side of Temescal wash, and about 3,000 acres on the north side of the wash, the latter tract being known as Auburndale. These tracts are being irrigated by waters from cienegas and artesian wells located in the Temescal valley, about six miles above the upper edge of the tract. These waters are conveyed to the tract in a thirty-two inch cement pipe, and then distributed in smaller iron and cement pipes.

On the opposite side of the river from Riverside is situated the Jurupa tract of land, comprising about 25,000 acres, over half of which is moist or semi-moist land, while the other half is fine orange land, and is to be irrigated by water developed in the lowlands along the Santa Ana river, and by water from the artesian belt. Already the canal, with a capacity of 5,000 inches, is nearly completed to the lands, at a cost of $150,000; and about 1,000 inches of water are flowing therein,—more water than is yet needed by the 3,000 acres now under the completed portion of the canal.

This review completes the principal irrigated sections of this great valley.

There is probably enough water in sight, to-day, to irrigate one-half of the irrigable, arable land in the San Bernardino valley; and storage reservoirs must be depended upon largely to complete the work.

To the south and east of this valley is another large valley, the San Jacinto, which is about twenty-five miles long by fifteen miles wide. This is a large body of fine land, at present mostly sparsely settled, principally because of lack of water. In the upper end of the valley is situated the town of San Jacinto, in quite an extensive artesian belt. The San Jacinto river furnishes some water for irrigation purposes, but the supply is limited. Upon the headwaters of this stream, which heads in the mountains bearing the same name, is a small mountain valley very similar to that of Bear valley, where the Hemet Valley Reservoir Company has taken steps to construct a reservoir that will do for San Jacinto what the Bear Valley reservoir is doing for the San Bernardino valley. It is a feasible project, however, to irrigate this entire valley from the waters of Bear Valley reservoir, by means of a pipe, ten or, perhaps, twenty miles long.

There are other reservoir sites in the mountain valleys that can yet be utilized.

There is one located on the north side of the mountains on a branch of the Mojave river high up in the mountains, so that from the mouth of the reservoir a short tunnel through the mountains would deliver the water out into the San Bernardino valley, where it will be of greater value than if used on the desert side. This reservoir when constructed will hold water enough to irrigate several thousand acres of land, and can be made to supplement the waters of Lytle creek to good advantage. The cost of this reservoir and tunnel will not exceed $35,000; and as much more money would probably deliver the water to the Lytle Creek Water Company, which irrigates the lands about Rialto.

The dry mesa lands of the San Bernardino valley have no value until they are irrigated,—except a speculative value. If a water-right can be bought for $100 an acre, and the irrigated land sold for $200 an acre, these facts have an influence on the speculative value of the dry land.

VALUE OF IRRIGATED LAND.

Choice land for orange culture is selling to-day at from $125 per acre—extremely low—to $200, $250, and even $400 and $500 per acre, according to location, and circumstances surrounding the owners. Without the water the value is nominal.

A cubic foot of water per second is equal to fifty inches of water under a four-inch pressure; and one inch of water is a good water-right for five acres of land, and a fair water-right for ten acres under favorable circumstances. Water is being developed in various ways.

Large amounts of water are being obtained from artesian wells; and this supply, when obtained, appears to be permanent.

Tunnels are frequently run under beds of creeks and under cienegas; and the results have been very satisfactory. In one instance, at Cucamonga, a tunnel was run under a cienega covering five acres, and furnishing but six inches of water. This tunnel was five hundred feet in length; and a branch tunnel the same length was also run. The two tunnels dried up the surface of the cienegas entirely, and furnished a permanent flow of 196 inches, or four cubic feet per second.

Storage reservoirs will become a necessity in the irrigation of the arid lands of America, as they are in irrigating the plains of India; and the Government should take a hand in reclaiming these lands, either directly or by advancing the funds to do the work, to be repaid back after the lands are made productive.

Riverside has 3,000 acres of orange orchards, a portion of which is yielding good crops, a portion is yielding partial crops, and a portion is not in bearing at all. These 3,000 acres this year produced 1,000 carloads of oranges and lemons, worth on the track an average of $750 a car, or $750,000,—about $250 an acre. This is not picking out sample orchards, but averaging all the orchards, whether in bearing or not.

Budded trees yield the third year in orchard $1.50 per tree; the fourth year, $3 per tree; the fifth year, $4 to $5 per tree,—from $300 to $375 per acre; eight-year-old buds, $10 per tree; and nine-year-old buds, $15 per tree, or $1,125 per acre. From six to seven boxes to the tree have been received from fifteen-year-old seedling trees; and this gives a net income of $1,225 an acre, counting the first but $1 a box on the tree.

These are some of the reasons why choice lands have sold at from $250 to $800 and $1,000 an acre in good locations; and why water has been developed and put upon land at a cost of $150 and $200 an acre for the water-right alone. During the past two years, there has been an advance in the price of bearing orange orchards, as the trees have grown in size and have increased the amount and value of their crops.

There is no place in the United States where the benefits of irrigation are more fully illustrated than they are in the San Bernardino valley.

XV.

In San Diego County Irrigation is a Necessity.

The streams of that county, except the Colorado, which flows along its southern boundary, are not large, nor is the water supply, without using catchment reservoirs, equal to the demand. Within the past few years, much attention has been given to the matter of irrigation in this locality. One great reservoir has been constructed, and others have been surveyed. And thus it will be observed that provisions are being made to store the waste waters of winter for practical uses in summer. This has already given special activity to horticultural and agricultural interests in this county, the possibilities of which have not hitherto been known or appreciated even by those who have lived there many years.

XVI.

The Amount of Land now Irrigated in the San Joaquin Valley.

In Fresno county there are about 100,000 acres of land now irrigated. This estimate is made by Mr. George Manuel, a well-known civil engineer ; but he adds :

"It is somewhat difficult to draw the line between irrigated and unirrigated lands, for the reason that the effects of irrigation by filling up the country affect and render fertile to a great extent lands lying contiguous to irrigated lands, but not themselves subjected to irrigation by the usual methods of application. Of this latter class of lands," says he, "there are about 200,000 acres."

Thus it will be seen that the 200,000 acres are an area double in extent of that which is actually irrigated, and is reaping the benefits without being subjected to any of the burdens of irrigation. *Irrigation in Fresno county has heretofore been carried on wholly by the private canal system.* It is a voluntary matter by this plan with each land-owner whether or not he will contribute anything towards the expense incident to the irrigation of lands. His lands may be surrounded by irrigated lands, and thus in a short time they become sufficiently irrigated by percolation; but he may and does decline to buy water where he can get it by absorption without. By the district plan, this iniquity is overcome; and every man who owns land that will be benefited is compelled to contribute his portion of the expense incident to the system, and gets in return all the water he may require.

The following is the estimates made by Mr. Manuel, of the amount of lands in Fresno county which is now not irrigated, but which is irrigable:

		ACRES.
1st.	In Madera Irrigation District about	300,000
2d.	Under Chowchilla canal, excluding about 5,000 acres already irrigated.........	60,000
3d.	Land lying above or east of Madera District, but which can be irrigated by a branch of the main canal of said District (in Fresno county).........	87,600
	Carried forward	447,600

		ACRES.
	Brought forward	447,600
4th.	Lands lying above water in main canal of Madera District, but which is susceptible of irrigation by a system of storage reservoirs	38,400
5th.	Land lying between San Joaquin and Kings rivers, excluding about 60,000 acres already irrigated, and which can be irrigated by existing works or their extensions	684,960
6th.	Land lying above or east of Enterprise canal, but which can be covered by storage reservoirs or branch canal taken out high up in the mountains	40,000
7th.	On west side of Fresno slough, below Hall survey in Fresno county, which can be covered with extensive irrigation works	113,000
8th.	In Sunset Irrigation District above Hall survey, proposed to be irrigated by a canal having levees 35 feet high at highest point, and about 15 miles long, and which lie above Hall survey	190,000
9th.	Between the 240 and 300 feet contour line on State Engineer's map, which can be irrigated by canal taken from Kern river, or by water pumped by water-power as proposed by Sunset District in Fresno county	190,000
10th.	Land lying above the 300 feet grade line in Fresno county on west side, which can only be irrigated by storage reservoirs on the streams flowing from the Coast Range	293,000
	Total	1,996,960

All of the above lands, with the exception of about 200,000 acres lying near and affected by the present irrigation, and possibly 50,000 acres lying near the foot of the Sierras on the east side, is practically useless without irrigation.

Instancing the benefits of irrigation in Fresno county, Mr. Manuel states: As examples of the benefits of irrigation, the following is from the Assessor's Records of Fresno county, for township 14 S., R. 20 E., showing the former and present assessed value of property:

In 1870.

Sections 1 to 35 assessed to W. S. Chapman at $1.01 per acre. Section 36 at $1.13 per acre.

In 1880.

Bank of California tract, 12 sections at $4 per acre.

Bank of California tract, 240 acres at $5 per acre.

C. A. Towne, section 2 (adjoining Fresno city) at $5 per acre.

C. H. Hoffman, section 12 (near Fresno city) at $5 per acre.

E. Jansen, 6 sections (near Fresno city) at $4 per acre.

In 1888.

A. T. Covell, in Washington Colony, five miles from Fresno, 60 acres at $150 per acre.

Sections 1 and 2, and 11 and 12, $250 to $350 per acre —$250 about average for unimproved land.

Sections 30 to 31, unimproved, at $40 per acre.

Sections 6–7 at $100 per acre.

Section 19 at $75 per acre.

Sections 5–8 at $125 and $200 per acre (unimproved and from one-half to one mile from city of Fresno).

Sections 17, 18 and 19 average $85 per acre.

Sections 23, 24, 25 and 26 at $75 per acre.

The above valuations from the assessment rolls of Fresno county teach an instructive lesson.

Ten years ago, when the effects of irrigation in Fresno county had been but little felt, the present city of Fresno was but a struggling village of probably from 1,200 to 1,500 souls. Now it is a bustling city of 10,000 inhabitants.

In Tulare county, much progress has been made in the work of irrigation. The one criticism to be made on the work in that section is that it is fragmentary and lacks uniformity and systematic methods. Irrigation is consequently patch-work, but enough has been done to demonstrate the miraculous power or irrigation in the San Joaquin valley.

Mr. P. Y. Baker, Civil Engineer, for many years devoted to the work, says: "There are about 15,000 acres irrigated in this county, and 950,000 acres not irrigated. There are about 250,000 practically useless without irrigation. Of the above 950,000, there are perhaps 700,000 that produce some crops without irrigation, but very little of it produces fair crops. That is to say, one year with another, the average would be so low that it would be a serious question of making a bare living on most of it. Experience has shown that the proximity of irrigation has added much to the productiveness of non-irrigated lands."

MERCED COUNTY.

In this county, provision has been made whereby a considerable area of lands may be irrigated; but the acreage actually subjected to irrigation is small. The famous Crocker canal, which is said to have cost $1,500,000, is situated in this county, and will eventually be applied to a large area. The area of the plain lands which may be profitably irrigated is large.

So far as irrigation has become an accomplished fact in the San Joaquin valley, it has been done through private enterprise. Under the District Irrigation Law of 1887, a number of irrigation districts have been organized; and by this means the irrigated area will soon be rapidly extended.

The following districts have been organized in this valley, having the acreage shown :

Modesto	Irrigation	District	108,000	acres
Turlock	"	"	176,000	"
West side	"	"	300,000	"
Madera	"	"	330,000	"
Alta	"	"	160,000	"
White River	"	"	 60,000	"
Poso	"	"	 48,000	"
Sunset	"	"	(Proposed) ..285,000	"

Total area San Joaquin valley......1,467,000 acres

XVII.

The Next Question is, Will Irrigation Pay?

For more than 700 years, irrigation has been successfully practiced in Lombardy, which covers a territory of but 9,000 square miles (an extent of country not half so large as Southern California), which to-day supports by means of irrigation a population of about 3,500,000 people, and is the garden spot of Europe and of the world. It has paid these people well, and it has built up a country and sustained a vast population; but for irrigation this territory would not otherwise support 500,000 people. Nor do we find the condition of things different in India. There has been expended for the irrigation canals of India, directly and indirectly, $200,000,000. The system of canals there constructed are the most stupendous ever built within historic times. The great Ganges canal is ten feet in depth and 175 feet in width. It is simply a vast river, and irrigates to-day a million and a half acres of land in a country where irrigation is not only necessary, but where the evaporation is double what it is in California. By means of this irrigation, that country produces, with certainty, from two to three crops a year; and this certainty and regularity is a characteristic feature of irrigation. There is no such thing as a failure, famine is rendered impossible, and a reasonable reward for labor is made sure.

After examining the official reports relating to the price of water in most of the irrigating districts of the world, the average annual expense is from $1.50 to $2.50 per acre. When only garden spots or small tracts are irrigated, the expense is greater.

In California the planting can be done in winter. By irrigation there are no crop failures. Farming becomes a certain business. There are no drouths, no dread of the scorching "northers," no parching of the earth. An uncertainty is changed to a certainty.

It has been estimated that, by irrigation, from ten to twenty times the number of people can live and prosper on the same extent of territory, and this even where there are the usual rains, as in Lombardy. Of course, in parts of India, in Arizona, and in Nevada, irrigation is a necessity. It has been noted in California that the price of lands, in districts like Fresno, Los Angeles and San Bernardino, has, by reason of irrigation, increased from twenty to fifty times its original value.

XVIII.

The Temperature of the West is Suited to Irrigation.

To present the favorable climatic conditions of the Pacific Coast, and especially of California, we append the following statistics, showing the mean annual temperature of the different localities in California, and of foreign countries as well. The statistical information as to the mean annual temperature of Washington Territory, Oregon, Montana, Nevada, Arizona and New Mexico, are not in reach, and cannot, in the short time allowed, be presented; but it can be truthfully said that many of the favorable conditions as to irrigation in California are applicable to most of the States and Territories referred to, except that in the western parts of Oregon and Washington Territory the rains are so ample that irrigation is quite unnecessary. In Nevada, Arizona and New Mexico, irrigation must be resorted to that the lands may be made productive; and to that end all the water in those sections should be and soon will be utilized.

TABLE OF MEAN ANNUAL TEMPERATURE OF DIFFERENT LOCALITIES.

California.

Marysville	63.58
Woodland	61.00
Calistoga	59.00
Auburn	58.00
Red Bluff	64.00
Chico	65.00
Redding	61.58
Truckee	43.00
Napa	59.19
San Mateo	54.00
Stockton	58.00
San Jose	56.75
Tulare	64.00
San Luis Obispo	57.00
Paso Robles	56.00
Gilroy	58.00
Livermore	58.00
Merced	63.00
Monterey	57.40
Colton	62.00
Yuma	74.00
Indio	73.00
Anaheim	67.00
Mojave	63.00

Caliente	64.00
Los Angeles	64.75
San Diego	61.00
Santa Barbara	60.00

MEAN TEMPERATURE OF THE FOLLOWING FOREIGN LOCALITIES.

Turin, Northern Italy	53.00
Florence, Northern Italy	59.00
Naples	61.00
Toulouse, Southern France	55.00
Toulon, Southern France	59.00
Madrid, Spain	57.00
Calcutta, India	68.00
Madras, India	82.00
Azores	65.00
Madeira	65.84

It will be observed by the foregoing tables, that so far as temperature is concerned, California is especially adapted to the purposes of irrigation. If the average mean temperature were too high, like that of Madras, India, the evaporation would be so great that it would be most difficult to carry on successful irrigation, and especially during the hot or summer months.

XIX.

What Interest Has the National Government in Irrigation?

The answer is, the whole nation is interested in the subject of irrigation, because the whole nation is interested in making the uninhabitable portion of our country habitable. Most of that part of the United States west of the 100th meridian either requires, or would be benefited by, irrigation. Without it crops are not certain. Thus irrigation not only becomes a question of national interest, but a question of national necessity. This is quite as much so in the United States in relation to this part of the republic as was irrigation in India to Great Britain, or irrigation in Lombardy to Italy. The vast territory in the United States requiring irrigation covers over one-third of the inhabitable part of our country, and if the national Government can wisely expend millions of dollars in keeping the water off from a portion of the inhabited part of the country, can it not, with equal wisdom, expend wisely money to put water upon that portion of the land which most needs it?

It may be noted that the public lands are almost exhausted; that the preparing of a new country for the habitation and support of a large population is the equivalent of the acquisition of a like amount of territory. By these means the national Government will make useful to the American people what before was of no use. To show the extent of the United States where irrigation would be advantageous, and where it is most necessary, we venture to refer to the territorial area of those States and Territories in parts of which the rainfall is too light to make farming a certainty:

	ACRES.	SQ. MILES.
Area of California	100,992,640	157,801
“ Oregon	60,975,360	95,274
“ Utah	54,380,800	84,970
“ Washington Ty.	44,769,160	69,994
“ New Mexico	77,568,640	121,201
“ Nevada	71,737,600	112,090
“ Arizona	72,906,240	150,932
“ Colorado	66,880,000	104,500
“ Wyoming	62,645,120	97,883
“ Idaho	55,228,160	86,294
“ Montana	92,016,640	143,776

Add to this territory the northern and western part of Texas, which covers an area of about 100,000 square miles and an acreage of 64,000,000, and we see what an empire would thus be brought into practical use. We submit that the oft-repeated argument, that the national Government cannot afford to promote private interests by national means, does not apply to this question; for this is one of national, not one of state or local, importance.

The population of our country is increasing at a remarkable ratio. As the population increases, the opportunities for young and ambitious men, who live in the older States of the Union, to gain an honest livelihood, is every year becoming less. Labor is necessarily becoming cheaper. If no more unoccupied lands are made fit for use, landholding will soon be the privilege of the rich, and tenantry the only hope of the poor. The old adage so often quoted by successful men, that "the fittest succeed," may be true; but unless those who are not "fittest" have an opportunity to establish for themselve homes, the poor will soon vastly outnumber those who are able to help themselves; and when there is little hope for the many, and the Government is carried on for the benefit of the few, neither the property of the one nor the labor of the other will be secure. Indeed, the best safety that capital can have, or that labor may receive, is universal ownership in the soil. Place land within the reach of every citizen. The Government is then secure, because the people are happy. Any system that will open up for settlement a new country, that will change from an arid waste to cultivated fields a region as big as half of Europe, necessarily promotes not only the interest of the whole nation, but benefits the whole civilized world.

Before this Republic should seek to acquire new territory, it should wisely utilize the territory it now has; and it is most respectfully submitted that a national system of irrigation, directed by wise and uniform laws, controlling the rights of water and its uses, will be of the most infinite advantage to the whole American people, and especially so if carried out under the wise supervision of the national

Government and engineered by its scientific and experienced men. When this is accomplished, there will be ample room in the unsettled portion of the United States to find homes for the millions of people who are to come after us.

Added to this we may say, that in considering the interest which the people of the United States have in the subject of irrigation throughout the arid regions of the United States, it is obvious that that interest is paramount. The time is within the recollection of men still young when the population of these United States did not exceed 20,000,000. The time is also readily recalled when the aggregate accession of population by European immigration did not exceed 50,000 per annum. To-day, the population of the United States exceeds 60,000,000; and the annual immigration equals, and for the past five years has almost equaled, 1,000,000 per annum. With the natural increase of 60,000,000 people, reinforced by the artificial increase of an incoming foreign immigration, reaching our shores at that period of life when the generations to be born of them are to be born in our own country, we are fast approaching that period in our national history when the condition known to political economists as the pressure of population will be felt here.

Hitherto, the larger possibilities of the common life of our country have been due largely to the opportunities of acquiring fertile land at primitive or undeveloped values, and enjoying the benefits of the increment which has followed settlement.

Up to the line of the 100th meridian, by a general classification, our country is fertilized by a natural precipitation of moisture, sufficient to mature annual crops of cereals. West of that line, with the exceptions of small portions of Washington, Oregon and California, the country is devoid of sufficient rainfall to mature agricultural crops. The soil is not wanting in fertility. The area embraces over one-third and nearly one-half of the territorial area of the United States. We have already shown that, under irrigation, land is more productive, and its cultivation more certain of profit to the cultivator, where the element of moisture is controlled and directed by means of artificial irrigation. It therefore follows that the application of water to the fertile areas lying west of the 100th meridian is to confer upon them a productive capacity even in excess of that capacity now inherent in the lands east of that line. Their fertilization by artificial systems of irrigation is, therefore, equivalent to acquiring a new territory, equal if not superior in fertility to that now occupied by the great body of our civilization. It is, therefore, equivalent to making room for 60,000,000 more industrious citizens. Nor would this great work if undertaken, or aided, or even encouraged, in the manner now proposed by the Congress of the United States, be work done in the interest of a population already settled in the territory under consideration. Practically, that portion of the United States lying west of the 100th meridian is unoccupied. It is a territory 1,600,000 square miles in extent, occupied by less than 2,000,000 inhabitants. An equal area, east of the line of the 100th meridian, as has already been shown, is occupied by an industrious citizenship of 60,000,000 inhabitants. The undertaking is, therefore, to be in the interest of the posterity of the 60,000,000 people comprising the citizenship of the United States.

The census of 1880 disclosed the fact that the male citizens of the United States between the ages of twenty-one and twenty-four years, including native born, foreign born and colored, aggregated 2,041,000. Of these, 1,556,000 were native. Assuming the present population of the United States to be 65,000,000 inhabitants, and allowing a proportionate number to the number of the census of 1890, would give about 2,000,000 native born young men between the ages of twenty-one and twenty-four, and 2,500,000 of all classes. From other statistical facts, it is derivable that at least 1,000,000 young men in each year reach their majority. In each year, therefore, 1,000,000 of the young male inhabitants of the United States reach the age which entitles them to the full rights of citizenship and independent action.

It is most obvious that if the territory lying west of the 100th meridian to-day possessed fertility equal to that of the fertility lying east of that line, and if the western territory had yet been unacquired by the United States, and was as sparsely settled or as nearly unoccupied as it is to-day, it would be deemed the highest statesmanship to acquire that territory, in order that the two and one-half million young men between the ages of twenty-one and twenty-four might find a proper field for the exercise of those high faculties of energy and enterprise which the American youth possess. If this be true, the fertilization of this field stands for the exact equivalent of its acquisition. The territory is already a portion of the national domain. Its reclamation, if it is reclaimed at all, will be in the interest of the posterity of the people reclaiming it. The attention our Government will bestow upon it will find all the justification which would attend the attention bestowed by a father upon the possible inheritance of his children. We believe any other enlightened and civilized nation of the earth would accept the possession of such a territory as a valuable inheritance, and would give it the attention we are now seeking at the hands of the Government for the territory under consideration.

England expended $200,000,000,—not to reclaim an arid and waste country in India, but for the purpose of adding to the resources of that fertile country the increased capacity which irrigation confers.

The overcrowded populations of Europe are seeking our shores, encouraged thereto by the enlarged possibilities of the common life in our country.

Our fiscal systems are directed to the maintenance of high wages to our working classes. The cost of transportation between Europe and America, and the time consumed in the passage, has so far diminished, that the difference between the reward of one week's labor in the two countries will fully compensate the loss of time and repay the passage money.

The conditions with reference to the density of population between Europe and America are very rapidly equalizing. If no other new territory is added, either by way of acquisition from adjacent territory or by the increased productiveness of our own, within the lifetime of children now born the fertile portions of the United States will be occupied by a population equal in density to that of England, Belgium and France.

The reclamation of the sterile valleys lying west of the 100th meridian can be achieved at a cost much less than that which would attend the clearing of a forest and the reduction to a state of cultivation of forest lands.

We are not now proposing that the Government of the United States from its treasury shall construct the instrumentalities of irrigation. What we ask, and what we hope will be granted, is that the preliminary cost of ascertaining all the economic facts necessary to induce capital to enter upon the completion of this great work shall be borne by the Government of the United States, and, when the public lands are effected, make such appropriations as may be wise. Let it once be shown by conclusive data that a reasonable reward awaits the investment of capital in the reclamation of the arid lands belonging to this nation, and private capital will not long be wanting to engage in that undertaking. The necessary capital for the prosecution of any reasonably profitable enterprise is not wanting, when the opportunity for such investment is clearly and officially pointed out. We believe, therefore, that the proposed surveys for reservoir sites, and the approximate ascertainment and publication of the possibilities for the reclamation of the sterile portions of our country, to be in consonance with the wisest statesmanship.

The people of California are more deeply interested in this subject than the people of the other States of the Union, only because of the proximity of the territory to be benefited. The development of a fertility in the soils now sterile for want of artificial irrigation in the portions of our State needing the vitalizing influence of artificial moisture, and in the territory lying immediately contiguous to us, would promote our wealth and prosperity, by building up strong neighboring communities, whose purchasing power would add to our wealth, and by adding that volume of population to our own State, so necessary to the establishment and maintenance of a higher civilization.

National life generates a surplus energy which in times past has found war a congenial field for its expenditure. Modern statesmanship addresses itself to directing this national energy into channels of public enterprise. The field under consideration is broad and full of promise in the direction of promoting national prosperity and perpetuating peace.

Respectfully submitted,

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